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

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The Constitution of India has proved to be an enduring one. Perhaps some of its strength draws from how detailed and lengthy it is, although it may well be proved that the Constitution has endured because it has proven malleable to the needs and aspiration of India, best exemplified by the sheer number of amendments it has undergone. These amendments, along with judicial decisions, appear to keep the constitution alive. Yet, even as the Indian constitution towers over most other constitutions of the world in terms of numbers of amendments, it has been faced with fresh and unprecedented challenges in the last year, at times, even from within the very judiciary that is tasked with safeguarding the rights guaranteed by it. The challenges to constitutional values, and particularly the disregard for rights, appear to be at their very peak when the central government is constituted by a single-party majority. The fresh challenges, which are seemingly uncharted territory, present the need for serious scholarship. The *Indian Journal of Constitutional Law* (IJCL) continues to strive to occupy this space with scholarship that is both significant and relevant to contemporary challenges. This volume of the journal is no different and engages with a range of issues that affect India and her neighbouring countries.

This editorial is split into three parts. The first part covers critical constitutional developments in the last year (1). It covers, not only decisions of the Supreme Court and various High Courts but also recent "amendments" to the Constitution. The second part introduces the scholarly contributions to this volume of IJCL (2). The third part contains acknowledgements (3).

1. A Smorgasbord of Constitutional Law Issues: 2019-20 in Review

Citizenship; asymmetric federalism; judicial independence and post-retirement appointments; reservations for teachers in scheduled areas; the right to internet; transparency of the Supreme Court under the Right to Information Act, 2005– the past year has thrown up a smorgasbord of issues in constitutional law. In keeping with tradition, this editorial will recap some of these developments in the year that has been. In the interest of brevity, we have omitted commenting on cases on which our authors have written longer form case comments, namely *Chebrolu Leela Prasad Rao v. State of Andhra Pradesh*[1], *Anuradha Bhasin v. Union of India*[2] and *Foundation for Media Professionals v. U.T. of Jammu & Kashmir*[3].

Amendments to the Constitution

The Constitution (103rd Amendment) Act, 2019 has amended Articles 15 and 16 to permit the government to provide for the advancement of "economically weaker sections". The amendment came into effect on January 14, 2019 and applies to Central Government-run educational institutions and private educational institutions. However, minority education institutions and State Government-run educational institutions are exempt from mandatory provision of this reservation. Further, the reservation of up to 10% for "economically weaker sections" in educational institutions and public employment will be in addition to the existing reservation.

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1 Chebrolu Leela Prasad Rao v. State of Andhra Pradesh, 2020 SCC Online SC 383.

2 Anuradha Bhasin & Anr. v. Union of India & Ors., 2020 SCC Online SC 25.

3 Foundation for Media Professionals & Ors. v. U.T. of Jammu & Kashmir & Anr., 2020 SCC Online SC 453.

The Constitution (104th Amendment) Act, 2020 seeks to extend the reservation of seats in the Lok Sabha and Legislative Assemblies of states for individuals from Scheduled Caste and Scheduled Tribes upto till January 25, 2030. Before this amendment, the Constitution provided for the reservation of seats for Scheduled Castes, Scheduled Tribes and the Anglo-Indian communities for a period of seventy years since the enactment of the Constitution. Thus, this reservation would have expired on January 25, 2020.The amendment is an attempt to nullify the effect of the cessation of this reservation. However, the amendment does extend the period of reservation of the two Lok Sabha seats reserved for members of the Anglo-Indian community. This means that the practice of nominating two members of the Anglo-Indian community by the President of India under the recommendation of the Prime Minister of India has been effectively abolished.

The Constitution (Application to Jammu and Kashmir) Order, 2019 was passed on August 5, 2019 to supersede the Constitution (Application to Jammu and Kashmir) Order, 1954. This presidential order states that all the provisions of the Indian Constitution applied to Jammu and Kashmir. Thus, in effect, Article 370 of the Constitution, which grants the special status to Jammu and Kashmir, stands abrogated. This dilution of Article 370 implies that Article 35A stands null and void and that any Indian citizen from any part of the country can now buy property, take a state government job and enjoy scholarships and other government benefits in Jammu and Kashmir. Other implications of the presidential order include the applicability of the fundamental rights guaranteed by the Indian Constitution, the applicability of the provision to impose a financial emergency under Article 360 and the applicability of other legislations of the Parliament,

such as the Right to Information Act, 2005 and the Right of Children to Free and Compulsory Education (Right to Education) Act, 2009.

Constitution Bench decisions of the Supreme Court

In *M Siddiq v. Mahant Suresh Das & Ors.*[4] a five-judge bench of the Supreme Court sought to bring quietus to a legal dispute that was more than a century old, over the piece of land that contained the *Ram Janmabhumi and Babri Masjid*, in one of the most anticipated judgements of the Supreme Court. In the Court's words, the dispute was over "ownership over a piece of land" in Ayodhya that was claimed to be of immense significance to both Hindus and Muslims. The Court was deciding an appeal from the judgement of the High Court of Allahabad on five separate suits concerning the same dispute, wherein the High Court had held that Hindu and Muslim parties were joint holders of the property. The Court ruled that the High Court had completely erred in granting the three way split since it was beyond the parties' pleadings and also granted remedies to parties whose suits the High Court had determined was barred by limitation. To determine the ownership of the property, the Court considered the property to be divided into two parts – the 'inner courtyard' and the 'outer courtyard'. Insofar as the outer courtyard was concerned the Court said that upon a "preponderance of probabilities" it was "impossible" to accept that Muslims were in possession since the outer courtyard had established Hindu places of worship. To determine the possessory claim over the inner courtyard the Court observed that prior to 1856 the Muslim account of worship at the site was conspicuously absent when compared to Hindu accounts. Further, although the Muslims claim to property was not abandoned after the riots and restoration in 1934, it was contested. Ultimately, relying on the findings of the Archaeological

4 M. Siddiq v. Mahant Suresh Das & Ors, (2020) 1 SCC 1.

Survey of India the Court determined that there was a pre-existing structure dating back to the twelfth century which on a preponderance of probabilities were thought to be of Hindu religious origin. The Mosque was constructed on the foundations of this structure. The Court acknowledged that the limitations of the ASI survey were that it could not establish the reasons for the destruction of the underlying structure and particularly whether the destruction was for the purpose of construction of the mosque. The ASI report also suggested that there was no conclusive evidence to show that the pillars used for the construction of the mosque were sourced from the underlying Hindu religious structure. Despite the existence of the mosque at the site, Hindu worship at the place was not restricted. According to the Court the establishment of the *Ramchabutra* close to the dividing wall set up by the British was an assertion by Hindus of their right to pray below the central dome and consequently the inner courtyard was a contested site. The Court did observe that the mosque was desecrated in 1949 when idols were installed in the mosque and that the subsequent destruction of the Mosque in 1992 was an "*egregious violation of the rule of law*". An assertion that the mosque did not comply with Islamic tenets was rejected and the Court also accepted that there was no abandonment of the mosque by the Muslim community. On the basis of these observations the Court sought to decree the suits consistently with principles of justice, equity and good conscience. Having found that "Bhagwan Shri Ram Virajman", the petitioner in the final suit, was a juristic person in order to "practically adjudicate the dispute", the same suit was also found to be maintainable. However, citing India's commitment to secularism, among other things, the Court rejected the argument that the *Ram Janmabhumi* itself i.e. the immoveable property possessed legal personality. The entire disputed property was decreed to the Hindus under this suit since they had a better possessory claim

to the composite whole of the property on a balance of probabilities. Thus, the entire disputed property was to be handed over to a trust that was to be created for the temple by the Central Government. To compensate the Muslim community for the illegal destruction of their mosque that the Court termed as "wrongful deprivation", it directed the Central Government to allot 5 acres of land to the Sunni Central Waqf Board for the construction of a mosque and associated activities. The Court noted that the Hindu faith and belief that Lord Ram was born in Ayodhya was not in dispute. Rather it was contested whether the disputed site was the exact place of birth. Notably however, although the aforementioned reasons were unanimous, only one of the judges (anonymously) recorded separate observations as to whether the disputed structure was the birthplace of Lord Ram, concluding that this was indeed the case based on the faith and belief of the Hindus. The decision, although cloaked in legal reasoning, appears to be what the judges thought would be a workable compromise, rather than a decision of the Court that is well founded in law. This is betrayed by the Court's observations that they were awarding the entire site to the Hindus because they had a better claim to one part of the site, while ownership of the inner courtyard was contested and unsettled between both sides. One therefore wonders whether the Court might have reached the same conclusion had the mosque not been destroyed in 1992, or if the Muslim parties had not signed a settlement resulting from the Court ordered mediation, indicating their willingness to forsake the communities interests in the site in entirety.

In *The Central Public Information Office, Supreme Court of India v. Subhash Chandra Agarwal*[5],the Court took a monumental step and expanded the scope of the Right to Information Act, 2005. What was

5 The Central Public Information Office, Supreme Court of India v. Subhash Chandra Agarwal, 2019 SCCOnLine SC 1459.

challenged before the Court was a 2009 Central Information Commission order asking the Central Public Information Office of the Supreme Court of India to disclose information regarding the decision-making of the Supreme Court Collegium with respect to appointment of certain judges. The primary question before the Court was whether disclosing the information requested by the Respondent interferes with the independence of the judiciary and therefore not in the public interest to disclose this information. Another point for adjudication was whether disclosing the information requested erodes the credibility of the Collegium's decision and/or curtail the future "free and frank expression" of Collegium members, when appointing judges to the Supreme Court. Balancing the competing values of confidentiality and transparency, the Court held that the office of the Chief Justice is a "public authority" within the meaning of the Right to Information Act, 2005 as it performs numerous administrative functions in addition to its adjudicatory role. Access to information is, therefore, regulated by the Right to Information Act, 2005. The Court also noted that the Chief Justice of India could not be a fiduciary vis-à-vis judges of the Supreme Court because judges held independent office and neither their affairs nor conduct was controlled by the Chief Justice of India. The Court also observed that the right to information cannot be used as a tool for surveillance and that any application under the Right to Information Act, 2005 which violates the right to privacy of the judges need not be responded to.

Other decisions of the Supreme Court

In *Vinubhai Haribhai Malviya v. State of Gujarat*[6], the question of law posed to the Supreme Court was whether a Magistrate has the power to order further investigation after taking cognizance of the

6 Vinubhai Haribhai Malaviya v. State of Gujarat, JT 2019 (10) SC 537.

chargesheet filed by the police, and if so, up to what stage of a criminal proceeding. The Court analysed this question on the touchstone of Article 21 and its interpretation in *Mrs. Maneka Gandhi v. Union of India and Another*[7]. In this case, the Court had unequivocally stated that procedures adopted in criminal trials must be *right, just and fair and not arbitrary, fanciful or oppressive*. Applying this test in the instant case, the Court held that a Magistrate has all powers necessary, which may also be incidental or implied, to ensure a proper investigation, including the ordering of further investigation after a report is received by him under Section 173(2) of the Criminal Procedure Code, 1973. The Court also observed that there is no good reason as to why a Magistrate's powers to order further investigation would suddenly cease upon process being issued, and an accused appearing before the Magistrate, while concomitantly, the power of the police to further investigate the offence continues right till the stage the trial commences.

In *Manohar Lal Sharma v. Narendra Damodardas Modi*[8], the Court took a remarkable stride towards ensuring greater transparency in the functioning of the government. The matter before the Court pertained to the admissibility of certain documents pertaining to the contentious Rafale deal which had been published by The Hindu without due permission. It was submitted that the documents had been removed without authorisation from the office of the Ministry of Defence and therefore could not be relied upon by the petitioners. It was further contended that unauthorised removal of the documents from the custody of the Government of India and their use to support the pleas, urged in the review petition, was in violation of the provisions of Sections 3 and 5 of the Official Secrets Act, 1923. Additionally, it was contended that the documents could not be accessed under Section

7 Mrs. Maneka Gandhi v. Union of India and Another, (1978) 1 SCC 248.
8 Manohar Lal Sharma v. Narendra Damodardas Modi, 2019 (1) MLJ 529.

8(1)(a) of the Right to Information Act, 2005. Upholding the publisher's right to publish these documents, the Court held that the right of such publication would seem to be in consonance with the constitutional guarantee of freedom of speech. It was also held that Section 8(2) of the Right to Information Act, 2005 manifests a legal revolution that has been introduced and that none of the exemptions declared under sub section(1) of Section 8 or the Official Secrets Act, 1923 can stand in the way of the access to information if the public interest in disclosure overshadows the harm to the protected interests. Thus, this judgment has established that the Right To Information Act, 2005 having an "overriding effect" over the Official Secrets Act, 1923, that security and intelligence outfits have to disclose information on corruption and human rights and, that the government's duty to reveal details that are in "public interest".

In *Indian Social Action Forum (INSAF) v Union of India*[9], the Supreme Court pronounced a significant judgement to safeguard the functioning of civil society groups engaged in advancing causes. INSAF challenged the constitutionality of certain provisions of the Foreign Contribution (Regulation) Act, 2010 (FCRA) as well as certain rules under the Foreign Contribution (Regulation) Rules, 2011. The appellants alleged that the impugned provisions were vague and conferred "uncanalised power" to the government to determine that an organization possessed a "political nature". The immediate consequence was that the government could block foreign funding to these organizations at a whim, and thereby prevent certain issues from being advanced. Although the Supreme Court was loathe to finding any of the challenged provisions to be unconstitutional, it secured the rights of civil society groups to receive foreign contributions by applying the "doctrine of reading down" to Rule 3(v) and 3(vi) of the

9 Indian Social Action Forum v. Union of India, 2020 SCCOnLine SC 310.

impugned Rules. To do so, the Court drew a distinction between "active politics or party politics" and advancing political interests. It observed that the objective of the FCRA was to prohibit funding of political objectives in active politics. Consequently, it found that organizations of farmers, workers or students, among others that did not make demands in active politics, could not be found to possess political nature. It also observed that organizations that used "common" political methods like hartals and bundhs did not possess "political interests". Cutting off external funding could be an easy way to drown out civil society's demands by nipping these organizations in the bud. This judgement is significant for preventing such abuse of power.

In *Mukesh Kumar & Anr v. The State of Uttarakhand*[10], the question before the Court was whether the State Government is bound to make reservations for public posts, particularly at the stage of promotions. As a corollary, the Court was also required to determine if the State Government could deny such reservations *only* on the basis of quantifiable data pertaining to the adequacy of representation of persons belonging to Scheduled Castes and Scheduled Tribes. The Court observed that it was trite law that Article 16 (4) and Article 16 (4-A) did not confer a fundamental right to reservations in promotions. Rather, these Articles were enabling provisions which granted the State Government some discretion to "*consider providing reservations, if the circumstances so warrant*." It further observed that if the State Government decided to provide for such reservations, only then would it be required to collect quantifiable data showing the inadequacy of representation of that class of persons in public services. In other words, the requirement of quantifiable data was envisioned as a shield for the Government to defend against a challenge to its

10 Mukesh Kumar & Anr v. The State of Uttarakhand, (2020) 3 SCC 1.

reservation policy – by demonstrating to the Court that such measures were necessary. Consequently, the Supreme Court found that the State Government's decision not to provide for reservations in promotions was a legitimate exercise of its discretion provided for in the Constitution. It further overturned a decision of the Uttarakhand High Court that required the State Government to collect quantifiable data to justify its decision not to provide for reservations since such data was only required when discretion was exercised in favour of reservations.

In *Prithvi Raj Chauhan v. Union of India*[11] ("Prithvi Raj Chauhan"), the Supreme Court upheld the validity of the 2018 amendment to the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 ("Atrocities Act"). The 2018 amendment had been introduced by the government to undo the Supreme Court's decision in *Dr. Subhash Kashinath Mahajan v. Union of India*[12] ("Subhash Kashinath Mahajan"), in the wake of widespread public criticism. In Subhash Kashinath Mahajan, the Court had taken upon itself the duty to examine data and determine policy, in a criminal appeal pertaining to the quashing of a complaint under the Atrocities Act, wherein the appellant had alleged that the Act was being grossly misused. In the resulting judgement, the Supreme Court passed directions that severely diluted the provisions of the Atrocities Act, holding that the exclusion of anticipatory bail did not constitute an absolute bar for the grant of bail in cases where it could be discerned that the allegations of atrocities committed were false based on a "preliminary enquiry". Ultimately the Court in Subhash Kashinath Mahajan ruled that the complaint could not be registered based on a preliminary enquiry. Following this, the government moved the Court to review the

11 Prithvi Raj Chauhan v. Union of India, 2020 SCC OnLine SC 159.

12 Dr. Subhash Kashinath Mahajan v. Union of India, 2018 (4) SCC 454.

judgement, and these directions were thus recalled and overruled in *Union of India v. State of Maharashtra*[13]. The 2018 amendments were introduced by parliament so that a "preliminary enquiry" would not delay the registration of a First Information Report. The Supreme Court in Prithvi Raj Chauhan upheld the amendments also observing that interfering with the operation of the Act would not be "a positive step"; basing this conclusion on the statistics provided by the National Crime Records Bureau. Crucially, however, the Court has held that where no prima facie materials exist to warrant a complaint under the Atrocities Act, courts have an "inherent power" to direct a pre-arrest bail. Notably, over the course of this saga, a key statistic that was quoted and misquoted was the low conviction rates under the act. The same was initially attributed to a high percentage of false cases rather than the empirically supported idea of power structures being abused to evade conviction. This critical error made in the highest court betrays an ignorance of Dalit and Adivasi experience. The whole saga highlights the need for more representation of members of the Dalit and Adivasi communities in the Supreme Court.

In *The Secretary, Ministry of Defence v. Babita Puniya*[14], while those of the Navy were clubbed in *Lt Cdr Annie Nagaraja and Ors v Union of India*[15] appeals involving the grant of permanent commission positions to women in the Army and Navy respectively, came before the Supreme Court. Both cases originated out of a policy letter dated September 26, 2008. The Union Government fell on its own sword. Here, the move to include women came from the Union Government, albeit with the Ministry of Defence dragging its feet. It is within this prolonged process that the Supreme Court located the policy

13 Union of India v. State of Maharashtra, 2019 (13) SCALE 280
14 The Secretary, Ministry of Defence v. Babita Puniya, 2020 SCC OnLine 200.
15 Lt Cdr Annie Nagaraja and Ors v Union of India, 2020 SCC OnLine SC 326.

considerations that paved the way toward equality of opportunity for women in the Armed Forces. Although the initial impetus came from the government itself, the Supreme Court sought to pave the way toward women joining the armed forces. To do so, it reiterated that Article 33 entailed a 'necessary' restriction of fundamental rights and not a complete voiding of the same. The Supreme Court then went on to use the Union Government's notifications against it. Taking note of stereotyping and gendered roles in defence forces, the Court observed that such blanket restrictions were based on unreasonable classification as the assumptions are based on socially ascribed roles for gender. The Court then struck down the classification in the Union Government's notification. However, the notification still remained the basis for the equality movement in the Armed Forces. Thus, the Supreme Court has finely maintained a balance between the public policy considerations of security and equality.

Decisions of the High Courts

In *Grievance Redressal Officer, Economic Times v. V.V. Minerals*[16], the Madras High Court laid down a significant precedent towards the judicial protection of free speech. The petitioners approached the Court seeking it to quash the proceedings under a private complaint of criminal defamation. The complaint arose due to an article in the Economic Times alleging illegal beach sand mining by the complainant. The Court discussed the Sullivan principle in civil defamation, laid down by the U.S. Supreme Court, and considered its application to criminal defamation. The Sullivan principle stated that mere inaccuracies would not make the writer liable for defamation, but that the test would be of 'actual malice'. The Madras High Court observed that this principle had been amplified by the Madras and

[16] Grievance Redressal Officer, Economic Times v. V.V. Minerals, 2020 SCC OnLine Mad 978.

Delhi High Courts, which extended its protection from cases involving public officials to cases involving questions of public interest. The Court held that this amplified principle has to be read into the exceptions to criminal defamation in Section 499 of the Indian Penal Code whenever the freedom of the press is involved. Therefore, mere inaccuracies in reporting about a public question would not constitute criminal defamation. The width of this margin of error would depend on the facts of each case. Further, the Court noted that it has a duty to be proactive when it comes to the protection of fundamental rights. It stated that it cannot let the petitioners go through the ordeal of trial to prove that they can claim the exceptions to Section 499. The Court held that where a summary examination can establish such defence, relief ought to be granted without a regular trial.

In *Kamil Siedczynski v. Union of India*[17], the Calcutta High Court safeguarded the right to life and personal liberty foreigners staying in India. The petitioner was a Polish student who had come to India on a student visa. He attended a protest against the Citizenship Amendment Act, consequent to which a Leave India Notice was issued to him. The Court held that a visa confers upon a foreigner the right to stay in India which cannot be taken away without any reason or prior hearing being given to them. With respect to the right to life and personal liberty, the Court held that this right is not limited to a "bare existence" and would include the right to follow one's interests and fields of specialization. The right to life and personal liberty also includes the right to have political views and participate in political activities. The Court further held that the language of Article 19 was not negative in nature and that the conferment of certain basic rights to citizens cannot cancel the basic rights of an individual. Based on the

17 Kamil Siedczynski v. Union of India, 2020 SCC OnLine Cal 670.

above reasons, the Court described the notice as a "paranoid overreaction" and set it aside.

In *Faheema Shirin R.K. v. State of Kerala*[18], the petitioner moved the Kerala High Court to challenge the new regulations applicable to the petitioner's university hostel which restricted the use of mobile phones within the hostel from 10:00 pm to 6:00 am and then from 6pm to 10pm, while the use of laptop by undergraduates was prohibited. The petitioner contended that the new regulations violated her right to access the internet, which is a part of the freedom of speech and expression guaranteed under Article 19(1)(a) of the Indian Constitution. Further, it was contended that the restriction of the use of mobile phones in the present case did not come within reasonable restrictions covered by Article 19(2) of the Indian Constitution. Additionally, the petitioner argued that the forceful seizure of mobile phones by the hostel authorities infringed upon the right to privacy and personal autonomy of the residents. After careful consideration of the facts of the case, the Kerala High Court held that the restriction imposed on the use of mobile phones in a women's hostel was an unreasonable infringement upon the right to access the internet, the right to privacy, and the right to education. Further, it observed that internet has become part of the right to education as well as right to privacy under Article 21 of the Indian Constitution.

In *Lipika Pual v. State of Tripura*[19], the Tripura High Court heard a petition filed by the petitioner Pual, who had been suspended from the state fisheries department and was facing proceedings, just days before her retirement. The petitioner had moved the Court seeking quashing of the inquiry against her and the suspension order. The petitioner had been suspended because she had attended a "political

18 Faheema Shirin R.K. v. State of Kerala, AIR 2020 Ker 35.
19 Lipika Pual v. State of Tripura, 2020 (1) SCT 688.

programme" in December 2017 and wrote a "political" post about it on Facebook. The state contended that these acts of the petitioner were in violation of the Conduct Rules of the state. The conduct rules prohibit government servants from being members of or being associated with any political party or political activity and from canvassing, interfering with or taking part in an election to any legislature or local authority. The High Court, on examination of the facts, held that government servants are entitled to hold and express their political beliefs. Further, the Court asserted that in the instant case, the petitioner had only expressed certain beliefs in general terms and that this does not amount to canvassing for or against any political party.

In *Ajay Maken v. Union of India*[20], the petitioner moved the Delhi High Court to seek relief in relation to the forced eviction of around 5000 dwellers of a jhuggi jhopri basti (JJ basti) 1 at Shakur Basti (West) near the Madipur Metro Station in Delhi on December 12, 2015. The High Court held that the right to housing is a bundle of rights not limited to a bare shelter over one 's head. This right includes the right to livelihood, right to health, right to education and right to food, including right to clean drinking water, sewerage and transport facilities. Further, the Court observed that slum dwellers have a 'right to the city' which stems, in part, from the fundamental rights that allow a person to move and reside anywhere freely within the nation. Further, the High Court held the 'right to the city' arises from the fact that the city is a common good and that those who contribute to the social and economic life of a city have a right to housing in it.

20 Ajay Maken v. Union of India, 260 (2019) DLT 581.

In *Sanjaya Bahel v. Union of India*[21], the petitioner was an Indian diplomat who had been convicted in the United States of America. After his subsequent deportation from the United States of America, the petitioner sought permission from the Ministry of External Affairs under Section 86 of the Civil Procedure Code, 1908 in order to initiate legal action the United Nations Organization for the non-observance of due process in his case. In response, the ministry stated that the consent of Government of India is not required to initiate a legal suit against the United Nations Organization as it is not a foreign state and is only an internal organization. Further, the ministry stated that the United Nations Organization and its officials enjoy immunity under the United Nations (Privileges and Immunities) Act, 1947. Challenging the extent of operation of this immunity, the petitioner filed a writ petition before the Delhi High Court. Examining the maintainability of the petition, the High Court reiterated that a writ under Article 226 lies only when the petitioner establishes that his or her fundamental right or some other legal right has been infringed by the State or other authority under Article 12 of the Indian Constitution. Since in the instant case, United Nations Organization is not a 'State' within the meaning of Article 12, the writ petition was dismissed.

In *Sowmya Reddy v. State of Karnataka*[22], the petitioners challenged the order issued by the District Magistrate of Bengaluru under section 144 of the Code of Criminal Procedure. The order, which applied to the entire city of Bengaluru, was issued in light of the protests against the Citizenship Amendment Act. The order was issued by the Commissioner of Police, acting as a District Magistrate, on the basis of reports from Deputy Commissioners of Police. It also directed

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21 Sanjaya Bahel v. Union of India, W.P.(C) 981/2019 & CM APPL. 4407/2019 & 6592/2019.

22 Sowmya Reddy v. State of Karnataka, Writ Petition No.52731 Of 2019.

that the permissions granted for any protests would stand cancelled. The Court observed, relying on the precedent laid down in *Anuradha Bhasin v. Union of India*[23] that a District Magistrate has to carefully inquire into the issue and form an opinion that immediate prevention. This formation of opinion was held to be a condition precedent to the exercise of power under section 144. The Court held that there was no indication of such inquiry or formation of opinion from the order and that the District Magistrate did not apply an independent mind to the facts of the case. Further, the Court held that a Commissioner exercising power under section 144(1) of the Code must act as a District Magistrate. Hence, he must inquire and form a reasoned opinion instead of acting as a police officer and relying on the opinions expressed by other officers, particularly superior officers. The Court held the order to be illegal as it was an unreasoned order with no formation of opinion that took away the fundamental rights of the citizens.

2. Contributions

This Edition of IJCL features a mélange of essays, articles and case comments by young academics, practitioners, and students alike. The themes covered in these pieces touch upon constitutional law issues of contemporary relevance- the abrogation of Article 370 and the reorganization of Jammu and Kashmir, weak form constitutional review, constitutionality of the law of criminal defamation and judicial accountability. This Edition also hosts scholarship on constitutional law questions from Bangladesh and China and thus, provides its

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23 Anuradha Bhasin v. Union of India, 2020 SCC Online SC 25; See also D. Mukhopadhyay & A. Gupta, *Jammu & Kashmir Internet Restrictions Cases: A Missed Opportunity To Redefine Fundamental Rights In The Digital Age*, 9 Indian. J. Const. L.208 (2020).

readers food for thought in areas of both Indian constitutional law and comparative constitutional law.

The Articles section of this Volume begins with John Sebastian and Aparajito Sen's fascinating exploration of the role of consent within a privacy rights analysis by studying the Supreme Court's recent constitutional jurisprudence. The authors argue that the Court has recognised an autonomy-rich conception of dignity, which focuses upon an individual's continued capacity to make autonomous choices. This both enhances and limits the role of consent in privacy – while consent is an important factor to be considered by courts, it does not completely determine whether a person can effectively claim a right to privacy. The authors then situate this understanding of consent within the doctrinal tools adopted by the Court to adjudicate privacy claims – the reasonable expectations test and proportionality. The authors conclude with the observation that consent is an important variable, but does not operate in an 'all-or-nothing' manner, and has to be balanced with other factors such as the autonomy of the individual, public interest and the rights of others.

In their article, M. Jashim Ali Chowdhury and Nirmal Kumar Saha examine the power of constitutional amendment in Bangladesh. The authors dissect the 2011 amendment to the constitution of Bangladesh, which has included a very widely framed perpetuity clause and, also, a very vague reference to the basic structure doctrine and consider the fragilities of these two parallel tracks to unamendability. Chowdhury and Saha show how a median line could be drawn by installing a system of popular referendum in the constitution amendment process. On this basis, they make a case for a reformulated version of the referendum system that was introduced in Bangladesh in 1979 but scrapped by the amendment of 2011.

Devashri Mishra and Muskan Arora put to test the constitutionality of the law of criminal defamation. In their piece, the authors seek to consolidate tools in the form of uncanvassed constitutional arguments that must be considered by the Supreme Court in a challenge to the law of criminal defamation, as they ought to have been in *Subramanian Swamy v. Union of India*. Mishra and Arora move past anecdotal accounts of the colonial origins of this law to examine its history, and intent, as well as its presence in modern India as the 'afterlife of colonialism'. On this basis, they make a compelling argument that the law on criminal defamation should be struck down for falling foul of the standard of a 'reasonable restriction' under Article 19(2). Placing reliance on the proportionality review as well as constitutional values that India's jurisprudence espouses, the authors criticise the Swamy judgment to finally advocate that defamation must be solely a civil offence.

In their piece, Rangin Pallav Tripathy and Chandni Kaur Bagga assess the information disclosure practices of the judges of the Supreme Court. The authors find that there exists a pervasive reluctance in judges to disclose essential educational and professional details. The authors argue that it is insincere to expect the public to trust judges when people have limited information about them. By exploring the democratic foundation of the idea of public faith in the judiciary, Tripathy and Bagga contend that people need information about the judges they are expected to trust and that judges have the primary responsibility to adopt robust disclosure practices and share more about themselves.

Kashish Mahajan explores the topical issue of abrogation of Article 370 of the Constitution and the consequent dilution of the special status and bifurcation of Jammu and Kashmir. The author examines the constitutional validity of the legal measures adopted to

effectuate these changes and contends that the Legislative Assembly of the State can be construed to mean the Constituent Assembly of the State thereby keeping the mechanism for the abrogation of Article 370 alive. The paper also lays down a legal standard for the kinds of decisions that may be taken by the President and the Parliament during the operation of President's rule and argues that the actions of abrogating Article 370 and bifurcating the State of Jammu and Kashmir are unconstitutional when tested against this standard. Lastly, the paper discusses the scope of judicial review in the instant case by analysing previous decisions of the Supreme Court on matters of executive and legislative policy.

The article by Anirudh Belle examines what Mark Tushnet had referred to as the "weak-form" system of judicial review. The author argues for weak- form review in India as a system that breaks away from the traditional contrasts between legislative and judicial supremacy, and which better protects rights by reallocating powers between the legislatures and the courts. In order to make his case for the adoption of weak-for review, Belle outlines the evolution of judicial review in India and explores the arguments made for weak-form review and concerns that are commonly placed against it.

Wenjuan Zhang delves into the debate of whether China has constitutionalism and offers a new analysis framework for examining the same. The author highlights the theoretical development of Constitutionalism in English Literature and reviews the evolution of constitutional design to show the struggling journey of the constitutional transition from revolution oriented to the rule of law direction. Zhang then introduces the constituted form in the Chinese constitution and analyses it from the perspective of popular sovereignty. Testing the Chinese constitution designing and practice

against the proposed analysis framework, the author concludes that China has a thin version of constitutionalism.

The Essays section of this Volume features powerful and thought-provoking pieces.

True to form, Abhinav Sekhri's essay launches a spirited challenge of Article 22 of the Indian Constitution. The essay is of immense significance given the wanton abuse of preventive detention within India, particularly in Jammu and Kashmir, in the last year. Sekhri tactfully argues that the protections guaranteed by Article 22, particularly the minimum threshold that it sets for legislatures, is painfully inadequate and subverts the ideal of safeguarding individual liberty against legislative tyranny. He asks, "is it time, then, to rid the Constitution of Article 22?"

Prannv Dhawan's essay revisits the controversial issue of appointment of judges to constitutional courts in India. It attempts to address the inadequacies of the collegium system, while underscoring the need to safeguard the institutional independence of the judiciary. Prannv's solution entails rigorous public scrutiny and debate about the judicial appointment process in a bid to increase objectivity and transparency. In an attempt to address the recurring judicial-political discord, the author proposes that the judiciary and other branches of government must engage in meaningful dialogue.

Volume 9 also features two powerfully written case comments on recent decisions delivered by the Supreme Court.

Shrutanjaya Bharadwaj comments on the Supreme Court's recent decision in *Chebrolu Leela Prasad Rao v. State of Andhra Pradesh*, better known as the 100% reservation judgement. Bharadwaj strikes at two aspects of the Court's decision with surgical dexterity. First, it is argued that the court erroneously interpreted the non-obstante clause

in Paragraph 5(1) of Schedule V of the Constitution. Second, the Court's ruling that the non-obstante clause cannot override Article 14 of the Constitution, is contested on the grounds that the basic structure doctrine has been held to apply prospectively, and that since the basic structure is a reflection of the original Constitution, it cannot be violated by an original provision.

Devdutta Mukhopadhyay and Apar Gupta provide an inside account of the twin decisions by the Supreme Court concerning internet shutdowns in Jammu & Kashmir in the last year – *Anuradha Bhasin v. Union of India*, and *Foundation for Media Professionals v. U.T. of Jammu & Kashmir*. The authors reveal how the principled recognition of a derivative fundamental right to internet access without any tangible relief in *Anuradha Bhasin,* required a second round of litigation on the same issues in *Foundation for Media Professionals*. They then critique the absence of any form of judicial review by the Court despite endorsing the proportionality standard in both judgements. It is also pointed out that these cases are an aberration from other cases in which the 'national security' defence has been advanced by the state, in that previous cases involved some form of facial review. The authors' then turn their focus to the negative and positive conceptions of a derivative fundamental right to internet access, criticizing the Court's non-enforcement of the former, and cursory dismissal of the latter. Although the Court failed to meaningfully check excesses by the executive in these cases, the authors contend that both decisions possess precedential value for future litigation.

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UNRAVELLING THE ROLE OF AUTONOMY AND CONSENT IN PRIVACY

John Sebastian & Aparajito Sen[*]

Abstract

It has been widely acknowledged that consent is central to the right to privacy. This has been recognised by the Supreme Court in Justice K.S. Puttaswamy v. Union of India (2017), as well as in the Personal Data Protection Bill, 2019 (currently pending in Parliament). While several studies have mentioned the difficulties of obtaining informed consent in today's world, there has been little discussion on the precise role of consent within a privacy rights analysis. We will attempt to explore this crucial and under-theorised issue through an analysis of the Court's recent constitutional jurisprudence. Underlying the recognition of the right to privacy have been the values of dignity, autonomy and liberty. We argue that the Court has recognised an autonomy-rich conception of dignity, which focuses upon an individual's continued capacity to make autonomous choices. This both enhances and limits the role of consent in privacy – while consent is an important factor to be considered by courts, it does not completely determine whether a person can effectively claim a right to privacy. We then situate this understanding of consent within the doctrinal tools adopted by the Court to adjudicate privacy claims – the reasonable expectations test and proportionality. We argue that consent plays a key role in both these tests. Consent is an important variable, but does not operate in an 'all-or-nothing' manner, and has to be balanced with other factors such as the autonomy of the

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individual, public interest and the rights of others. This has important implications for assertions of privacy in the future.

Keywords: Right to Privacy, Puttaswamy, Data Protection Bill, 2019, consent, dignity

1. Introduction

The decision of nine judges of the Supreme Court, in *Justice K.S. Puttaswamy v. Union of India*[1] *(Puttaswamy I)*, declaring the right to privacy a fundamental right has justifiably been celebrated because of its unanimous recognition of the constitutional status of privacy in India.[2] The many opinions in *Puttaswamy I* espouse several high principles of constitutional law in the process of linking up the right to privacy with Article 21, as well as with Articles 14, 15, 19, 25 and other provisions of Part III. However, sources of uncertainty in the decision have made predicting the application of its principles to future decisions a tricky exercise. The reasons for this are several: the lack of

1 K.S. Puttaswamy v. Union of India, W.P. (Civil) 494/2012 (Supreme Court, 24/08/2017).

2 See M. Kamil, *Puttaswamy: Jury still out on some privacy concerns?,* 1(2) Indian Law Review 190 (2017); see also, Pritam Baruah and Zaid Deva, *Justifying Privacy: The Indian Supreme Court's Comparative Analysis*, Indian Yearbook of Comparative Law (Forthcoming in 2018) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3223381, last seen on 08/07/2019; V Bhandari, A Kak, S Parsheera, F Rahman, *An Analysis of Puttaswamy: The Supreme Court's Privacy Verdict*, 11 IndraStra Global 1, (2017) https://nbn-resolving.org/urn:nbn:de:0168-ssoar-54766-2 last seen on 08/07/2019; see also, AP Kumar, *The Puttaswamy Judgment: Exploring Privacy Within and Without*, 52(51) Economic and Political Weekly 34 (2017).

a clear majority opinion,[3] the use of often conflicting theoretical foundations,[4] as well as the limited scope of the referral.[5]

Two years on, we have now had time to observe the application of the principles of this decision by the Supreme Court, in decisions such as *Navtej Singh Johar*[6], *Joseph Shine*[7], and *Justice K.S. Puttaswamy v. Union of India (Puttaswamy II)*[8]. *Puttaswamy II* is particularly significant because it deals with the validity of the Aadhaar;[9] and it was arguments against the Aadhaar scheme which occasioned the referral to the nine-judge bench in *Puttaswamy I*.

While *Puttaswamy II* has clarified a few matters with regard to how *Puttaswamy I* is to be applied, it has also thrown up a host of questions. We do not propose to examine all these questions in this paper; instead, we focus on the narrower issue of consent. Both *Puttaswamy I* and *II* repeatedly emphasise the centrality of consent to the right to privacy.[10] The precise role of consent, and its interaction with other principles is, however, uncertain. This is an important

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3 The decision has a 'plurality' opinion rendered by Chandrachud, J and assented to by three other judges (JS Khehar, CJI, RK Agrawal, J and S Abdul Nazeer, J), falling one short of a clear majority of five. In addition, J Chelameswar, J, SA Bobde, J, RF Nariman, J, Abhay Manohar Sapre J, and Sanjay Kishan Kaul, J gave separate concurring opinions.

4 Pritam Baruah and Zaid Deva, *Justifying Privacy: The Indian Supreme Court's Comparative Analysis,* Indian Yearbook of Comparative Law (Forthcoming in 2018) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3223381, last seen on 08/07/2019

5 M. Kamil, *Puttaswamy: Jury still out on some privacy concerns?,* 1(2) Indian Law Review 190 (2017), at 202-03.

6 Navtej Singh Johar v. Union of India, W.P. (Criminal) 76/2016 (Supreme Court, 06/09/2018).

7 Joseph Shine v. Union of India, W.P. (Criminal) 194/2017 (Supreme Court, 27/09/2018).

8 K.S. Puttaswamy v. Union of India, W.P. (Civil) 494/2012 (Supreme Court, 26/09/2018).

9 Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016.

10 See supra 1, at ¶ 171.

lacuna: if consent is indeed central to privacy, then understanding the role of consent in privacy becomes crucial.

In this paper, we chalk out a few of the major questions in this regard and propose a few preliminary solutions. The main purpose of our paper is to provoke a debate over the role of consent in a privacy rights analysis. We here will not be concerning ourselves with the separate (and important) question about whether consent can be meaningfully obtained in the context of many privacy claims. For instance, studies have shown that people do not really understand what they are consenting to when agreeing to privacy policies online.[11] Similarly, scholars have questioned whether the processes of metadata collection can ever meaningfully be consented to.[12]

We will, instead, explain the role of consent within privacy, when meaningfully given, with a full understanding of its consequences. This is important, as many studies of consent stop at questioning whether consent is real or illusory, without going into the larger question of what justificatory work consent performs in privacy rights claims. Further, even though the focus of our paper will be upon the right to privacy, much of our analysis with respect to, for instance, waiver of fundamental rights, can apply to other fundamental rights as well.

The structure of our paper will be as follows: Part 2 will explore the principles of liberty, autonomy and dignity, which were the foundations of the right to privacy as conceived in *Puttaswamy I*. We will demonstrate how *Puttaswamy I* and subsequent cases adopted what we term an 'autonomy-rich' conception of dignity, which can help us situate the role of consent. Part 3 will discuss the application of this

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[11] V. Bhandari, A. Kak, S. Parsheera, F. Rahman, *An Analysis of Puttaswamy: The Supreme Court's Privacy Verdict*, 11 IndraStra Global 1, (2017) available at https://nbn-resolving.org/urn:nbn:de:0168-ssoar-54766-2, last seen on 08/07/2019.

[12] D. Solove, *Privacy Self Management and the Consent Dilemma,* 126 Harvard Law Review 1880, 1894-1900, (2013).

conception to the question of waiver of rights, the right to be forgotten and the public interest. After Part 4 briefly discusses the doctrinal contours of privacy, Parts 5 and 6 will explore how consent can be situated within the reasonable expectations doctrine and proportionality analysis as adopted by the Court in *Puttaswamy I* and *II*. Our discussion will be concluded in Part 7, which re-asserts our central claim that consent is an important, but not completely determinative, value in privacy claims. Courts must take consent into account as a variable in the balancing process which also considers the overall autonomy of a person and the rights of others.

2. Philosophical Foundations of Consent in *Puttaswamy I*

This Part will focus on analysing the foundations of the fundamental right to privacy in *Puttaswamy I*. This will be done at four levels. First, we will discuss the justifications used in the various opinions for declaring privacy a fundamental right, as these will inform both the contours of privacy, as well as its limitations. Second, we will focus specifically on how these justifications in turn impact the role of consent. Third, we will look at a few cases which were decided post-*Puttaswamy I*, to clarify a few of the positions mentioned in the latter. Last, we will briefly explore how the majority opinion in *Puttaswamy II* misunderstood a few of these key principles underlying the opinions in *Puttaswamy I*.

2.1. *The Justifications for Privacy - Unravelling the Dignity-Liberty-Autonomy Triangle*

The right to privacy is not explicitly stated in the Constitution; this made it all the more important for the various judges in *Puttaswamy I* to link it up with other constitutional values. These other constitutional values, such as for instance, the right to life and personal liberty in Article 21, then became prisms through which privacy could be constructed. Similar links were drawn with other fundamental rights, such as the right to equality (Articles 14), right against

discrimination (Article 15), freedom of religion (Article 25) and the various freedoms in Article 19.[13]

However, three concepts dominate the justifications given for the right to privacy across all the opinions: liberty, autonomy and dignity. We'll begin with the 'plurality' opinion authored by Chandrachud, J and subscribed to by three other judges. In the discussion over the 'essential nature of privacy', the opinion begins by observing the importance of privacy in protecting the autonomy of the individual. The ability to make choices was seen as the core of human personality.[14]

Therefore, in Chandrachud, J's formulation, privacy allows individuals to 'chart and pursue' the development of their personalities, which is in turn a postulate of dignity.[15] Similarly, privacy is linked to liberty by the observation that "it is in privacy that the individual can

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[13] The final 'Order of the Court', signed by all nine judges, signifies the multiple sources of the right to privacy when it states, "The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and *as a part of the freedoms guaranteed by Part III of the Constitution*." (emphasis ours). As an instance of more explicitly drawing from multiple sources, we can refer to Chandrachud J [See Supra 1, at ¶ 169 (Chandrachud, J)]: "The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right… Privacy is the ultimate expression of the sanctity of the individual. *It is a constitutional value which straddles across the spectrum of fundamental rights* and protects for the individual a zone of choice and self-determination." (emphasis ours) Similar linkages are drawn up by the other opinions in *Puttaswamy I* as well.

[14] Supra 1, at ¶ 168 (Chandrachud, J).

[15] Ibid.

decide how liberty is best exercised".[16] Liberty, dignity and privacy, therefore, all help preserve diversity in a plural culture. Similar statements on the links between liberty, autonomy and dignity can be found in the other opinions in this case.[17]

This does not mean that the concepts above are interchangeable, and neither are all subsumed with the notion of privacy. For instance, Chandrachud, J clearly observes that privacy is a subset of liberty, with the latter being the broader notion.[18] This understanding is reiterated by Nariman, J when he notes that privacy, even though based on liberty, is different from it. He illustrates this by observing how the First Amendment of the US Constitution has been used to protect privacy rights with respect to the possession of obscene material at one's home, while the same First Amendment will not protect obscenity in public spaces.[19]

We therefore largely agree with Kamil, when she observes, "[F]or the large part, the Supreme Court's articulation of the rationale for privacy appears to be based on the notion of individual liberty operationalized through the ideas of autonomy and dignity."[20] However, it becomes crucial to understand the precise nature of the relationship between these concepts. In case of a conflict between liberty and dignity, for instance, which one will prevail? European courts have shown a tendency to give precedence to dignity in such cases. The 'dwarf-tossing' case is a famous instance of this, where the mayor of a town banned 'dwarf-tossing' performances, a show in which a dwarf in protective gear is tossed around by customers in a bar. In an appeal by an affected dwarf, the French Conseil d'Etat held that the ban was justified because the show undermined human

16 Ibid.
17 Supra 5, at 191-197
18 Ibid, at 169 (Chandrachud, J).
19 Ibid, at ¶¶ 49-50 (Nariman, J).
20 Supra 5, at 197.

dignity. It upheld the power to ban the show, "even where protective measures are in place to ensure the safety of the person concerned and *this person lends himself willingly and for reward to this activity*."[21] Similarly, the German Federal Administrative Court has upheld the prohibition of 'peep-shows', on the grounds of protecting the dignity of women who expose themselves to men for payment.[22]

This is important, because it is clear from the above that the consent of the person whose rights were involved was largely deemed irrelevant when it conflicted with dignity. Indeed, as Baruah and Deva point out, dignity can often manifest itself in a 'liberty-restricting' role.[23] One of the reasons often cited for the importance given to dignity by German courts is the position of dignity in the German Basic Law as the supreme value in the objective order of values.[24] However, as McCrudden points out, dignity has often been used in a rights-constraining role in other countries as well.[25] McCrudden, in his analysis of dignity, notes that there can be two approaches to dignity: a choice-based autonomy approach, and a communitarian approach.[26]

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21 Commune de Morsang-sur-Orge, CE, Ass., 27 Oct. 1995, N° 136727 (Administrative Court Assembly, France). [Translation available at https://law.utexas.edu/transnational/foreign-law-translations/french/case.php?id=1024, last seen on 24/06/2019.] See generally Luís R. Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. Int'l & Comp. L. Rev. 331 (2012).

22 Sittenwidrigkeit von Peep-Shows, BverfGE 64, 274, (Higher Administrative Court for Münster) at 279–280; *as cited in* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights,* 19(4) The European Journal of International Law 655, at 705 (2008).

23 Supra 4, at 18-19.

24 For instance, Article 1(1) of the Basic Law provides, "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." Article 1(2) states, "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."

25 C. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights,* 19(4) The European Journal of International Law 655, at 702 (2008).

26 Ibid, at 699.

A choice-based autonomy approach focuses upon the decisions made by an individual. A communitarian approach, on the other hand, focuses on a person as a social being, and the concept of dignity is constructed on that basis. As observed by the German Constitutional Court: "[H]uman dignity means not only the individual dignity of the person but the dignity of man as a species. Dignity is therefore not at the disposal of the individual."[27] He notes that this underlies the decisions of the Courts in the dwarf-tossing and peep-show cases. Inbuilt into this idea of dignity is the notion that dignity is dependent upon communitarian standards of what is dignified or 'human'.[28]

The question which arises in our context is: what role does *Puttaswamy I* conceive for dignity? This is a challenging task since, even though dignity is universally mentioned in the various opinions, several statements, often contradictory, are made with respect to its functional relationship with liberty and autonomy.[29] Chandrachud, J seems to ascribe dignity the status of the foundational value and the 'core' which unites the fundamental rights. Privacy, in this context, is valuable because it assures dignity to the individual.[30]

Interestingly, Chandrachud, J quotes Aharon Barak[31], where he observes the 'central normative role' of dignity'[32] in uniting 'human rights into one whole'.[33] This understanding of dignity has been used

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27 Ibid, at 705.

28 However, we will argue later that the judges in *Puttaswamy I* and subsequent cases have adopted an autonomy-rich approach to dignity. The autonomy-rich approach gives greater emphasis to the choices of individuals. However, it is still not the case that *any* choice is determinative of the issue. Choices can be limited in certain circumstances, as will be explained later. (*See* Parts 2.3 and 3.2 of this article)

29 See supra 4, Supra 25, for more.

30 Supra 1, at ¶ 107 (Chandrachud, J).

31 A. Barak, Human Dignity: *The Constitutional Value and the Constitutional Right* (CUP 2015) as cited in supra 1 at ¶ 105 (Chandrachud, J).

32 Supra 1 at ¶ 105 (Chandrachud, J).

33 Ibid.

by the Supreme Court of Israel in rights-constraining ways, as can be seen in the case of *Station Film Co. v. Public Council for Film Censorship*, where the Supreme Court of Israel upheld the deletion of scenes from a film on the grounds of protection of dignity.[34] However, this discussion has to be mediated with what Chandrachud, J says about the concept of dignity itself. He notes that dignity has both intrinsic and instrumental value.[35] From an instrumental point of view, "dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other."[36]

The implication which seems to flow from this is that dignity is a liberty-affirming concept rather than a liberty-restricting one. Indeed, in many situations, protection of dignity can easily be envisaged as converging with an increase in liberty. For instance, in *Navtej Singh Johar v Union of India*[37], Misra, J observes that Section 377 denudes persons of dignity because it impinges upon their 'right to choose without fear' in the context of sexual relationships.[38] However, there is again little clarity in the above quotation from Chandrachud, J, as to what would happen in case of a conflict between dignity and liberty.

There is a possible key to the resolution of this conflict in Chandrachud, J's discussion of the concept of 'inalienability' in the context of privacy being a 'natural' right. In fact, all the judges (with the notable exception of Chelameswar, J), accord privacy the status of a 'natural right'.[39] Most, in turn, also refer to these rights being

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34 Station Film Co. v. Public Council for Film Censorship, (1994) 50 PD (5) 661 (Supreme Court of Israel); Supra 25, at 702.

35 Intrinsic value is the value ascribed to dignity as an interest in itself. Instrumental value is the value ascribed to dignity in furthering other interests. *See* Supra 1, at ¶ 169 (Chandrachud, J).

36 Supra 1, at ¶ 169 (Chandrachud, J).

37 Supra 6.

38 Ibid, at ¶¶ 132, 138 (Misra, J).

39 See, for instance, supra 1 at ¶ 12 (Bobde, J) and ¶ 56 (Nariman, J).

'inalienable'.[40] For instance, Chandrachud, J observes that "[p]rivacy is a concomitant of the right of the individual to exercise control over his or her personality", which in turn finds its origin in the idea of certain rights being 'natural' to human beings.[41] He then states, "Natural rights are inalienable because they are inseparable from the human personality."[42] However, inalienability and autonomy can pull in opposite directions, and this is acknowledged by him:

The concept of natural inalienable rights secures autonomy to human beings. But the autonomy is not absolute, for the simple reason that, the concept of inalienable rights postulates that there are some rights which no human being may alienate. While natural rights protect the right of the individual to choose and preserve liberty, yet the autonomy of the individual is not absolute or total. As a theoretical construct, it would otherwise be strictly possible to hire another person to kill oneself or to sell oneself into slavery or servitude.

He further quotes Ster and Jones in observing that such acts, though ostensibly autonomous, 'pretend to an autonomy that does not exist', being exercises in 'false autonomy'.[43] This is just an instance of the age-old debate about the limitations of autonomy. Immanuel Kant, for instance, has often been seen to be among the originators of the modern concept of dignity in his conception of persons as ends-in-themselves. In his formulation of the categorical imperative, however, Kant mentions instances of duties towards oneself, such as the duty to not take your own life.[44] The duty to not treat others as means to an

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[40] Supra 1, at ¶ 40 (Chandrachud, J); at ¶ 92-94 (Nariman, J); at ¶ 25 (Sapre, J); at ¶ 12, 31, 47 (Bobde, J); at ¶ 20 (Chelemeswar, J). It is clear that a majority of the judges not only recognised privacy as a fundamental right, but also characterised it as 'inalienable'.

[41] Ibid, at ¶ 40 (Chandrachud, J).

[42] Ibid.

[43] C. A. Ster & G. M. Jones, *The Coherence of Natural Inalienable Rights*, 76(4) UMKC Law Review 939, 971-972 (2007- 08); Supra 1, at ¶ 45 (Chandrachud, J).

[44] I. Kant, *Practical Philosophy,* 73-74 (Cambridge edn., 1996).

end also extends to oneself; so we can clearly see the linkages between this and the idea of 'false autonomy' i.e. autonomy does not contemplate the ability to make absolutely any choice.

In making these linkages with natural law theories, Chandrachud, J cites *Golaknath v. State of Punjab*[45], where Subba Rao, CJ speaks of the fundamental rights as 'transcendental', 'primordial' and 'natural' within his larger argument that fundamental rights cannot be amended by Parliament.[46] Chandrachud, J concludes from this that fundamental rights "are primordial rights which have traditionally been regarded as natural rights."[47] He then goes on to cite a few of the judges in *Kesavananda Bharati*[48], such as Sikri, CJ who also accorded fundamental rights the status of natural rights. However, this understanding of natural rights is of doubtful provenance, as (a) *Golaknath* was overruled by *Kesavananda Bharati*, and (b) *Kesavananda Bharati* is ambivalent about natural rights theories. Khanna, J's opinion in *Kesavananda*, regarded by many as the controlling opinion because it straddles a middle path, explicitly disregards a reliance on natural rights theories, even in the formulation of the basic structure.[49]

Be that as it may, *Puttaswamy I* does effectively hold (by eight judges) that fundamental rights are natural rights, and thereby imports much of the uncertainty of natural law theories. For our purpose, it is sufficient to observe the impact this has on consent, and the possible

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45 Golaknath v. State of Punjab, (1967) 2 SCR 762.

46 Ibid, at ¶¶ 17-19 (Rao, J).

47 Supra 1, at ¶ 108 (Chandrachud, J).

48 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

49 Ibid, at ¶ 1467 (Khanna, J): "It is up to the state to incorporate natural rights, or such of them as are deemed essential, and subject to such limitations as are considered appropriate, in the Constitution or the laws made by it. But independently of the Constitution and the laws of the state, natural rights can have no legal sanction and cannot be enforced. The courts look to the provisions of the Constitution and the statutory law to determine the rights of individuals. The binding force of Constitutional and statutory provisions cannot be taken away nor can their amplitude and width be restricted by invoking the concept of natural rights."

liberty-restraining potential of both the reliance on dignity, and its corresponding link to natural law theories.

2.2. *Consent in Puttaswamy I*

Having looked at the theoretical foundations of the right to privacy in the preceding sub-part, our focus here is on how this is used in the judgment to specifically deal with the issue of consent. Consent finds mention especially in the parts of the opinions which deal with informational self-determination. Chandrachud, J, for example, observes, "Apart from safeguarding privacy, data protection regimes seek to protect the autonomy of the individual. This is evident from the emphasis in the European data protection regime on the centrality of consent."[50] He also takes note of the Report of the Group of Experts on Privacy (under the erstwhile Planning Commission), which laid out nine privacy principles, where consent is mentioned at several places: in the collection of data, purpose limitations, the ability to access and correct data, and in the disclosure of information.[51] These principles are largely reiterated by Kaul, J.[52]

A similar emphasis on consent can be found in other judgments. Bobde, J conceives of the right to privacy as involving the right to choose and specify.[53] The right to choose necessarily involves the choice about whether to disclose information, whereas the right to specify encapsulates the right to decide who gets access to the information.

Bhatia observes that we need to look at the emphasis on consent in *Puttaswamy I* and read it together with the clear rejection of the 'third-party doctrine'.[54] In doing so, he observes that, from the

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50 Supra 1, at ¶ 177 (Chandrachud, J).

51 Ibid, at ¶ 184 (Chandrachud, J).

52 Ibid, at ¶ 70 (Kaul, J).

53 Ibid, at ¶¶ 43-44 (Bobde, J).

54 The 'third-party' doctrine is a doctrine evolved by the US Supreme Court which holds that, once a person discloses information to a third party, they have effectively lost their privacy rights to such information. This was categorically

perspective of privacy, 'consent is not a one-time waiver of your right to control your personal information, but must extend to each and every distinct and specific *use* of that information, *even after* you have consented to the State collecting it from you.'[55]

We largely agree with his statement about the holding in *Puttaswamy I*, but would modify it to the extent that it needs to account for a fuller understanding of the right to be forgotten, which we will deal with in Part 3 of this article. It is also important to observe that, though the judgments do commendably focus on consent, there is little focus upon its limitations in the context of the theoretical foundations of privacy laid out in the preceding parts of their judgments. This still leaves open the question about those cases where consent can conflict with dignity or autonomy: what if a person wants to delete information which they have put up on Facebook 10 years ago, because it is embarrassing or affects their job prospects?[56] On the same thread, what if a person has handed over biometric details to the State when

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rejected by the Supreme Court of India in District Registrar and Collector, Hyderabad v. Canara Bank, (2005) 1 SCC 495. The majority in *Puttaswamy* agrees with the Canara Bank decision, as can be seen in Chandrachud, J and Nariman, J's opinions. This shall be discussed in greater detail in later sections. (*See* Part 5 of this article).

55 G. Bhatia, *The Supreme Court's Right to Privacy Judgment – IV: Privacy, Informational Self-Determination, and the Idea of Consent*, Indian Constitutional Law and Philosophy, available at https://indconlawphil.wordpress.com/2017/08/30/the-supreme-courts-right-to-privacy-judgment-iv-privacy-informational-self-determination-and-the-idea-of-consent/, last seen on 08/07/2019 (emphasis in original).

56 An additional question which can be asked in such a situation is: *who* would be the duty-bearer to ensure deletion of the information in such an instance - the State or a private agency such as Facebook? We will not enter into the question of horizontal applicability of the right in this article, but suffice it to say that these arguments can potentially also be used to construct liability under tort law. Alternatively, arguments could be made for horizontal application of certain fundamental rights based on the public nature of such social networking websites. (*See* Zee Telefilms v. Union of India, (2005) 4 SCC 649.) *Puttaswamy I* did not conclusively answer this question, but a few of judges did recommend data protection laws.

enrolling for Aadhaar, but now wants that biometric information to be deleted?

2.3. *Post-Puttaswamy I aids to construction*

Several cases following *Puttaswamy I* relied upon various aspects of the judgment. Here, we will be looking at three judgements to help decipher the position of the Court on the issue of the limits of consent: *Common Cause v Union of India*[57] *('Common Cause')*, *Navtej Singh Johar v Union of India*[58] *('Navtej Johar')* and *Puttaswamy II*[59].

In *Common Cause*, the issues were the constitutional validity of passive euthanasia and living wills. Euthanasia is perhaps amongst the most contentious arenas with respect to the limits of consent, as can be seen from the Kantian duty against suicide.[60] A five-judge bench of the Supreme Court upheld the validity of passive euthanasia for terminally ill or PVT (persistent vegetative state) patients, while passing directions regarding a mechanism to ensure safeguards in the process.[61] The Court also upheld the usage of 'living wills', whereby a person can specify, in advance, refusal of treatment in case they later are not in a position to do so.[62] A question that might legitimately be asked here is whether allowing a person to die would be a violation of dignity? Can consent in this case override dignity?

This question is dealt with in an interesting manner by the Court. Misra, J, writing for himself and Khanwilkar, J, notes that dignity must necessarily take into account the circumstances of the patient. A patient in a terminally ill or PVT state "has no other choice but to suffer an avoidable protracted treatment."[63] This is turn affects

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57 Common Cause v. Union of India, W.P. (Civil) 215/2005 (Supreme Court, 09/03/2018).

58 Supra 6.

59 Supra 8.

60 Supra 44.

61 Supra 57.

62 Ibid.

63 Ibid, at ¶ 160 (Misra, J).

the patient's "right to live with dignity and face death with dignity, which is a preserved concept of *bodily autonomy* and right to privacy."[64] In a similar vein, Chandrachud, J observes that terminal illness signifies a loss of control over one's faculties. This makes control over 'essential decisions about how an individual should be treated at the end of life' fundamental to their autonomy and dignity.[65]

What is essential to note here is the conception of dignity in terms of autonomy, and the ability to make real choices. This choice is permitted because of the lack of any real autonomy in the patient in case she continues to lose control over her faculties. This does not follow the German 'communitarian' model of dignity, as observed by McCrudden. Misra, J re-emphasizes this, when he observes that neither 'social morality' nor 'medical ethics' will have a role to play here, given that dignity requires that the autonomy of the individual in this matter be preserved.[66] The 'medical ethics' referred to included, for instance, the Hippocratic Oath administered to doctors, which gives emphasis to the preservation of life.

Navtej Johar augments this departure from the 'communitarian' model of dignity with its focus on 'constitutional morality'. When, for instance, Chandrachud J notes that the Supreme Court cannot rely on 'popular public morality' when rendering its decisions, but instead has

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64 Ibid, at ¶ 160 (Misra, J) (emphasis ours).

65 Ibid, at ¶ 82 (Chandrachud, J): "Dignity in death has a sense of realism that permeates the right to life. It has a basic connect with the autonomy of the individual and the right to self-determination. Loss of control over the body and the mind are portents of the deprivation of liberty. As the end of life approaches, a loss of control over human faculties denudes life of its meaning. Terminal illness hastens the loss of faculties. Control over essential decisions about how an individual should be treated at the end of life is hence an essential attribute of the right to life... In matters as fundamental as death and the process of dying, each individual is entitled to a reasonable expectation of the protection of his or her autonomy by a legal order founded on the rule of law. A constitutional expectation of providing dignity in death is protected by Article 21 and is enforceable against the state."

66 Supra 6, at ¶ 170 (Misra, J).

to be guided by 'constitutional morality', he affirms a choice-based autonomy approach to dignity.[67] 'Constitutional morality' in turn reflects the broad principles underlying the Constitution, such as liberty, equality and fraternity.[68] *Navtej Johar* also affirms the crucial role of autonomy in the determination of a zone of privacy.[69]

Another important take-away from *Common Cause* is the combination of subjective and objective factors in the determination of whether passive euthanasia should be permitted in a particular case. This is implicit in the directions given by the court regarding the procedure to be followed to allow passive euthanasia, which takes into account both the patient's wishes, as well as doctors' opinions as to the condition of the patient.[70] This is directly noted by Chandrachud, J when he observes that "[w]hat an individual would decide as an autonomous entity is a matter of *subjective* perception. What is in the best interest of the patient is an *objective* standard."[71] He later clearly states that what is required is a 'balance' between these two standards.[72] The individual must have the right to determine whether or not to accept medical intervention, but this has to be coupled with an objective determination by experts about the condition of the patient (as to whether she is terminally ill or in a permanent vegetative state).[73] This objective prong ties up with the earlier observations regarding the lack of real choices available to the patient.

So how does this fit in with the *Puttaswamy I* discussion on the limitations of autonomy and the inalienability of rights? *Common Cause* and *Navtej Singh* give us what we term an 'autonomy-rich' notion of

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67 Supra 6, at ¶ 144 (Chandrachud, J).

68 Ibid.

69 This also reaffirms a departure from a privacy approach which is focused on 'spaces' to a privacy approach which focuses upon the 'person'. *See* supra 6, at ¶ 60-62 (Chandrachud, J).

70 Supra 57 at ¶ 191 (Misra, J).

71 Supra 57, at ¶ 118 (Chandrachud J).

72 Ibid, at ¶ 120 (Chandrachud J).

73 Ibid.

dignity, which is divorced from communitarian notions which position dignity in an often-antagonistic position to autonomy. However, even a choice-based autonomy account does limit consent: it would not, for instance, permit those choices which *reduce autonomy* in the future. For example, an individual cannot sell herself into slavery, as observed by Chandrachud, J in *Puttaswamy I*. The idea is simple: the choice-based autonomy approach respects individual choices because this shows respect for the autonomy of an individual, which in turn ensures a dignified life. It cannot allow those choices which effectively deprive an individual of the status of an autonomous agent, thereby limiting her dignity. A dignified life, being tied to an autonomous life, *resists anything which would render the ability to make decisions in the future limited.* This has implications for the examples we gave above, in the context of privacy: even though a person might consent to the collection of her data, this does not mean that she has foregone all interests in that data. The requirements of an autonomy-respecting notion of dignity would require that all consensual usage of data cannot be unconditional. It has to take into account the ability of the data in question to affect the ability of the individual to make choices in the future. Consent, hence, is a retractable and ongoing process to the extent that an individual's interests in the data persists. This has links to the idea of the right to be forgotten, which we will deal with in the next Part.

2.4. *Puttaswamy II's (mis)applications of consent and autonomy*

Before parting, it is important to observe a few discordant notes in the majority opinion of *Puttaswamy II*, which was tasked with determining the constitutional validity of Aadhaar. A particularly concerning aspect of the decision was the way in which it dealt with consent, and the use of dignity. The majority opinion, authored by Sikri, J, attempted a new 'formulation' of dignity which is based on

'public good', which he called the 'community approach'.[74] He contrasted this with a choice-based autonomy approach to dignity, terming it as the 'individualistic approach.'[75] This alternative approach to dignity is then used as a counter to the individualistic approach to justify a balancing act which allows for the sacrificing of certain privacy rights:

It is the balancing of *two facets of dignity of the same individual*. Whereas, on the one hand, right of personal autonomy is a part of dignity (and right to privacy), another part of dignity of the same individual is to lead a dignified life as well (which is again a facet of Article 21 of the Constitution). Therefore, in a scenario where the State is coming out with welfare schemes, which strive at giving dignified life in harmony with human dignity and *in the process some aspect of autonomy is sacrificed*, the balancing of the two becomes an important task which is to be achieved by the Courts.[76]

This raises several questions. The first is a clear departure from the autonomy-rich view of dignity in *Puttaswamy I* and *Common Cause*. Nowhere in the above is the question asked: what is the consent of the individual to this bartering away of rights? A choice-based autonomy model would, as we have seen before, have put the individual's choices center stage. However, here it would seem as though the Court is making the choice for the individual herself. We suspect that the majority opinion realizes that it cannot base such a balancing exercise upon the autonomy approach, and hence, moved towards a community approach.[77] It could then avoid answering uncomfortable

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74 Supra 8 at page 537-38 (Sikri, J).

75 Ibid.

76 Ibid, at page 539-40 (Sikri, J). (emphasis ours)

77 The majority opinion does also offer an alternative argument of 'public interest' to justify the privacy infringements. But it is important to observe that even the 'public interest' is repeatedly framed in the language of the right to dignity of other people to receive welfare benefits (*See* Supra 8 at page 548-549 (Sikri, J) for instance). It would be interesting to think about the reasons behind the move

questions about the lack of real choices in the functioning of the Aadhaar scheme. Second, and in keeping with the model of autonomy we have discussed above, Chandrachud J in his dissent points out that it was not established by the State that the 'two rights are mutually exclusive.'[78] The right to lead a dignified life in terms of access to welfare schemes can only be seen as entailing a 'sacrifice' of privacy when it could be proved that no alternatives are available, and the burden lies upon the State to prove this.[79] This, again, fits in with the choice-based autonomy model of dignity we have discussed, which naturally does not fit in with decisions which lead to a *reduction* in the overall autonomy of a person.

This approach of Sikri, J is tied into the way in which he generally deals with the 'voluntariness' of the Aadhaar scheme. The judgement is replete with referrals to the fact that Aadhaar is 'voluntary'.[80] However, in a pointed question as to whether people (above the age of 18) have a right to 'opt out' or 'revoke' consent to Aadhaar, the UIDAI clarifies that there is no such option.[81] Consent to part with biometric information is then essentially, a one-time act. This can be contrasted with the way in which the majority opinion deals with children. While observing that children are incapable of giving consent, it notes that parents can give consent on their behalf.[82]

converting the 'public interest' into a matter of 'rights'. Our suspicion is that it is a device to lend a greater weightage to the 'public interest' in the proportionality analysis.

78 Supra 8, at ¶ 254 (Chandrachud, J).

79 Ibid.

80 See, for instance, Supra 8, at ¶¶ 373, 323.

81 Supra 8, at page 66 (Sikri, J).

82 Supra 8 at ¶ 327 (Sikri, J); Sikri, J further emphasises the 'incapacity' rationale through a review of Indian legislative policy on juveniles in India which indicates protection towards children: "Thus, when a child is not competent to contract; not in a position to consent; barred from transferring property; prohibited from taking employment; and not allowed to open/operate bank accounts and, as a consequence, not in a position to negotiate her rights, thirsting [sic] upon compulsory requirement of holding Aadhaar would be an inviable inroad into

Importantly, however, children are given the right to opt out of the scheme when they attain the age of majority.[83] In this context, it is a bit curious that this right to opt out is not given to adults who may similarly wish to exit the scheme.[84] Chandrachud, J, in contrast, observes that all persons must have the ability to opt-out, as ownership of data 'must at all times vest in the individual whose data is collected.'[85]

Though the majority opinion on this issue suffers from several other shortcomings,[86] what is particularly concerning is the introduction of an uncertain counter-formulation of dignity, which departs from the autonomy-rich conception of dignity in *Puttaswamy I*, *Common Cause* and *Navtej Johar*. Similarly, the inability to opt-out of the Aadhaar scheme for adults rests uneasily with an understanding of privacy which emphasises the individual's continuing interests in information voluntarily parted with, clearly established by the larger nine-judge bench decision in *Puttaswamy I*. In the next part, we will demonstrate how an autonomy-rich conception of dignity helps us understand other important privacy-related concepts such as the doctrine of waiver and the right to be forgotten.

3. Waiver of Fundamental Rights and the Right to be Forgotten

A possible source of confusion over the role of consent in fundamental rights claims is the controversial doctrine of waiver. In this Part we will, first, analyse the principles which underlie the doctrine of waiver and clarify a few common misconceptions about

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their fundamental rights under Article 21." [Supra 8 at ¶ 327 (Sikri, J)] It is also worth mentioning that the thrust is upon the 'compulsoriness' of the requirement further indicating an 'autonomy-rich' approach.

83 Supra 8, at ¶ 332 (Sikri, J).

84 See part 6 for an attempt to decode this from the perspective of proportionality.

85 Supra 8, at ¶ 152 (Chandrachud, J).

86 In particular the characterisation of various schemes as 'rights' in the case of children, and hence their not being subject to verification by Aadhaar. Many of these schemes are seen as 'benefits' in the case of adults, even though the Court holds them to be a part of the right to dignity. *See* Supra 8, at page 390-91, 563-64, and 548-49 (Sikri, J).

the doctrine. Second, we will demonstrate that the doctrine, if properly understood, underlines our autonomy-rich conception of dignity. In the process, we will show how this helps us understand important issues such as the continuing privacy interests that a person has in their information, and the right to be forgotten.

3.1. *The Doctrine of Waiver*

Another lens through which we can understand *Puttaswamy I's* formulation of privacy and the limitations of consent is through the controversial doctrine of 'waiver' of fundamental rights. The doctrine of waiver was also discussed in *Puttaswamy I* to a certain extent, but we will begin to explore this doctrine through the landmark *Basheshar Nath*[87] case.

In the *Basheshar Nath* case, the appellant challenged the validity of a settlement he made with taxation authorities under the Taxation on Income (Investigation Commission) Act, 1947 (the 'Investigation Act'). The appellant had agreed to pay certain arrears to the taxation authorities under this settlement. Subsequently, parts of the Investigation Act were declared as violative of Article 14 (and hence invalid) in other cases.[88] The appellant raised a claim that the settlement he entered into was invalid because the underlying provision had been declared unconstitutional. The Attorney General rebutted this, by claiming that, by entering into the settlement, the appellant had 'waived' or given up his Article 14 claim in the matter.

In dealing with this claim, the Court dealt with the question: can the fundamental right of the appellant here be waived? The five-judge bench rendered four different opinions, holding in favour of the appellant. Das CJ (on behalf of himself and Kapur, J) confined the discussion on waiver to Article 14 specifically, observing that it was unnecessary for their purposes to consider whether other fundamental

87 Basheshar Nath v. Commissioner for Income Tax, 1959 Supp (1) SCC 528.
88 Suraj Mall Mohta and Co. v. A. V. Visvanatha Sastri, [1954] 26 ITR 1 (SC).

rights could be waived.[89] Looking at the text of Article 14[90], they observed that it is not framed as a 'right', but is rather a *command* to the State to ensure equality. Therefore, it would not be permissible for the State to argue that a person has *chosen* to be treated unequally.[91] This is, they note, a 'matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every welfare State, such as India, is by her Constitution expected to do.'[92] This obligation of the State remains irrespective of the conduct of any person.

N.H. Bhagwati, J and K Subba Rao, J delivered separate concurring opinions, and held that *no* fundamental right can be waived. NH Bhagwati, J observed that Article 13(2)[93], which declares laws in contravention of the fundamental rights as void, does not contain any exception for waiver of fundamental rights.[94] Similarly, the text of the fundamental rights themselves specify the conditions under which they can be restricted, and none of them mention waiver.[95] He observed that the distinction in US case law between rights which are enacted for the benefit of the individual (which can be waived), and rights which are enacted in public interest (which cannot be waived) should not apply to India, because ours is 'a nascent democracy' with a

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89 Supra 85, at ¶¶ 14-15 (Das, CJ).

90 Art. 14, the Constitution of India, *'The State shall not deny* to any person equality before the law or the equal protection of the laws within the territory of India.' (emphasis ours)

91 Supra 87, at ¶¶ 14-15 (Das, CJ).

92 Ibid.

93 Art. 13, the Constitution of India, '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.'

94 Supra 87, at ¶¶ 8-9 (Bhagwati, J).

95 Ibid, at ¶ 10 (Bhagwati, J).

different social, economic, educational and political situation from the US.[96]

This idea is further exemplified by K Subba Rao, J, who observed that we have to take into account the power imbalances which exist between the State and the citizen, who can easily be made to give up her rights by the State 'by fear of force or hope of preferment'.[97] In a particularly trenchant tone, he stated:

A large majority of our people are economically poor, educationally backward and politically not yet conscious of their rights. Individually or even collectively, they cannot be pitted against the State organizations and institutions, nor can they meet them on equal terms. In such circumstances, *it is the duty of this Court to protect their rights against themselves*.[98]

This undoubtedly has strong paternalist undertones, but we need to appreciate it in the context of the duties of the State in a country where, as Ambedkar observes, democracy is only 'top-dressing on an Indian soil, which is essentially undemocratic.'[99] He makes this observation in the context of discussing the absence of 'constitutional morality'[100] in Indian society. He approvingly quotes the historian

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96 Ibid, at ¶¶ 55-56 (Das, J); See ¶¶ 92, 103 (Justice SK Das in a separate opinion largely follows the distinction in US case law between rights which are for the benefit of the individual and rights which are for public interest).

97 Ibid, at ¶ 67 (Rao, J).

98 Ibid, at ¶ 74 (Rao, J). (emphasis ours)

99 Speech by B.R. Ambedkar, *Constituent Assembly Debates,* Constituent Assembly (4/11/1948), available at http://cadindia.clpr.org.in/constitution_assembly_debates/volume/7/1948-11-04, last accessed on 15/7/19.

100 Ambedkar, in his speech, quotes with approval the conceptualization of constitutional morality given by the historian Grote, who notes that constitutional morality means 'a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst

Grote who thought constitutional morality an 'indispensable condition' for a free government.[101] While these observations were made by Ambedkar in the context of explaining the extremely detailed nature of the Indian Constitution, if this is coupled with the larger constitutional goal of 'social revolution[102], one can envisage a strongly interventionist rights framework. Ambedkar repeatedly emphasized that merely giving political rights would not be enough to emancipate; in the absence of State intervention, such rights might never be exercised meaningfully.[103]

It is difficult to cull out a clear binding ratio from *Basheshar Nath* because of the many opinions. At the very least, it is certain that Article 14 cannot be waived, as that is held by four judges. *Olga Tellis*[104], however, clearly disagrees with the US case law distinction between those fundamental rights which are for private and those which are for public benefit. The Court observes that *all* fundamental rights are enacted for the larger public interest, and no individual "can barter away the freedoms conferred upon him by the Constitution."[105] *Olga*

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the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own.' Ibid.

101 Ibid.

102 Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, ch 2 (1st ed., 1972).

103 In his essay on 'Slaves and Untouchables', for instance, he wrote: 'In untouchability there is no escape... A deprivation of a man's freedom by an open and direct way is a preferable form of enslavement. It makes the slave conscious of his enslavement and to become conscious of slavery is the first and most important step in the battle for freedom. But if a man is deprived of his liberty indirectly he has no consciousness of his enslavement. Untouchability is an indirect form of slavery. *To tell an Untouchable 'you are free, you are a citizen, you have all the rights of a citizen ', and to tighten the rope in such a way as to leave him no opportunity to realise the ideal is a cruel deception.* It is enslavement without making the Untouchables conscious of their enslavement. It is slavery though it is untouchability. It is real though it is indirect. It is enduring because it is unconscious. Of the two orders, untouchability is beyond doubt the worse.' (emphasis ours) Kamala Visweswaran, *Un/common Cultures: Racism and the Rearticulation of Cultural Difference,* 156-57, (Duke University Press, 2010).

104 Olga Tellis v. Bombay Municipal Corporation and Ors., AIR 1986 SC 180.

105 Ibid, at ¶ 28 (Y.V. Chandrachud, J).

Tellis' formulation extends to all fundamental rights, and not just Article 14. The reasoning given by the Court is closely aligned with K Subba Rao, J in *Basheshar Nath*, i.e. that this is in order to safeguard the individual against the powerful State.[106]

Another reason as to why the public interest might weigh against waiver of fundamental right is because of what is called the 'precedential' effect of the case in affecting the rights of third parties.[107] This is exemplified by the ECtHR in the *Pretty v UK*[108] case, which dealt with the permissibility of active euthanasia. Upholding the law which prohibited this, the Court observed that even though the conditions of terminally ill patients will vary, what matters is the 'vulnerability of the class' of patients for whose protection the law existed. It was the rights of these vulnerable patients which would weigh against the decision of the patient to end her life.[109]

However, this does not mean that a person must always *exercise* their rights irrespective of their wishes.[110] For instance, having the freedom of speech does not imply that I have to necessarily write an

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106 Ibid, at ¶ 29. (Y.V. Chandrachud, J) "Were the argument of estoppel valid, an all-powerful State could easily tempt an individual to forego his precious personal freedoms on promise of transitory, immediate benefits." Of course, there is a minor difference between estoppel and waiver, but that is not material for our purposes, as the Court itself says that the two concepts are 'closely connected'.

107 Sébastien Van Drooghenbroeck, *Does the Theory of Waiver of Fundamental Rights Offer Solutions to Settle Their Conflicts?*, 69, in *When Human Rights Clash at the European Court of Human Rights Conflict or Harmony?* (Stijn Smet and Eva Brems, 1st ed., 2017).

108 Pretty v. United Kingdom, App. no 2346/02, 29 April 2002.

109 Ibid, at 70. "The more serious the harm involved the more heavily will weigh in the balance considerations of public health and safety against the countervailing principle of personal autonomy. The law in issue in this case, section 2 of the 1961 Act, was designed to safeguard life by protecting the weak and vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end life or to assist in ending life. Doubtless the condition of terminally ill individuals will vary. But many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law in question."

110 This difference between non-exercise of a right and *waiver* is emphasised by K Subba Rao J in *Basheshar Nath,* Supra 87, at ¶ 67.

opinion piece on an important political issue everyday; I can choose to not speak at all, while reserving the *right* to speak when I want to. What would be invalid, for instance, is my entering into a contract with the State whereby I am prohibited from speaking on a particular issue (when, of course, it is not covered by any of the reasonable restrictions in Article 19(2)). Kulgod, for instance, argues that we inherently accept waiver of fundamental rights because we allow for persons to plead guilty or to accept a plea bargain during a criminal trial, and hence waive our Article 21 rights to a full trial.[111] However, this can be dealt with in a simple way: the right under Article 21 prohibits the deprivation of one's liberty except in accordance with a just, fair and reasonable procedure.[112] When a person enters a guilty plea in conditions free from coercion, and in compliance with fair procedures, there is no waiver of this right, as the conditions of Article 21 have been met.

We agree, however, that a possibly better way to frame the inability to waive a right would be that "it will not be open to the State or to a defendant or respondent to contend that a person is not entitled to enforce his fundamental right because he has waived it."[113] Otherwise, as Datar correctly points out, this would lead to an anomalous situation wherein a person, whose fundamental rights have been violated, would be forced to approach a Court to challenge it even if they did not want to do so.

3.2. *Balancing privacy rights and the right to be forgotten*

This distinction between waiver and non-exercise can help clarify how, rather than being paternalistic, the inability to waive

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[111] Sachin Kulgod, *Waiver of Constitutional and Fundamental Rights-- A Constitutional Discretion, Not An American Doctrine*, 1 SCC Journal 19, 34 (2011).

[112] We are reading in the requirements in the Maneka Gandhi case here. *See* Maneka Gandhi v. Union of India, 1978 1 SCC 248 at ¶¶ 4-7.

[113] Arvind Datar, *Can a Fundamental Right be waived?: Legal Notes by Arvind Datar,* Bar & Bench, available at https://barandbench.com/can-fundamental-right-waived-arvind-datar/, last seen on 08/07/2018.

fundamental rights *enhances* autonomy.[114] It also syncs in with *Puttaswamy I*'s discussion about the 'inalienability' of fundamental rights.[115] Interestingly, the doctrine of waiver was sought to be used by counsel for the respondents to argue that privacy should not be recognised as a fundamental right.[116] The fact that it cannot be waived, it was argued, implies that the government cannot under any circumstances get any information from a citizen. This was correctly rebuffed by Nariman J, who observes that the question of waiver is completely separate from the question of justifiable limitations on a fundamental right.[117] When the State imposes a reasonable restriction on a right following constitutional limitations, there is no question of a waiver.

In answering this question, however, Nariman, J gives an example of a person who posts information on a public space such as Facebook. He claims that a person cannot claim a privacy right in that information after such a disclosure.[118] With respect, we feel that this might not be the correct approach to the issue. First, since the doctrine of waiver as enunciated in *Basheshar Nath* and reaffirmed in *Olga Tellis*, was not overruled in any of the opinions in *Puttaswamy I*, it is questionable whether Nariman, J meant that the person here has

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114 A related (but different) concept in this regard is the doctrine of 'unconstitutional conditions', which forbids 'any stipulation imposed upon the grant of a governmental privilege which in effect requires the recipient of the privilege to relinquish some constitutional right.' [Ahmedabad St Xavier's College Society v State of Gujarat, 1974 1 SCC 717, at ¶ 158 (Mathew, J)]. The doctrine of waiver is, however, broader since it includes situations where a person has voluntarily given up her rights, even if it is not a condition for the grant of a privilege by the state.

115 Interestingly, none of the judges in *Basheshar Nath* who said that FRs cannot be waived relied upon any natural rights theory. Natural rights were mentioned only once, by Justice SK Das, largely in order to note that it does not apply. Supra 87, at ¶ 56 (SK Das, J).

116 Supra 1, at ¶ 60 (Nariman, J).

117 Ibid.

118 Ibid, at ¶ 60 (Nariman, J).

'waived' their rights. Second, as observed by Kaul, J in his opinion, people continue to have privacy interests in information which concerns themselves even after such information is made public.[119] This idea of continuing interests in information even after disclosure is also reaffirmed by the idea of purpose limitations and the requirement of deletion of data when it has served its purpose.[120] The reason for this is that the right to privacy is valuable partly because it enables us to control information which pertains to ourselves, which forms a part of our person. This is implicit in the recognition of informational privacy by all the judges in *Puttaswamy I*.

However, once the information is made public, then, even though a person continues to have a privacy right in such information, this has to be balanced with the rights of other citizens to freedom of speech and expression. This is because, as explained by Robert Post, this information now becomes a part of the 'public sphere'[121], which is essential to the healthy functioning of democracies. As an example, a politician 'X' decides to post, on Facebook, a personal picture of him having dinner with a friend 'Y' at a restaurant. Five years later, it is found that 'Y' has links to a spy agency of a foreign government. People use the Facebook photograph in order to allege links between 'X', 'Y' and the foreign government. In this situation, the public interest would demand that the privacy rights of 'X' be overridden, and that the picture is not mandatorily deleted. On the other hand, one can

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119 Ibid, at ¶ 65 (Kaul, J).

120 Ibid, at ¶ 184 (Chandrachud, J).

121 Robert Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right To Be Forgotten, and the Construction of the Public Sphere,* 67 Duke Law Journal, 981, 1051-1052 (2018) ("The public sphere is a field of intersubjective communicative action; it would collapse if individuals could at will withdraw from circulation information "relating to" themselves because they have the right to 'control' such personal data. The public sphere in a democracy also serves the political purpose of self-governance. Those who control the circulation of personal data in the public sphere control the creation of public opinion.")

imagine several situations in which there would be no public interest in the information in question, and the individual in question can assert continuing rights in it.

There is little doubt that balancing the public interest and the privacy rights of individuals in such cases is a delicate matter. However, this exercise is already done in several places for the right to privacy. For instance, Section 8(1)(j) of the Right to Information Act, which allows for the non-disclosure of information which would cause 'an unwarranted invasion of the privacy of the individual' explicitly authorizes a balancing of this privacy with the public interest.[122] The Supreme Court too has implicitly endorsed such a balancing of privacy with the public interest in *Rajagopal*[123], known as the 'Autoshankar' case. In this case, while observing that the right to privacy is implicit in Article 21, exceptions were carved out for public records and for public officials with respect to the discharge of official functions.[124] We leave aside, for the purposes of this paper, the separate but important question as to how do we evaluate what counts as a 'public interest'

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122 S. 8(1)(j), The Right to Information Act, 2005, states:
"8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, …
(j) information which relates to *personal information* the disclosure of which has *no relationship to any public activity or interest,* or which would cause *unwarranted invasion of the privacy of the individual* unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the *larger public interest justifies the disclosure of such information*:
Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person." (emphasis ours)

123 R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632.

124 Ibid, at ¶ 26 (Reddy, J). It has been argued that *Rajagopal* in fact deals more with a tortious claim rather than an assertion of a fundamental right against the State. See Gautam Bhatia, *State Surveillance and the Right to Privacy in India: A Constitutional Biography*, 26 National Law School of India Review 127, 138-139 (2014). This can be a way in which we can apply the right to privacy in our Facebook examples, for instance.

and the importance it can be given when balancing against the right to privacy in particular cases.[125]

Linked to the idea of a continuing privacy interest in personal information, is the 'right to be forgotten', which is referred to by Kaul, J in *Puttaswamy I*.[126] The right to be forgotten can be described as the right to individuals to 'determine the development of their lives in an *autonomous* way, without being perpetually or periodically stigmatized as a consequence of a specific action performed in the past.'[127] The concept is clearly based in the autonomy of persons, and can be understood as a part of the right of individuals to change and re-invent themselves, unshackled by mistakes made in the past.[128] This assumes all the more importance in the digital age, where the Internet becomes a permanent record of a person's acts, leading to permanent stigmatization.[129]

Rustad and Kulevska, while arguing for a right to be forgotten, have also observed that this has to be balanced with other rights such as freedom of expression.[130] To determine whether an individual can

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125 For instance, it is questionable whether pervasive profiling of individuals can be justified on the grounds of small gains in economic efficiency. Of particular concern in this regard is the recent Economic Survey of India's push for greater data collection across multiple spheres. *See* Economic Survey 2018-19 Volume, *Chapter 4: Data "Of the People, By the People, For the People"* avaliable at https://www.indiabudget.gov.in/economicsurvey/doc/vol1chapter/echap04_vol1.pdf last seen on 10/07/2019.

126 Supra 1, at ¶¶ 62-69 (Kaul, J).

127 Alessandro Mantelero, *The EU Proposal for a General Data Protection Regulation and the Roots of the "Right To Be Forgotten"*, 29(3) Computer Law & Security Review 229, 229–235 (2013); Michael L. Rustad, Sanna Kulevska, *Reconceptualising the Right to be Forgotten to Enable Transatlantic Data Flow*, 28(2) Harvard Journal of Law & Technology 349, 353, (2015). (emphasis ours)

128 Supra 1, at ¶¶ 66-69 (Kaul, J).

129 Michael L. Rustad, Sanna Kulevska, *Reconceptualising the Right to be Forgotten to Enable Transatlantic Data Flo*w, 28(2) Harvard Journal of Law & Technology 349, 352, (2015). This can also be linked to the 'right to repent'. *See* Supra 107, at 71-72.

130 Ibid, at 354.

claim this right, they evolve a complex balancing process which involves taking into account the nature of the information, whether the person is a public figure, and the public right to know.[131] This is what has largely been encapsulated in Section 20 of the Personal Data Protection Bill, 2019, which is currently pending before Parliament.[132]

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[131] Ibid.

[132] S. 20, Personal Data Protection Bill, 2019 (pending), states:
20. Right To Be Forgotten
(1) The data principal shall have the right to restrict or prevent the continuing disclosure of his personal data by a data fiduciary where such disclosure—
(a) has served the purpose for which it was collected or is no longer necessary for the purpose;
(b) was made with the consent of the data principal under section 11 and such consent has since been withdrawn; or
(c) was made contrary to the provisions of this Act or any other law for the time being in force.
(2) The rights under sub-section (1) may be enforced only on an order of the Adjudicating Officer made on an application filed by the data principal, in such form and manner as may be prescribed, on any of the grounds specified under clauses (a), (b) or clause (c) of that sub-section:
Provided that no order shall be made under this sub-section unless it is shown by the data principal that his right or interest in preventing or restricting the continued disclosure of his personal data overrides the right to freedom of speech and expression and the right to information of any other citizen.
(3) The Adjudicating Officer shall, while making an order under sub-section (2), having regard to—
(a) the sensitivity of the personal data;
(b) the scale of disclosure and the degree of accessibility sought to be restricted or prevented;
(c) the role of the data principal in public life;
(d) the relevance of the personal data to the public; and
(e) the nature of the disclosure and of the activities of the data fiduciary, particularly whether the data fiduciary systematically facilitates access to personal data and whether the activities shall be significantly impeded if disclosures of the relevant nature were to be restricted or prevented.
(4) Where any person finds that personal data, the disclosure of which has been restricted or prevented by an order of the Adjudicating Officer under sub-section (2), does not satisfy the conditions referred to in that sub-section, he may apply for the review of that order to the Adjudicating Officer in such manner as may be prescribed, and the Adjudicating Officer shall review his order.
(5) Any person aggrieved by an order made under this section by the Adjudicating Officer may prefer an appeal to the Appellate Tribunal."

This provision, which gives a right to an individual to 'restrict or prevent the continuing disclosure of his personal data by a data fiduciary' under certain circumstances, mandates that this right be balanced with *inter alia* 'the relevance of the personal data to the public' and the 'role of the data principal in public life.'[133] Importantly, the right to be forgotten applies even where the initial use of the data was authorised by the individual, underlining the idea that a person continues to possess interests in her data, even if she has consented to its use for a particular purpose.

In conclusion, it is clear, from the discussion on waiver of fundamental rights in this Part of the article as well as the previous Part's discussion on inalienability and autonomy, that consent, while important in determining the scope of privacy, is not completely determinative of the question as to whether a person can successfully make a privacy claim. As Van Drooghenbroeck observes in the context of the position of consent in ECtHR law, consent impacts the scope of rights, but it does not completely neutralize the conflict.[134] Consent and waiver do not operate in an 'all-or-nothing' manner, and become only one of the arguments in the balancing exercise to be undertaken by Courts.[135]

We have conceptualized the limitations on consent and waiver as an operationalization of the principle of preservation of the autonomy of individuals through the prism of dignity. Recognizing consent is, of course, an important part of recognizing a person's autonomy, and Courts must take it into account. However, where consent might lead to an irreversible reduction of the autonomy of individuals, courts will have to weigh consent against other factors such as the autonomy of the person, the rights of others and the public

133 Ibid.
134 Supra 107, at 71.
135 Ibid.

interest. The consent of the person should be given a high weightage when balancing it with the other interests we have specified.

4. The Doctrinal Contours of the Right of Privacy

We will now use our analysis in Parts 2 and 3 of this article to explore certain doctrinal formulations related to the right to privacy. Doctrines such as the 'reasonable expectations test' and 'proportionality' have been introduced and used in *Puttaswamy I* and *II* in order to determine the scope of privacy claims. We will situate consent within these doctrines, in an attempt to bring together the principles underlying these judgements and their doctrinal formulations.

Puttaswamy I held unanimously that the right to privacy is a constitutionally guaranteed fundamental right. However, the Court did not answer several allied questions about its content. For instance, the key question as to the scope of the right to privacy is largely unanswered, although the question seems inevitable in any assessment of a privacy claim: 'What is covered by the right to privacy?' Perhaps the lack of an answer has good justification. Some judges in *Puttaswamy I* acknowledge the difficulty (if not impossibility) inherent in establishing coherent contours to the right and thus consciously refuse to adopt a clear doctrine, instead endorsing a 'case by case' determination - presumably anchored on the considerations of dignity and liberty.[136] Chelameshwar, J, for instance, offers a broad definition in terms of 'repose', 'sanctuary' and 'intimate decision' - acknowledging, yet not addressing, the 'definitional concerns' in

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[136] The 'case to case basis' approach is either expressly adopted (or hinted to) by Justice Chelameshwar, Justice Bobde, Justice Sapre and Justice Nariman. *See* Supra 1 at ¶ 36 (Chelameshwar, J); ¶ 36 (Sapre, J): 'Similarly, I also hold that the "right to privacy" has multiple facets, and, therefore, the same has to go through a process of case-to-case development as and when any citizen raises his grievance complaining of infringement of his alleged right in accordance with law.', ¶ 40 (Bobde, J), and ¶ 46 (Nariman, J). The judges consciously kept the definitional contours of the right vague in the interest of its breadth.

relation to the right of privacy.[137] In a similar vein is Nariman, J's discussion of the three aspects of privacy being physical, informational and decisional privacy.[138] It is important to note here that despite the various conceptualisations of the right, all judges ground these in the values of liberty, autonomy and dignity, and our claims about the role of consent equally apply across all aspects of privacy.[139]

By contrast, Chandrachud, J's lead judgment (representing four judges of the nine) invokes the 'reasonable expectations test' (hereinafter 'RET') to define a valid privacy claim. This formulation of RET involves the dual components of (i) the subjective *willingness* to be protected by privacy and (ii) objective *recognition* of privacy - defined by 'constitutional values'.[140] The precise contours of the test shall be discussed in Part 5 of this article.

As to valid limitations to the right to privacy, Chandrachud, J and Kaul, J invoke the 'proportionality' review to adjudge permissible infringements of privacy.[141] The proportionality review as adopted by

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[137] A key argument made by the state in *Puttaswamy I* was to challenge the constitutional status of the right to privacy was to point to the definitional concerns in the formulation of the right. Thus, the Attorney General had argued that the right itself is vague, the right being recognized would provide unhindered judicial scrutiny. Judges Chelameshwar and Nariman specifically reject this argument suggesting that the definitional concerns of privacy do not take away from its constitutional status. See Supra 1, at ¶ 19 (Bobde, J) and ¶ 36 (Chemeshwar, J).

[138] Supra 1, at ¶ 81 (Nariman, J).

[139] See part 2.1 and part 3.2 of this article. Since the interests in individual autonomy, liberty and dignity underlie all aspects of privacy, we see no reason to limit the applications of our analysis to only certain aspects of privacy.

[140] Supra 1 at ¶ 169 (Chandrachud, J).

[141] Chandrachud, J and Kaul, J form a majority endorsement of the proportionality review. Kaul, J adds to the three components offered by Chandrachud, J: the fourth component of 'procedural safeguards'. Considering that Chandrachud, J alone does not make the majority opinion, Bhatia observes that the standard of review as accepted by the court in *Puttaswamy I* would include the four components of legality, legitimacy, balancing and procedural safeguards. *See* Gautam Bhatia, *The Supreme Court's Right to Privacy Judgment – VI: Limitations*, Indian Constitutional Law and Philosophy, available at

Chandrachud, J includes the prongs of (i) legality - there exists a law backing the infringement, (ii) legitimacy - the law is in pursuance of a legitimate state aim and (iii) balancing - the legitimate aim is proportional to the infringement of privacy in question.[142]

Puttaswamy II largely follows *Puttaswamy I* in adopting RET (to define a privacy claim) and proportionality (to limit it). The nuances of the court's approach in *Puttaswamy II* shall be discussed through the anchor of 'autonomy' and 'consent' in the succeeding sections, building upon our discussion in Parts 2 and 3.

5. Finding consent within the doctrinal contours of privacy: Consent and reasonable expectations

In *Puttaswamy I*, traces of consent, choice and autonomy seem to be inherently operationalised within Chandrachud, J's formulation of RET.[143] Chandrachud, J uses RET to define the contours of the right to privacy[144] - with dual stages of enquiry: (i) subjective

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https://indconlawphil.wordpress.com/2017/09/01/the-supreme-courts-right-to-privacy-judgment-vi-limitations/ last seen on 08/07/2019. However, it has to be noted that Sikri, J does not consider 'procedural safeguards' as a separate doctrinal prong of proportionality within his formulation of the test in *Puttaswamy II*. *See also* V Bhandari, A Kak, S Parsheera and F Rahman, supra 11. For an interesting discussion on the use of proportionality in *Puttaswamy I* and *II*, *see generally* Aparna Chandra, *Proportionality in India: A Bridge to Nowhere?* 3(2) University of Oxford Human Rights Hub Journal 55 (2020).

142 There have also been questions as to what was the standard of review adopted within the balancing stage, with both 'compelling interest' and 'reasonableness' being referred to across the opinions. *See* M Kamil, *The Aadhaar Judgment and the Constitution – II: On proportionality (Guest Post),* Indian Constitutional Law and Philosophy, available at https://indconlawphil.wordpress.com/2018/09/30/the-aadhaar-judgment-and-the-constitution-ii-on-proportionality-guest-post/ last seen on 08/07/2019.

143 And perhaps Kaul, J's approach, which checks solely for an autonomous decision to opt for privacy: "all that needs to be considered is if such an intent to choose and specify exists, whether directly in its manifestation in the rights bearer's actions, or otherwise." Supra 1, at ¶ 43 (Kaul, J).

144 See Gautam Bhatia, *The Aadhaar Judgment and the Constitution – I: Doctrinal Inconsistencies and a Constitutionalism of Convenience,* Indian Constitutional Law and Philosophy, available at

willingness, and (ii) objective acceptance on the basis of 'constitutional values'.[145] The subjective stage of RET inevitably involves a scrutiny of the individual's autonomous choices, while the objective stage functions to limit it. To answer the precise role of consent within RET, it is best to first identify the role of consent within RET as used in the United States.

The role of consent is seen evidently through the application of the American third party doctrine (hereinafter 'TPD'). TPD (largely accepted as a subset of RET) postulates that an individual loses her privacy claim against the state if she consents to sharing the information with a third party. For instance, therefore, if an individual shares personal data to a service provider, she shall be deemed to have forgone her privacy claim over the data, against the State - which may access the information. This is, of course, open to misuse and clearly minimises individual autonomy over data. However, the doctrine's rationale may help posit a role for consent within RET.

5.1. *The American Third Party Doctrine and Puttaswamy I*

RET was first admitted by US Courts in *Katz v. United States*[146] - abandoning the 'spatial' model of inquiry as established *Olmstead v. United States*.[147] The erstwhile rule in *Olmstead* suggested that the Fourth Amendment protection of privacy only extended to 'constitutionally

https://indconlawphil.wordpress.com/2018/09/28/the-aadhaar-judgment-and-the-constitution-i-doctrinal-inconsistencies-and-a-constitutionalism-of-convenience, last seen on 08/07/2019. However, it must be noted that other judges of the court do not (at least explicitly) endorse this formulation nor do they explicitly invoke the 'reasonable expectations test'; in particular, Bobde, J specifically refuses to admit the doctrine on grounds that it was "not necessary for the purpose of this case to deal with the particular instances of privacy claims". Additionally, an explicit critique to (and rejection of) the doctrine is found in the Nariman, J's judgment which specifically rejects the doctrine. *See* Supra 1, at ¶ 40 (Bobde, J); See also supra 1, at ¶ 59 (Nariman, J).

145 Supra 1, at ¶ 169 (Chandrachud, J)

146 Katz v. United States, 389 U.S. 347 (1967).

147 Olmstead v. United States, 277 U.S. 438 (1928).

protected areas'.[148] The two-staged test adopted by Harlan, J (constituting the subjective willingness to be protected by privacy and objective societal acceptance)[149] in *Katz* was eventually recognised as the 'reasonable expectations test'.[150]

Later, American courts (primarily through *United States v. Miller*[151] and *Smith v. Maryland*[152]) developed the TPD. In *Miller*, the court held that an individual did not possess a legitimate privacy claim over bank records voluntarily revealed to a third party, on the grounds that (i) the bank deposits are not confidential communications, thus lacking a societal acceptance of the privacy claim, and (ii) the information was voluntarily disbursed.[153]

A clearer expression of the role of voluntariness in TPD is found in *Smith v. Maryland* where the court rejected a privacy claim over telephone records using TPD - given that the accused had provided the information to the telephone company voluntarily, he did not have a privacy claim over it. The Court here goes on to justify the rationale of TPD within the second (objective) stage of RET: there was no

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148 Ibid, at page 465-466. Here, the court interpreted the fourth amendment narrowly in terms of "actual physical invasion(s)". *See* Richard Thompson, *The Fourth Amendment Third-Party Doctrine,* Congressional Research Service, 5 available at https://fas.org/sgp/crs/misc/R43586.pdf last visited on 08/07/2019.

149 Supra 146, at page 361 (Stewart, J). "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable.""

150 Ibid, at page 351 (Stewart, J). The case in *Katz* concerned the admissibility of recordings of the accused's telephonic conversations in a phonebooth. The conversations were recorded by investigating authorities from *outside* of the phonebooth. This was significant as the prosecutor (following *Olmstead's* spatial formulation) argued that the accused had no constitutional protection in the space that lay outside the booth and thus lacked a privacy claim. The court rejected this argument holding that (i) the fourth amendment protected people and not places and (ii) that even "an area accessible to the public may be constitutionally protected".

151 United States v. Miller, 425 U.S. 435 (1976).

152 Smith v. Maryland, 442 U.S. 735 (1979).

153 See Ibid, at page 442 (McReynolds, J).

societal acceptance of the privacy claim, since the accused had 'voluntarily' assumed the risk of the information being given to the police.[154]

From the formation of the doctrine in *Smith*, it seems that TPD is hinged on the second stage of RET, i.e. societal acceptance (or alternatively societal assumption of risk). In this context it must be remembered that the second stage of the RET as formulated by Chandrachud, J in *Puttaswamy I* is not a consideration of societal acceptance, but a consideration of constitutional delineation.[155]

In the recent decision of *Carpenter v. United States*[156] the American Supreme Court reconsidered TPD. The case concerned the constitutionality of a law which allowed the state to compel mobile service providers to provide Cell-Site Location Information (CLSI), i.e. time-stamped information about an individual's location, provided that there were reasonable grounds to show that the information may be relevant to an ongoing criminal investigation.

The majority opinion of Roberts, J clarifies the application of TPD in two ways: First, the court acknowledges that the doctrine is not to be invoked blindly without taking into account the nature of information being solicited.[157] Roberts, J holds that CLSI gave the State an opportunity to intricately survey individuals; given these 'concerns', there exists a reasonable expectation for such information to be protected (curiously, for Roberts, J similar concerns would not apply to records of bank transactions and records of numbers dialed).[158] Second, Roberts, J holds that a mere disbursal of information to a third party need not necessarily amount to a voluntary assumption of risk -

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154 Ibid, at page 735 (Blackmun, J).

155 See supra 144 for more.

156 Carpenter v. United States, 138 S. Ct. 2206 (2018).

157 Ibid, at page 2221 (Roberts, J).

158 Ibid, at page 2217 (Roberts, J); Roberts, J notes that the information provides the state access to "an intimate window into a person's life" as the information reveals "familial, political, professional, religious, and sexual associations."

particularly not for information gathered from cell-phones, given that cell phones are "a pervasive and insistent part of daily life".[159]

5.2. *Third Party Doctrine in India*

The majority opinion in *Carpenter* presumably restricts the application of TPD to (i) disbursal of 'non-serious' information, and (ii) instances where disbursal to a third party would imply the 'voluntary assumption of risk'. The attempt here is to hide the potential flaws of TPD - although, the cracks remain visible: Why can't a State-possessed record of numbers dialed by an individual be used to survey an individual (per facts in *Smith*)? Why should the disbursal of bank record transactions imply a 'voluntary' assumption of risk that the information may be disbursed to the state (per facts in *Miller*)? Can the disbursal of information to a third party *ever* imply a 'voluntary' forgoing of all privacy claims altogether?

TPD is rightly criticized for its severe consequences. The doctrine offers lax restrictions on the state's ability to survey and gather private data considering, particularly, that a significant amount of sensitive personal information today is provided 'voluntarily' to internet service providers (We share our search history with Google, information related to our purchases with Amazon, etc.). More importantly, the approach minimizes individual autonomy and consent since the disbursal of information to a third party is seen as a forfeit of privacy interests altogether.[160] TPD was unequivocally rejected by the Court in the pre-*Puttaswamy* case of *District Registrar & Collector v. Canara Bank*.[161] However, it remains to be seen whether it would be tenable in light of the discussion on RET in *Puttaswamy I*. Nariman, J in *Puttaswamy I* also expressly rejects TPD, and in fact refuses to

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[159] Ibid, at page 2221(Roberts, J).

[160] See Part 3 of this article.

[161] District Registrar & Collector v. Canara Bank, (2005) 1 SCC 496; *also see* Supra 1, at ¶ 47 (Nariman, J).

incorporate RET fearing that it would be "intrinsically linked" to TPD.[162]

It must be noted here that the objective stage of the American RET (which is the doctrinal hinge of TPD) has *not* been entirely incorporated by the Indian Supreme Court. Chandrachud, J in *Puttaswamy I* does not incorporate a 'societal' standard for the objective stage of RET (as in the US) but instead contemplates a 'constitutionally' defined standard wherein privacy, on the objective plane, is defined by 'constitutional values'[163]. This formulation implies the adoption of an objective harm-based standard i.e. ultimately, the subjective willingness to define a particular privacy claim shall stand *unless* the privacy claim has the potential to 'harm' constitutional values, such as another person's rights.[164] This approach, we feel, is most apt in allowing for a progressive standard while also addressing the problems of RET discussed by Nariman, J.

An approach similar to this harm-based approach can be seen in the recent decision of the Canadian Supreme Court in *R v Jarvis*[165], especially in the concurring opinion of Rowe, J. In *Jarvis*, the majority adopted a 'context-based' enquiry into determining RET which implies that the Court would take into account a variety of factors (not limited to the publicity of information or its societal acceptance), to determine

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[162] Supra 1 at ¶ 59 (Nariman, J).

[163] Supra 1, at ¶ 169 (Chandrachud, J).

[164] An implication of this is found in Chandrachud, J's formulation of RET where he alludes to the objective prong of the test as being defined in terms of harm to the rights of third parties. *See* Supra 1 at ¶ 169 (Chandrachud, J).; "[T]he exercise of individual choices is subject to the rights of others to lead orderly lives. For instance, an individual who possesses a plot of land may decide to build upon it subject to zoning regulations. If the building bye laws define the area upon which construction can be raised or the height of the boundary wall around the property, the right to privacy of the individual is conditioned by regulations designed to protect the interests of the community in planned spaces."

[165] R v. Jarvis, [2019] 1 SCR 488 (Supreme Court of Canada).

the validity of the privacy claim.[166] Rowe, J, utilised a value-laden approach to determining reasonable expectations - similar to Chandrachud, J in *Puttaswamy I* - to establish that the information's availability in the public domain was not determinative as to the absence of a valid privacy claim.[167] Other precedents from foreign jurisdictions also hint at a 'harm'-based metric to define the breadth of privacy - these may also shed some light on how the 'harm-based' standard may be adopted in India in forthcoming cases.[168]

Ultimately, the scope of review in the RET stage should be relatively thin. As long as a non-trivial privacy-related harm is discernible from the petitioner's claim, the Court should (ideally) find a privacy infringement. The Court should then proceed to determining whether the infringement of privacy is justified due to other interests, at the proportionality stage.[169] The Court should set a flexible threshold at the RET stage of inquiry, rather than having strict definitional

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166 Ibid, at ¶ 63-68 (Wagner, CJ).

167 Ibid, at ¶¶ 135-136 (Rowe, J). Although the approach here does not specifically invoke a 'harm'-based inquiry, the approach hinted by Justice Rowe is similar to RET as contemplated by Chandrachud, J. See Gautam Bhatia, *Notes from a Foreign Field: The Canadian Supreme Court on the "Reasonable Expectation of Privacy"*, Indian Constitutional Law and Philosophy, available at https://indconlawphil.wordpress.com/2019/03/01/notes-from-a-foreign-field-the-canadian-supreme-court-on-the-reasonable-expectation-of-privacy/ last seen on 07/07/2020 for an analytical comparison of *R v. Jarvis* and *Puttaswamy I*.

168 The nature of 'harm' in this context has been significantly broadened by some courts, as they have suggested that the storage and permanent recording of information (due to the potential harm in such storage) can give rise to a reasonable expectation of privacy, despite a user's initial consent to share the data. See PG&JH v. United Kingdom, App. no. 44787/98, at ¶ 57; "Private-life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain. It is for this reason that files gathered by security services on a particular individual fall within the scope of Article 8, even where the information has not been gathered by any intrusive or covert method." The 'harm', therefore, need not be immediate, but even proximate and impending harm which might flow from the disclosure shall be considered in determining RET.

169 We discuss proportionality in Part 6 of this article.

standards (which are injudicious considering the vagueness of the concept as a whole).[170] Such an approach is consistent with most of privacy jurisprudence in Europe and India which advocates for broad and non-exhaustive definitional contours for privacy.[171]

Therefore, our reformulation of RET (from *Puttaswamy I*) would place individual autonomy at the doctrinal core. We suggest that the determinant of defining a legitimate privacy claim would be an individual's autonomous choice to be protected by privacy (subjective component of RET). The restriction on this autonomous choice (objective component) would *not* be 'societal' recognition of the autonomous claim, but an objective harm principle i.e. only if the privacy claim impacts other constitutional values would the claim be rejected.[172]

5.3. *Puttaswamy II and the Third Party Doctrine*

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[170] Samuel Beswick, *Perlustration in the Pathless Woods: Hamed v R*, 17 Auckland University Law Review, 291, 297-298 (2011).

[171] See Niemietz v. Germany, App. no. 13710/88, at ¶ 29 and Costello-Roberts v. the United Kingdom, App. no. 13134/87, at ¶ 36. Also see Supra 1, ¶ 46 (Nariman J). Many judges in *Puttaswamy I* explicitly acknowledge the ambiguity in the definition of privacy and favour an open-texture in its definition to catalyse an expansive reading of the right in subsequent cases, as has been discussed in Part 4 of this article.

[172] A sound invocation of the 'objective harm principle' in relation to the second stage of RET is found in *Joseph Shine v. Union of India,* concerning the validity of section 497 of the IPC criminalising adultery. The court (albeit obliquely) looked into the matter from the lens of matrimonial privacy. Although the court held S. 497 as unconstitutional, it categorically upheld the state's 'intrusive' legislative efforts to regulate certain matrimonial (harmful) offences like domestic violence and dowry. Chandrachud, J (writing for himself) legitimised the reformative efforts of the legislature (through the dowry prohibition act or the DV act, etc.) on the ground that the laws "protect[ed] the fundamental rights of every woman to live with dignity" noting further that the offence of adultery "did not fit that paradigm". Thus, to explain our formulation of the second stage of RET; in a situation of domestic violence or physical abuse, any claim to privacy by the accused would fail, given the objective 'harm' on the woman. *See* Supra 7, at ¶ 61 (Chandrachud, J).

There are certain discordant notes to our aforementioned formulation in Sikri, J's opinion in *Puttaswamy II*. Bhatia points out two irregularities: First, Sikri, J's formulation in certain instances extracts the American formulation of RET (which scrutinizes societal recognition instead of the constitutional harm principle)— a standard which Chandrachud, J in *Puttaswamy I* avoids and Nariman, J unequivocally rejects[173]. Second, Sikri, J suggests that biometric and demographic information does not raise any reasonable expectation of privacy given that "[t]hey are taken for passports, visa and registration by the State and also used in mobile phones, laptops, lockers etc. for private use."[174] This seems uncomfortably close to the TPD rationale: an individual divulging information to third-parties shall be deemed to have forfeited her privacy claim over the information altogether.

Although we empathize with Bhatia's concerns, we feel that Sikri, J's opinion does not necessarily bind us to a regressive standard. Therefore, we add certain qualifications: First, it is unclear whether Sikri, J has unequivocally adopted the American standard for RET. Throughout the judgment, he offers different reformulations for RET - including the 'constitutional values' laden approach adopted by Chandrachud, J in *Puttaswamy I*.[175] More importantly, Sikri, J's final comment on RET is a list of considerations which must be taken into account when assessing a valid privacy claim, which include 'triviality', 'injury', 'nature' of information stored and extent of prior disclosure of information as considerations.[176] These considerations attempt to measure the degree of 'harm' which may be caused from the privacy infringement in question. This indicates that the test is closer to Chandrachud, J's formulation of RET test than the American test, despite its inconsistent use by Sikri, J.

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173 Supra 55. *Also see* Part 5.2 of this article.
174 Supra 8, at ¶ 252 (Sikri, J); *also see* supra 144.
175 Supra 8, at ¶ 287 (Sikri, J). *See also* supra 8 at ¶ 289 (Sikri, J).
176 Ibid, at ¶ 292 (Sikri, J).

Secondly, although there are indications that Sikri, J does not endorse the existence of 'reasonable expectations' over demographic and biometric information, Sikri, J eventually acknowledges a valid privacy claim over the information stored and collected with the government:

No doubt, the information which is gathered by the UIDAI (whether biometric or demographic) is parted with by the individuals to other agencies/body corporates etc. in many other kinds of transactions as well, as pointed out by the respondents. *However, the matter is to be looked into from the angle that this information is collected and stored by the State or instrumentality of the State.* Therefore, it becomes important to find out as to whether it meets the test of proportionality, and satisfies the condition that the measure must not have disproportionate impact on the right-holder (balancing stage).[177]

The rationale here is that *despite* the information being previously shared with other agencies, the factum of such sharing *will not amount to a waiver* of privacy claims over the information altogether. This appears to be a rejection of TPD. Instead, Sikri, J focuses on the information being "collected and stored by the State or instrumentality of the State"[178]. This may imply that information being 'stored' by the state would raise a heightened privacy claim due to the possible 'harm' which may be caused by the disbursal of information.[179] Alternatively, it could be suggested that privacy interests are heightened because it is the 'state' or its instrumentalities collecting and storing the

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177 Supra 8, at ¶ 284 (Sikri, J). (emphasis ours)

178 Ibid.

179 It is also essential to note in this context that the Sikri, J offers a specific direction to limit the amount of time for which authentication transaction data was retained at the CDR Erstwhile regulations provided that the data would be retained for 5 years which was reduced to 6 months by the judgment. *See* Ibid, at ¶ 205 and ¶ 447 (Sikri, J).

information.[180] Nevertheless, the focus remains on the calculus of 'harm' and not 'societal' acceptance, thus steering clear of TPD.

Therefore, we feel that it is best to broadly read some of the ambiguities in Sikri, J's opinion in consonance with the doctrinal positions of *Puttaswamy I*, in the manner we have proposed here, while discarding those parts which are contrary to the nine-judge decision. It is this proposed doctrinal interpretation, which is in conformance with the principles in *Puttaswamy I*, which should guide future applications of RET.

6. Consent and Proportionality

The role of consent within proportionality is more difficult to judge given that the 'balancing act' is significantly fact-sensitive in nature and the stage of review, as such, does not subsume any common metric of considerations.[181] Given the open texture in the balancing stage of review, different judges and courts use unique approaches to find the correct balance.[182] Therefore, in this Part, we will offer a broad overview of the doctrinal content of proportionality and examine the contrasting approaches of the judges in conducting proportionality, specifically discussing the role of consent within the approach.

6.1. *The Content of Proportionality*

Chandrachud, J in *Puttaswamy I* invokes the proportionality test to identify legitimate infringements of privacy: the three stages of the test include : (i) *legality*- existence of law, (ii) *legitimacy*- existence of a legitimate state aim to justify the infringement and (iii) *balancing* -

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[180] It was argued by the Petitioners that individuals have a 'higher expectation of privacy from the State' given the existence of concentrated and centralised State power. *See* Ibid, at ¶ 241 (Sikri, J).

[181] Stavros Tsakyrakis, *Proportionality: An assault on human rights?* 7 International Journal of Constitutional Law, 468, 471-472 (2009)

[182] See Aparna Chandra, Supra 141 at 57-58, 84-86.

balancing the infringement against the legitimate aim identified.[183] Sikri, J in *Puttaswamy II* adds to this, the components of 'suitability' (whether the means adopted by the state is suitable for the ends it seeks to meet); and 'necessity' (that the state must adopt the least restrictive alternative to meet its desired ends).[184] Sikri, J does not, however, contemplate significant scrutiny within these two stages and the key focus remains on 'balancing'.[185]

The nature and content of the balancing stage remains notably elusive. To shed some light on this stage of review, Alexy offers the 'weight formula'. Alexy suggests that the 'balance' contemplated is essentially a weighted average of (i) the relative abstract weights of opposing principles, (ii) the relative intensity of interference with or possible advancement of each opposing principle; and (iii) the reliability of assumptions relied upon to arrive at the relative intensity of interference or advancement.[186] Alexy's weight formula is provided: (*I* denotes intensity, *W* denotes abstract weight and *R* denotes reliability)

$$W_{i,j} = \frac{I_i \cdot W_i \cdot R_i}{I_j \cdot W_j \cdot R_j}$$

Within this formulation, autonomy (broadly) and consent (narrowly) have significant value. In continuance of what we have said in Parts 2 and 3 of this article, 'consent' here will become a factor which has to be taken into account in assigning relative 'abstract weights' to

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183 Importantly, the only other judge invoking proportionality was Kaul, J who incorporated the additional prong of "procedural guarantees" within the test. *See* footnote number 141 above.

184 Supra 8, at ¶ 267 (Sikri, J).

185 Sikri, J adopts a nuanced version of the German test over the Canadian test which offers significantly less scrutiny for necessity. *See* Supra 142 for more.

186 Robert Alexy, *Constitutional Rights and Proportionality*, 22 Journal for Constitutional Theory and Philosophy of Law 51, 55 (2014).

opposing principles.[187] In addition to this, the variable of consent and autonomy shall be significant in the court's calculation of the relative 'intensity' of the privacy infringement in question. Within this calculation, (i) the degree of consent involved in the disbursal of information, and (ii) the potential 'harm' on individual autonomy (or the rights of others and the public interest[188]) through the disbursal will have to be taken into account.

An objection might be raised to this particular formulation of the role of consent in proportionality. As we have discussed in the previous part, RET accounts for the consent of the individual in question in the subjective willingness component of the test. The invocation of consent at the balancing stage might then be seen as a repetitive counting of the same factor in the privacy analysis. This objection is, however, misplaced. RET operates as a *threshold* requirement in order to determine whether a person can legitimately claim privacy (whether the right to privacy has been 'engaged' or 'infringed'), whereas proportionality deals with whether privacy can be restricted in a particular situation by competing interests, after finding that privacy has been engaged.[189] However, there are legitimate concerns about whether RET, as conceptualised in *Puttaswamy I* and *II*, ends up being redundant in light of a rigorous proportionality analysis. First, the RET as conceptualised by the Supreme Court involves balancing between subjective willingness and objective constitutional values at the threshold stage of determining whether a person can claim a privacy interest. It is questionable whether this balancing

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[187] The question as to the balance between the relative 'abstract weights' of dignity and autonomy for instance can be formulated through a 'liberty-affirming' concept of dignity as opposed to a 'liberty-restricting' one. In this context the *relative* weight of opposing principles would depend upon the degree of importance which is accorded to autonomy, consent and the public interest within the formulation. See part 2 of this article.

[188] See part 2 of this article.

[189] Supra 142. [Kamil]

should be done at this stage, when balancing is an essential part of the proportionality test, which follows RET. Second, as Barendt argues, this threshold balancing in RET leads to the 'double counting' of several factors.[190] Barendt, in fact argues that this is one of the many reasons as to why RET as a whole is an incoherent and redundant concept.[191] As we have discussed above, however, neither *Puttaswamy I* or *II* adopt the US model of RET, but the majority in *Puttaswamy II* clearly adopts a modified form of the test. It might be possible to argue that even this modified form of RET is redundant when proportionality is being used, but that is outside the scope of this paper. A possible way of reconciling these concerns is to adopt a broad harm-based approach to determining whether RET is satisfied, as we have discussed in the previous Part.[192]

None of the judges in *Puttaswamy I* or *Puttaswamy II* invoke Alexy explicitly. However, Alexy's weight formula offers a good framework to analyse how the judges conducted the 'delicate task'[193] of balancing. *Puttaswamy I* did not specifically deal with a privacy claim and therefore the question as to the nuances of the proportionality test become moot. However, it becomes important to see how *Puttaswamy II* expressly invokes consent in relation to the doctrine.

6.2. *Autonomy and Voluntariness to Determine Relative Intensity of Privacy Infringements*

An interesting part of the *Puttaswamy II* judgment, which helps unravel the role of consent in the proportionality analysis, is the Court's approach towards Section 57 of the Act.[194] This provision of

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190 Eric Barendt, *'A reasonable expectation of privacy': a coherent or redundant concept?,* 96, 109 in *Comparative Defamation and Privacy Law* (Andrew Kenyon, 1st ed., 2016).

191 Ibid., at 114.

192 *See* Part 5.2 of this article.

193 Supra 8, at ¶ 189 (Sikri, J).

194 S. 57, The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, states: "57. Nothing contained in this Act shall prevent the use of Aadhaar number for establishing the identity of an individual for any

the Act allowed for the use of Aadhaar for establishing the identity of a person 'for any purpose', by both the State or 'any body corporate or person', pursuant to any law, or any contract. The Court upheld that part of Section 57 which dealt with the use of the number by the State pursuant to any law, subject to such a law being proportionate.[195] However, it struck down that part of Section 57 which allowed the use of Aadhaar by private parties pursuant to any contract. It did so for two reasons: (a) that such a contract is not a 'law', and hence the 'legality' requirement of proportionality is not met, and (b) that this would 'enable commercial exploitation of an individual [sic] biometric and demographic information by the [sic] private entities.'[196]

The argument about 'commercial exploitation' is particularly relevant from our perspective. This is because it is clear that the Court suggests that the use of Aadhaar by private parties is unconstitutional *even if it is used voluntarily*. Otherwise, there would be no need to strike down the part linked to the use of it through contracts, as contracts are voluntary by definition.[197] In addition, this argument is independent

purpose, whether by the State or any body corporate or person, pursuant to any law, for the time being in force, or any contract to this effect: Provided that the use of Aadhaar number under this section shall be subject to the procedure and obligations under section 8 and Chapter VI."

195 Supra 8, at page 560 (Sikri, J).

196 Ibid.

197 Prasanna S, *Why Aadhaar can't be used as authentication by private companies*, Medianama.com, 27 Sept 2018, Available at: https://www.medianama.com/2018/09/223-section-57-why-aadhaar-cant-be-used-as-authentication-by-private-companies/ last seen on 2/07/2019. See also Vrinda Bhandari and Rahul Narayan, *In Striking Down Section 57, SC Has Curtailed the Function Creep and Financial Future of Aadhaar*, The Wire, 28 Sept 2018, Available at: https://thewire.in/law/in-striking-down-section-57-sc-has-curtailed-the-function-creep-and-financial-future-of-aadhaar, last seen on 02/07/2019. However, the recent Aadhaar and Other Laws (Amendment) Act, 2019, has amended section 4 of the Act to allow voluntary use of Aadhaar as proof of identity even by private entities (although it is subject to several procedural protections). We, nevertheless, assert that *Puttaswamy II* clearly holds that voluntary use of Aadhaar for authentication by private parties is prohibited.

of the legality requirement i.e. it would not be valid for private parties to use Aadhaar even if this was specifically backed by law.[198] Sikri, J does not mention any reasons for this beyond 'commercial exploitation'.

Chandrachud, J's opinion is a bit clearer and can be used to decode the reasoning of the majority opinion. He mentions two reasons as to why this part of Section 57 is unconstitutional: (a) that it traverses beyond the legitimate state aim of targeted delivery of social welfare benefits, and (b) that it allows for commercial exploitation of citizens' data, which would lead to profiling.[199] This means that this impacts the proportionality analysis for right to privacy at *two levels:* (a) at the initial stage of a legitimate state aim, which cannot extend to commercial use of data, and (b) at the balancing stage, because this would lead to pervasive profiling. He observes that extending the use of Aadhaar to private parties would lead to the creation of a comprehensive profile of citizens which would extend to 'every facet of human life'.[200] But why is profiling dangerous? This is explained by Chandrachud as follows:

Profiling can impact individuals and their behaviour. Since data collection records the preferences of an individual based on the entities which requested for proof of identity, any such pattern in itself is crucial data that could be used to predict the emergence of future choices and preferences of individuals. These preferences could also be used to influence the decision making of the electorate in choosing candidates for electoral offices. Such a practice would be unhealthy for the working of a democracy, *where a citizen is deprived of free choice.*[201]

This is a clear exposition of our central argument about the role of consent. First, it is clear that Chandrachud, J declares Section 57 to

198 Ibid.
199 Supra 8, at ¶ 243. (Chandrachud,J)
200 Ibid, at ¶ 244.
201 Ibid, at ¶ 245. (emphasis ours)

be unconstitutional even if individuals voluntarily give their Aadhaar details. Second, the reason for this is the continued autonomy of the individual; the profile of an individual can be used to deprive her of 'free choice' in the future. So, even though consent is important to determine infringements of privacy, it can be overridden by other factors, including the autonomy of the very individual concerned.

In addition to this, the degree of consent involved in the method of disbursal of information can also be used to measure the degree of intensity of the infringement. In this context, it is important to note that both judges give significant weight to the degree of 'voluntariness' of the Aadhaar scheme. Sikri, J establishes the voluntariness of the scheme on the basis of Section 3 of the Act which 'entitles' an individual to an Aadhaar number.[202] The suggested 'voluntariness' of the scheme implies that the intensity of the infringement of privacy is reduced due to individual's consensual disbursal of information. This is most explicit in Sikri, J's discussion in relation to the compulsory linking of Aadhaar to SIM Cards, where he notes that such mandatory linking "impinges upon the voluntary nature of the Aadhaar scheme".[203] However, this does not mean that Sikri, J holds consent to be a 'one-time' waiver of all privacy interest. Instead, consent is a consideration which tips the balance in favour of constitutionality.[204]

Chandrachud, J also considers the voluntariness of the Aadhaar scheme to be an important consideration although he questions the voluntariness of the scheme.[205] The nature and degree of the voluntariness of the Aadhaar scheme can be debated (as there is

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202 Ibid.

203 Ibid, at ¶ 442 (Sikri, J).

204 See supra 8 at ¶ 446 (Sikri, J), conclusion (j): "the scheme by itself can be treated as laudable when it comes to enabling an individual to seek Aadhaar number, more so, when it is voluntary in nature. *Howsoever benevolent the scheme may be, it has to pass the muster of constitutionality.*"

205 Ibid, at ¶ 11 (Chandrachud, J).

a clear difference of opinion here) - although we do not seek to address that question. The pertinent fact remains, nevertheless, that the degree of consent remains a significant consideration in measuring the intensity of infringement for *both* the judges.

6.3. *Voluntariness and Balancing*

The problematic invocations of consent by Sikri, J in relation to children have already been noted.[206] Sikri, J holds that children being 'incapable' of consenting, any legislative attempts at 'foisting' such consent shall be 'disproportionate'.[207] Sikri, J furthers this rationale to allude to a heightened privacy claim for children: since children lack capacity to consent, they have a heightened privacy claim over their information.[208] However, there is little analysis by the Court on the question of the 'meaningful consent'[209] of data subjects when it came to upholding Section 7 of the Act. Nevertheless, the focus on the 'incapacity'-based rationale indicates the silent yet critical weight Sikri, J accords to the consideration of 'consent': given that children lack the capacity to consent, the balancing exercise finds the scheme disproportionate.

The judges also use consent in context of their discussion on the savings clause in section 59 of the Aadhaar Act (which legitimized all data collected under the Aadhaar scheme between 2009 and 2016 when the law was enacted). Given that the 'legality' requirement of proportionality was not satisfied during this period, the petitioners argued that the infringements prior to 2016 were clearly disproportionate. In addition to this, it was argued that the lack of any procedural safeguards prior to the commencement of the act implied that any information shared prior to 2016 was not backed by the

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206 See Part 3 of this article.

207 Supra 8, at ¶ 327 (Sikri, J).

208 Murray v. Big Pictures (UK) Ltd., 109(2008) 3 WLR 1360 as cited in Supra 8, at ¶ 331 (Sikri, J).

209 See supra 8, at ¶ 253 (Sikri, J) for petitioner arguments based on 'illusory consent'.

'informed consent' of individuals. Chandrachud, J echoes these concerns in his minority opinion as he holds the savings clause invalid given that "the informed consent of those individuals, whose Aadhaar numbers were generated in that period cannot be retrospectively legislated by an assumption of law."[210]

Sikri, J, on the other hand, upholds section 59 and, thereby, the privacy infringements prior to 2016. He holds that the requirement of 'legality' is satisfied since Section 59 'deems' the existence of law prior to 2016.[211] He further notes that in any case "the problem can be solved by eliciting 'consent' of all those persons who were enrolled prior to the passing of the Act."[212] This can be seen either as (i) an observation that that the 'legality' requirement can be excused with prospective consent or (ii) as bolstering the existent 'deemed' consent elicited prior to 2016. The position in (i) is clearly incorrect given that legality is an independent requirement in the proportionality analysis, and a restriction that is not backed by a law will be invalid despite satisfying the other prongs of the test.[213] However, position (ii) also raises legitimate concerns as to whether infringements of fundamental rights can be retrospectively consented to. In any case, the rationale of the majority is significantly autonomy-restricting even in 'deeming' of consent; which is sharply contrasted by Chandrachud, J's approach, which we discuss below.

Additionally, although Sikri, J does not invoke TPD to deny the petitioners' claim, he considers the factum of private information

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210 Supra 8, at ¶ 304 (Chandrachud, J).

211 Ibid, at ¶ 371-372 (Sikri, J).

212 Ibid, at ¶ 373 (Sikri, J).

213 This has been recognised long before the adoption of the proportionality standard. In *Kharak Singh*, for instance, the Supreme Court clearly held that only a 'law' could justify infringements of Articles 19 and 21, and that this requirement is independent of the reasonableness of the restriction. See Kharak Singh v State of UP, (1964) 1 SCR 332, at ¶¶ 5 and 6 (N Rajagopala Ayyangar, J).

being available 'in public domain' as being relevant in balancing.[214] This largely follows our discussion in Part 3 about waiver of fundamental rights and the right to be forgotten. As we stated there, when information is in the public domain, the interests of the public must be taken into account and balanced against the individual's subsisting privacy rights in the information. However, whether the possession of Aadhaar information by the State actually contributes to the public interest is another question, which is outside the scope of this article.[215]

Chandrachud, J's dissenting opinion in *Puttaswamy II* places individual autonomy at the centre of proportionality.[216] As we have observed previously, Chandrachud J links purpose-limitations in the handling of data, with the continuing ability of an individual to exercise control over information pertaining to her.[217] He furthers this rationale to condemn third-party access to Aadhaar data: an individual's data must be within her 'control' and therefore unauthorized 'secondary' linking of data (by a third party) would 'erode the personal control over the information'.[218] This, of course, supplements his observations on 'commercial exploitation' as have been discussed earlier.[219] The purpose-limitation rationale is also used to strike down Section 7 of the Act. [220] Given that the scope of Aadhaar is undefined (and resultantly infinitely broad), it is impossible to for an individual to meaningfully consent to prospective uses of her biometric data.[221]

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214 Ibid, at ¶ 284 (Sikri, J).
215 See Supra 144, for instance.
216 See Ibid at ¶ 240 (Chandrachud,J)
217 Ibid, at 218 (Chandrachud, J). *See* part 2.2 of this article.
218 Ibid, at ¶ 231
219 See part 6.2 of this article.
220 Supra 8, at ¶ 248 (Chandrachud, J).
221 Supra 8, at ¶ 246 (Chandrachud, J)., "The scope of Section 7 is very wide. It leaves the door open for the government to route more benefits, subsidies and services through the Consolidated Fund of India and expand the scope of Aadhaar."

Summarising the approaches of Chandrachud, J and Sikri, J, we feel that Chandrachud, J's approach to balancing offers a markedly 'autonomy-rich' formulation of the right of privacy. Sikri, J's opinion departs from this autonomy-rich conception, clearly affirmed by the nine-judge decision in *Puttaswamy I* and subsequent cases[222], at several instances. Chandrachud, J foregrounds his measurement of the intensity of privacy infringements on the considerations of autonomy and consent. This reaffirms our discussion about an autonomy-rich approach to privacy, where individuals continue to possess privacy rights in information which pertains to them, and is in greater consonance with the decision in *Puttaswamy I*.

7. Conclusion

This article has explored various aspects about the role of consent in the right to privacy. *Puttaswamy I* builds upon a foundation rich with references to dignity, autonomy and liberty. Reading *Puttaswamy I* along with cases which have followed, we have conceptualised an autonomy-rich formulation of dignity, which focuses upon an individual's continued capacity to exercise autonomous choices. We have then situated consent within this matrix, as a key variable which signifies the importance of individual choice. However, preserving an autonomy-rich formulation of dignity can, in certain situations, require us to balance consent against other factors such as the continuing autonomy of the individual concerned. In this sense, the balancing exercise is a combination of subjective (consent) and objective (autonomy) factors, both of which have to be taken into account by a Court.

This conception of the role of consent also helps us explain the otherwise tricky issue of 'waiver' of fundamental rights. As we have shown in our analysis, consent in the disclosure of information does not lead to a complete abandonment of a person's privacy interests in that information, as is required by an autonomy-rich formulation of

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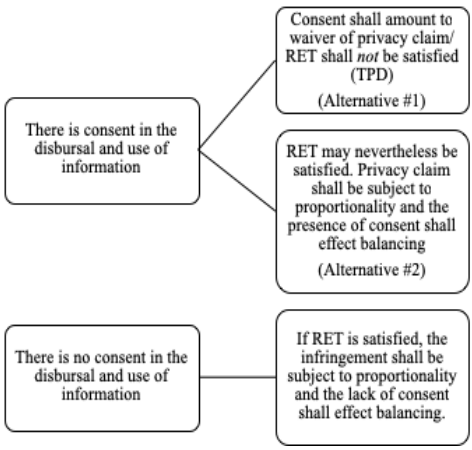
222 *See* Part 2.3 of this article.

dignity. Consent does, however, alter the landscape within which privacy rights can be claimed. Once the information is in the public sphere, other rights, such as freedom of speech will have to be balanced against the person's continuing privacy rights. This also helps us understand the scope of the right to be forgotten.

We have analysed the implications of these principles upon the doctrinal tests used in *Puttaswamy I* and *II*, to determine the validity of privacy infringements. The alternative approaches to the role of consent (both within RET and proportionality) can be summarized through the diagram below:



In relation to RET, Alternative #2 is the correct approach, which maximizes autonomy. We do not endorse Alternative #1, which limits consent to a 'one-time' act. Reinforcing this, we have also shown how *Puttaswamy I* unambiguously rejects the American third-party doctrine. The Court adopts a standard which takes into account subjective and objective factors which emphasises constitutional values based on dignity.

Puttaswamy I and *II* cement the role of a proportionality analysis in determining the validity of privacy infringements. We have situated consent within this analysis, in a manner which takes into account the doctrinal formulations of the Court. Consent is taken into account as a factor which affects the balancing stage during the proportionality analysis, rather than as an 'all-or-nothing' variable. The weight and

intensity ascribed to consent will vary depending on the facts of a particular case, and will be balanced against such factors as the autonomy of the individual, the rights of others and the public interest.

We only attempt to lay down the foundations and define the broad contours of the functioning of consent. Several important issues remain to be addressed. For instance: how are Courts to evaluate 'objective' constitutional values and construct the image of an autonomy-rich individual without unduly affecting a person's actual choices? What is the exact weight to be given to consent in the proportionality analysis? Which public interests can weigh against a person's privacy interests? These questions need to be answered as well, and this article is only the first step in unravelling the tricky issue of consent.

AMENDMENT POWER IN BANGLADESH: ARGUMENTS FOR THE REVIVAL OF CONSTITUTIONAL REFERENDUM

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Abstract

The recent constitutional trend in divided societies and relatively unstable democracies has seen an increased use of perpetuity clauses as a tool to foster constitutional stability. Propriety and effectiveness of making certain part or parts of constitution totally unamendable either by insertion of some perpetuity clauses or by judicial articulation of perpetual norms (basic structure) has been doubted by many. The Supreme Court of Bangladesh tested the way of judicial articulation of certain perpetual norms as back as 1989. The 2011 amendment to the constitution of Bangladesh has included a very widely framed perpetuity clause and, also, a very vague reference to the basic structure doctrine. This article considers the fragilities of these two parallel tracks to unamendability and shows how a median line could be drawn by installing a system of popular referendum in the constitution amendment process. Considering the qualitative questions over Referendum as a tool of deliberative democracy, the paper would argue for a reformulated version of the referendum system that was introduced in Bangladesh in 1979 but scrapped by the amendment of 2011.

Keywords: Constituent Power, Amendment Power, Basic Structure, Unamendability, Referendum, Judicial Review.

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1. Introduction

A typical constitutional supremacy clause characterizes the constitution as the 'highest law' of a country. Again, pitched against the concept of popular sovereignty, constitutions often occupy a lower designation, as 'higher law'.[1] Constitutional supremacy clauses however accommodate a slippery concept of the peoples' sovereignty. A claim of supremacy here rests on constitution's embodiment of the will of the people. Seen this way, a constitution's supremacy remains subject to the 'highest' will of the people. The biggest problem with this approach is that 'will of the people' is a theoretical concept not capable of perfect subtraction into a legal concept. It is hard to pinpoint exactly when the 'will of the people' changes and a "constitutional moment"[2] knocks on the door. Added to this is the near impossibility to discern what exactly the 'will' itself is. Hence, a more accommodating alternative might be to take the constitution as the 'legal highest' and leave the will of the people – the 'political highest' - aside.

Yet this would not solve the problem altogether. The 'legal' and 'political' highest, are not norms in isolation. They constantly interact, influence and saturate each other. Instability in one destabilizes the other. Therefore, possible instability in the highest 'law' needs be checked by taming instability in the peoples' highest 'will'. Constitutions try to do this by defining the amendment process with the best possible precision. Amendment clauses give constitutions the height necessary to remain above the nitty-gritty of 'presentist'[3]

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1 J. M, Balkin, *Living Originalism*, 59 (1st ed., 2011).

2 B. Ackerman, *We the People, Volume 2: Transformations*, 17-26 (1st ed., 1998).

3 J. Rubenfeld, *The Moment and the Millennium,* 66 George Washington Law Review 1085, 1089 (1998). Jed Rubenfield explained Thomas Jefferson's thesis on living constitutionalism - "the earth belongs to the living" - as making "the priority of the present into an axiom of self-government, such that self-government would have to be conceived as *governance by present popular will* and governance under old

tendencies of the peoples' will. They also provide necessary leeway for intra and inter-generational adaptability of the constitutional texts and principles.[4]

Amendment power and process is laced with complexity. Constitutional provisions may be 'comparatively hard', 'particularly hard', or even 'impossible' to amend. Many constitutions choose *comparatively hard* amendment processes and require a qualified majority of two-thirds or three-fourths in the legislature for a constitutional amendment. Some constitutions, the United States' being the most prominent, chose a *particularly hard* process of amendment and require some additional steps like ratification and concurrent action by institutions apart the legislature. Though no constitution so far has claimed *strict unamendability* for all of its contents, some jurisdictions have attempted such strategy for parts of their constitutions by introducing eternity or perpetuity clauses and, as Roznai shows, the trend is growing in this direction.[5] This trend of legislative entrenchments through perpetual or eternity clauses – which Richard Albert calls "codified unamendability"[6] is an addition to the judicially

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laws would have to be regarded as antithetical to political freedom." [Emphasis supplied].

4 C. J. Friedrich, *Constitutional Government and Democracy theory and practice in Europe and America,* 137-38 (4th ed., 1974).

5 Y. Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*, Thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy, 27 (2014), available at: http://etheses.lse.ac.uk/915/, last seen on 08/06/2020. (As Roznai's groundbreaking dissertation notes, "between 1789 and 1944, only 17% of world constitutions enacted in this period included unamendable provisions (52 out of 306), whereas between 1945 and 1988, 27% of world constitutions enacted in those years included such provisions (78 out of 286). Out of the constitutions which were enacted between 1989 and 2013 already more than half (53%) included unamendable provisions (76 out of 143). In total, out of 735 examined constitutions, 206 constitutions (28%) include or included unamendable provisions").

6 R. Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, 140 (1st ed., 2019).

articulated "interpretative unamendability"[7] under the so-called doctrine of basic structure.

Both the eternity clause and the basic structure doctrine involve controversies. With the court, a facially "counter-majoritarian"[8] institution, pressing for perpetuity of an unidentified set of basics, democracy's basic arraignment of representation, institution, power and principles face a new challenge. Basic structure denies political forces and the people the scope to anticipate and react to in the judicial interpretation of constitutional text and principles. Inconsistent interpretation leads to an ever-fluctuating list of unamendable basic structures. Codified eternity clauses, on the other hand, create a highly problematic dead hand rule – ideals of the foregone generation binding the present generation - within the constitutional landscape.

This paper aims to address the dilemmas of the eternity clause and the basic structure doctrines in the context of Bangladesh. The 2011 constitutional amendment in Bangladesh that purports to accommodate both the legislative articulation of unamendable constitutional basics and the judicial articulation of basic structure unamendability forms the principal case study of this paper. Part II presents a general introduction to the Bangladeshi constitutional regime regarding amendment power and process. Part III offers a brief analysis of the doctrinal issues associated with the eternity clauses and the basic structure doctrine. Part IV deals with the problems of basic structure doctrine in Bangladesh with occasional references to other south Asian jurisdictions, particularly the India and Pakistan. Part V argues for qualified entrenchment of constitutional basic structure provisions subject to popular participation in the process through referendum. Part VI considers some of the confusions associated with

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7 Ibid, at 149.

8 A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics,* 16-18 (2nd ed., 1986).

the concept of referendum and argues for modified reintroduction of the referendum clause that was introduced in Bangladesh in 1979 but discontinued in 2011.

2. Amendment Power in Bangladesh: Trichotomy of Basic Structure, Unamendability and Referendum

The Parliament of Bangladesh is given both plenary legislative power[9] and the power of constitutional amendment.[10] The original constitution of 1972 contained no limitation whatever on the parliament's power of amendment. Amendment could be made through a Bill passed by two-thirds majority of the members of Parliament. Article 142 being the sole repository of amendment power, there could be no extra-constitutional route to amendment.[11] The military regimes of 1975-79 and 1982-1986 however, frequently took the extra-constitutional routes.

A series of martial law orders, regulations and proclamations amended the constitution as per the sweet will of the martial law administrators. Thereafter all those 'amendments' were placed as two packages before second and third parliaments which approved the

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9 Art. 65, the Constitution of Bangladesh (Subject to the Constitution, the legislative power of the Republic is vested in Parliament).

10 Art. 142, the Constitution of Bangladesh (Parliament is empowered to amend the constitution by of addition, alteration, substitution or repeal subject to the procedure and conditions laid down in this Article).

11 See R. Albert, *Constitutional Amendment by Stealth*, 60 McGill Law Journal 673, 678 (2015). Amendment by stealth has been defined as 'an informal, obscure and irregular method of constitutional amendment that by-passes the process of public deliberation through formal, transparent and predictable procedures designed to express the informed aggregated choices of political, popular and institutional actors.'. Though there is global awareness of a process of 'amendment by stealth' through different informal politico-administrative processes short of formal amendment, its implication for Bangladesh remains unexplored or under researched so far. 'Amendment by stealth' therefore falls beyond the ambit of this paper which deals with formal and express amendments regulated by article 142 and judicially reviewed within the basic structure framework.

packages though the Fifth and Seventh Amendments respectively.[12] In the Fifth Amendment, a system of referendum was installed within the amendment process.[13] As per the new formula, amendments in the Preamble or some other articles consolidating the presidential system vis-a-vis the Prime Minister and cabinet and the parliament,[14] would require referendum in addition to a two-thirds majority in parliament. Though it was not told expressly, the newly installed referendum system treated some articles, some of which were controversial[15], as more 'fundamental' than the other articles of the constitution.

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12 M. J. A. Chowdhury, *An Introduction to the Constitutional Law of Bangladesh*, 76-86 (1st ed., 2010).

13 Clause 1A was first added to Article 142 by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order no IV of 1978).

14 Second Schedule of the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978 enlisted the provisions that were to be brought into the ambit of the referendum clause. The enlisted provisions were the Preamble, Arts. 8 (status of fundamental principles of state policies), 48 (president), 56 (prime minister), 58 (tenure of the prime minister and cabinet), 80 (president's control over legislative process), 92A (president's power to dissolve a parliament which fails to approve the budget proposed by the government) and 142 itself. Later the Constitution (Twelfth Amendment) Act 1991 (Act No. XXVIII of 1991) amended the referendum list. Under the 1991 amendment, the Preamble, articles 8, 48, 56 and 142 would require referendum. With a change of the presidential system into a parliamentary one, articles 58, 80 and 92A relating to presidential powers became redundant and hence got omitted from the list.

15 The 1978 list of referendum articles included the provisions like presidential authority to dissolve a parliament failing to approve the government's budget proposal, presidential superiority vis-à-vis the prime minister and the cabinet and also the distortion in the preamble (which now introduced a state religion, deleted the secularism, distorted the Bangalee nationalism and limited the meaning of socialism – all of the four founding principles of the original constitution). The 1978 list was controversial because it apparently sought to entrench the presidential system of government as well as other politico-legal philosophies of the military regime capturing power after the killing of the Father of the Nation Bangabandhu Sheikh Mujibur Rahman and acting in direct defiance of the founding principles of the liberation war of 1971 – secularism, socialism, *Bangalee* nationalism and representative democracy in the form of parliamentary government. See S. Lition, *The Depth of 5th Amendment*, The Daily Star

Later, the Fifth Amendment was invalidated by the Supreme Court of Bangladesh. The High Court Division judgement in the Fifth Amendment case specifically dealt with the referendum clause:

> Addition of clause (1A) was craftily made. In the one hand the President and the Chief Martial Law Administrator was not only merrily making all the amendments in the Constitution of the People's Republic of Bangladesh according to his own whims and caprices by his order…but at the same time, made provision in Article 142 itself in such a manner so that the amended provisions cannot be changed even by the two thirds majority members of the parliament short of a referendum. In short[,] by *executive order of one person, amendment of the Constitution can be made at any time and in any manner* but even the two thirds majority of the representative of the people cannot further amend it. We are simply charmed by the *sheer hierocracy of the whole process.*[16] (Emphasis supplied)

It seems that the High Court Division was questioning the *hierocratic manner* in which the referendum clause was inserted and entrenched in the constitution, *i.e.,* through a military chief's orders and proclamations etc. While the High Court Division did not test the substantive concept of referendum *as such*, the Appellate Division judgment on the Fifth Amendment also did not deal with the referendum clause specifically. It did however approve the High Court Division's nullification of the referendum clause.[17] The Fifteenth

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(22/07/2010), available at https://www.thedailystar.net/news-detail-147758 , last seen on 09/06/2020.v

16 Bangladesh Italian Marble Works Ltd v. Bangladesh, 14 (2006) BLT (Spl) (HCD) 1, 199 (High Court Division of Bangladesh Supreme Court). See M. J. A. Chowdhury, *Negotiating article 142(1)(A) for Basic Structure*, The Daily Star 12 (Dhaka, 06/03/2010).

17 Khandkar Delware Hossain v. Bangladesh Italian Marble Works Ltd, Civil Leave to Appeal Petition 1044-45/2009, 182; Full text of the judgment available at

Amendment Act of 2011, which followed the Supreme Court verdict in the Fifth Amendment case, deleted the referendum clause and revived the original format of Article 142 i.e., amendment through two-thirds majority only.[18]

The Fifteenth Amendment, however created another problem of its own. By inserting a new Article 7B in the constitution, it made a large part of the constitution totally unamendable. Prior to that, the doctrine of basic structure was explicitly embraced by the Supreme Court of Bangladesh in its 1989 *Anwar Hossain Chowdhury* decision.[19] The doctrine claims that certain provisions and principles constitute the basic structures of the constitution and are therefore unamendable. Now, the Fifteenth Amendment has added a large number of specific articles in the unamendability list. It also included other unspecified 'basic structures' to list of unamendability.

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http://www.dwatch-bd.org/5th%20Amendment.pdf , last seen 09/06/2020. (As it appears, the High Court Division's declaration of unconstitutionality of the referendum clause was based on *the hierocracy of the* process of its insertion. Apparently, the substantive concept of referendum *as such* was not tested for constitutionality. Interestingly, the Constitution (Twelfth Amendment) Act 1991 (Act No. XVIII of 1991), passed after the country's democratic transition in 1991 and with unanimous bi-partisan support, amended the referendum clause and thereby substantively endorsed the system of referendum *as such*. Given the renewed entrenchment of the referendum clause through the 1991 amendment, it may be asked whether the High Court Division could judge it in 2005 on the ground of a procedural *hierocracy* of 1978 (For a brief history of the Twelfth Amendment See M. A. Hakim & A. S. Hoque, *Governmental Change and Constitutional Amendments in Bangladesh*, 2(2) South Asian Survey 255, 268-69 (1995).

18 Like the question over the High Court Division's invalidation of the referendum clause, it may also be asked whether the parliament could remove the referendum clause in 2011 by a mere two-thirds majority while the twelfth amendment of 1991 required a further referendum to amend the referendum clause. While these fundamental issues require elaborate theoretical and doctrinal exposition, scope of the present article confines us to the effect of the fifth amendment judgement and the fifteenth amendment act rather than process and rationality of those.

19 Anwar Hossain Chowdhury v. Bangladesh, (1989) 18 CLC (AD) 1.

Article 7B is titled as "Basic provisions of the Constitution are not amendable". It has made the Preamble, all articles of Part I, II and III (subject to the emergency provisions), Article 150 and "all the provisions of articles relating to the basic structures of the Constitution" unamendable by way of insertion, modification, substitution, repeal or by any other means. The vague reference to "all provisions of articles relating to basic structure of the constitution" in article 7B seems problematic. While entrenchment of core constitutional values through eternity clause like this one is not totally unknown in global constitutional literature, there is an obvious danger in unnecessarily widening the breadth of unamendability. Common understanding of eternity clause jurisprudence suggests that only the higher values of constitutional order – the "constitutional cores"[20] – should be entrenched. Extensive listing of unamendable articles is likely to constraint the peoples' primary constituent power.[21] Seen in this light, the Fifteenth Amendment of 2011 is "extremely wide"[22] and susceptible to future disregard.

As will be argued subsequently in this paper, the discarded system of referendum, though having a problematic origin, if retained through necessary modification, could have solved most of the problems associated with the eternity clause and basic structure doctrines.

3. Understanding Amendment Power vis-à-vis the Unamendable Clauses

There are debates as to whether amendment power is a

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[20] R. Hoque, *An unamendable constitution? Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All?,* 195, 222 in *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Richard Albert and Bertil Emrah Oder., 1st ed., 2018).

[21] M. Abdelaal, *Entrenchment illusion: the curious case of Egypt's constitutional entrenchment clause*, 16(2) Chicago-Kent Journal of International and Comparative Law 1 (2016).

[22] Supra 20, at 218.

'constituent' power or a 'constituted' one.[23] Constituent power is the highest political sovereignty that works as an extra-legal grundnorm whose legitimacy is taken for granted.[24] Constituted power on the other hand is secondary and derivative. It draws its authority from the constituent power and must conform to it. Amendment power has been inconsistently described as 'constituent power' and/or 'constituted power'. Holmes and Sunstein write that amendment power:

> … inhabits a twilight zone between authorizing and authorized powers. ... The amending power is simultaneously framing and framed, licensing and licensed, original and derived, superior and inferior to the constitution.[25]

Sieyes claimed that constituent power is unlimited, unrestricted and free from all prior bondages and is always subject to reclamation.[26] Doyle argues that constituent power should be seen as a capacity (power) rather than an entity (bearer of power).[27] Entity based understanding of constituent power insists that only one entity - the

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[23] *Carl Schmitt's Constitutional Theory*, 71-75, 141-46 (Jeffrey Seitzer, 2008); M. Loughlin, *On Constituent Power,* 151, in *The Political Construction of the State* (Michael W. Dowdle and Michael A. Wilkinson, 2017); Sieyes*, What is the Third Estate?,* 124 (1963)*;* C. Pfenninger, *Reclaiming Sovereignty: Constituted and Constituent Power in Political Theory*, E-International Relations, available at https://www.e-ir.info/2015/01/12/reclaiming-sovereignty-constituted-and-constituent-power-in-political-theory/CHRISTIAN PFENNINGER, last seen on 09/06/2020.

[24] J. Raz, *Kelsen's Theory of the Basic Norm,* 19(1) The American Journal of Jurisprudence 94, 95 (1974).

[25] S. Holmes, and C.R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, 275, 276 in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Sanford Levinson, 1995).

[26] Y. Roznai, *Towards a Theory of Unamendability*, *New York University Public Law and Legal Theory Working* Paper Series, 8, Working Paper Number 515, *New York University School of Law (2015).*

[27] O. Doyel, *Populist Constitutionalism and constituent power*, 20(2) German Law Journal 161, 166-71 (2019).

people, can exercise it.[28] Capacity based understanding, on the other hand, would look for whether an entity (revolutionary force, legislature or military for example) can successfully create a new constitution by breaching the existing one. If the new constitution so brought forth is perceived by the people as serving their interest, there should be no reason to deny that the concerned entity has exercised its constituent power. On this count, exercise of amendment power may qualify as a constituent power in suitable cases e.g., where the legislature drastically alters its own sphere of competence.[29]

A contrary view of the amendment power, however, describes it as a *constituted* power. According to this view, the constituent power is laid to rest once its job of constituting the original constitution is over. Thereafter, every entity works under the constituted system.[30] Since the legislature's amendment power is part of the system as constituted, it cannot claim an authority beyond its boundary. On this basis, Schmitt argues that an amendment cannot eliminate the constitution nor can it annihilate the constitution by stripping off its essential identities.[31] Tribe also echoes the tune that amendments may not alter fundamental values of the constitution to such an extent that may tantamount to regime change or revolution or create inconsistency within the regime.[32]Amar also recognizes 'a seemingly paradoxical exception' to amendability and claims that the 'inner logic' of the constitution calls for entrenchment of certain [U.S. first

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28 Ibid, at 169.

29 Ibid, at 170.

30 U. K. Preuss, *The Exercise of Constituent Power in Central and Eastern Europe,* 220 in *The Paradox Of Constitutionalism: Constituent Power And Constitutional Form* (M. Loughlin and N. Walker., 1st ed., 2007).

31 C. Schmitt, *Legality and Legitimacy* 150, 151 (1st ed., 2004).

32 H L Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harvard Law Review, 433, 441 (1983).

amendment, for example] values.[33] Entrenchments of constitutional norms through eternity clauses (explicit limits on amendment power) or basic structure doctrines (implicit limits on amendment power) or transnational norms (supra-constitutional limits on amendment power) are therefore not devoid of reasoning.[34]

One of the contemporary thinkers on the unamendability doctrine, Roznai however takes a conciliatory approach and tries to find out a middle ground in the debate. Roznai perceives the amendment power as a constituent one subject to a further classification within – Primary Constituent (constitution making) and Secondary Constituent (constitution amending) Power.[35] Primary constituent power is not only original but also a principal one. He relies on Max Radin's idea of real and minor sovereignty. Real sovereignty is exercised by revolutionary authority and 'minor or lesser sovereignty' is exercised by the constituted authority.[36] Amendment power, though exercised by a constituted authority, is 'almost sovereign' and stands above all other functions of governance.[37] It is 'almost' sovereign because its authority is derivative, not original.[38] Working further on this, Roznai asserts a 'principal-agent' relationship between the primary constituent power and secondary constituent (amendment) power. Amendment is more than constituted power and less than original constituent power. It is a delegated power to be exercised by a special constitutional agent e.g., parliament. Its power is neither unlimited nor severely limited.[39] As regards the unamendable eternal clauses, Roznai

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33 A. R. Amar *Philadelphia Revisited: Amending the Constitution Outside*, 55 University of Chicago Law Review 1043, 1072 (1988).

34 Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* 124-26 (1st ed., 2017).

35 Ibid, at 122.

36 M. Radin, *The Intermittent Sovereign*, 39 Yale Law Journal 514, 525 (1930).

37 Ibid, at 526.

38 Supra 26, at 15-18.

39 Ibid, at.19-20.

applies his delegation theory in the following terms:

> Unamendability limits the delegated amendment power, which is the secondary constituent power, but it cannot block the primary constituent power from its ability to amend even the basic principles of the constitutional order.[40]

The people would reserve their primary constituent power and use it *de novo*[41] when the secondary constituent authority (legislature) attempts a change 'contrary to their fundamental values'.[42] Seen in this light, the secondary constituent authority is debarred from unilaterally entrenching some of provisions of its liking. Here again, involvement of the primary constituent authority (the people) is inevitable.

If this position of Roznai is considered from a practical perspective, there should be a place of public participation in the amendment process through devices like referendum which we argue for in this paper. Our argument for participatory amendment process can also be justified in terms of Joel Colón-Ríos's "five concepts of constituent power".[43] First, Rios' ideas locate the constituent power in a Westminster styled 'sovereign' parliament. Second, the constituent power may be delegated from the Crown to the legislatures (e.g., the colonial legislatures in the wake of the decolonization) who would reconstitute the system a fresh. Third, the constituent power may lie with the peoples' right to revolt and alter the existing system. Fourth, within a participatory democracy framework, the constituent power may mean the power of the people to instruct their representatives who would remain bound by the instruction. Fifth, the constituent power may be channeled through the fundamental law in such a way as to institutionalize the "normally extra-legal- exercise of the people's

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40 Supra 34, at 124-26.
41 Ibid, at 128.
42 Ibid, at 134.
43 J. Colón-Ríos, *Five conceptions of constituent power,* Law Quarterly Review 306 (2014).

constitution-making power".[44] While Rios' first two senses of Westminster parliamentary sovereignty and colonial deregulation fall outside the scope of this investigation, the third concept of revolutionary constituent power remain is essentially extra-legal. Rios' fourth and fifth concepts allocate the "true constituent power"[45] in the people and projects the institutional mechanisms *e.g.,* the legislature as formal and legal proxies of popular sovereignty.[46] As will be seen in Part V of this paper, our argument for referendum based participatory amendment process draws on popular sovereignty and representative responsibilities of the legislature.

Roznai's classification of primary-secondary constituent power also runs in line with the Indian and Bangladeshi Supreme Courts' approaches to amendment power as well. The *Kesavananda Bharati v. State of Kerala*[47] and *Anwar Hossain Chowdhury v. Bangladesh*[48] courts have perceived amendment power as a power limited by essential norms of the constitution i.e., the basic structures of the constitution. Both the judgments distinguish between the adoption of a new constitution and the 'derivative power' of amending the existing one and took the view that amendment of the Constitution does not mean its abrogation or destruction or a change resulting in the loss of its identity and

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44 Ibid, at 308.

45 Ibid, at 333.

46 At this juncture, it is useful to refer to Japanese scholar Yasuo Hasebe who argues against dragging the narrative of constituent power in the discussion of constitution making and amendment. Hasebe argues that constitutions and amendments would thrive if their outcome are acceptable to the people and in conformity with university principles of political morality, not because those are allegedly enacted by a particular generation of people exercising their constituent power (See Y. Hasebe, *On the Dispensability of the Concept of Constituent Power,* 3 Indian Journal of Constitutional Law, 39, 46, 49, 50 (2009)). This paper however deals with the procedural and institutional issues, rather than Hasebe's substantive considerations, of constitutional amendment which makes it imperative to locate the power and authority of amendment to its precision.

47 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

48 Supra 19.

character. The Indian Supreme Court in *Keshavananada Bharati* observed:

> The word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alteration. [S]ubversion or destruction cannot be described as amendment of the Constitution as contemplated by Article 368 [of the Indian Constitution].[49]

Similarly, all the four Appellate Division judges, including the dissenting judge, sitting in *Anwar Hossain Chowdhury v Bangladesh* have agreed that amendment power is a limited power, though they varied on the question whether amendment power is a constituent power or not. Justice Badrul Haider Chowdhury apparently refused the constitutional amendment any higher status in terms of its 'constituent' character. Relying on the constitutional supremacy clause in Article 7(1) of Bangladesh constitution, Justice Chowdhury would see the constituent power, if there be any, belonging only to the 'people':

> All powers in the republic belong to the people. This is a concept of Sovereignty of the people. *Sovereignty lies with the people not with executive, legislature or judiciary* - all these three are creations of the Constitution itself.[50] (Emphasis supplied)

While finding that amendment power was not a constituent power, Justice Chowdhury did not specifically say whether it is a constituted power instead. Amendment power is elevated from the ordinary law-making power in so far as article 142 of the constitution 'enables' it to bring changes in, short of swallowing up, the

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[49] Kesavananda Bharati v. State of Kerala quoted in S. K. Chakraborty, *Constitutional Amendment in India: An Analytical Reconsideration of the Doctrine of 'Basic Structure',* 11 Social Science Research Network Electronic Journal, 1, 9 (2011), available at http://ssrn.com/abstract=1745439, last seen on 28/02/2019.

[50] Supra 19, at ¶ 166 (Justice Badrul Haider Chowdhury).

constitution:

> [Article 142] merely confers enabling power for amendment but by interpretative decision that clause cannot be given the status for swallowing up the constitutional fabric.[51]

Similarly, Justice M H Rahman would not articulate the amendment power as either constituent or constituted one. He would rather see the amendment power as one limited by the constitutional fabric e.g., the rule of law:

> I am, however, striking down the amendment not on the ground of uncertainties or irreconcilability of the existing provisions with the amended provisions as such, but on the ground of the amendment's irreconcilability with the rule of law, as envisaged in the preamble, and, in furtherance of which, Articles 27, 31,32,44,94 to 116A were particularly incorporated in the Constitution.[52]

Compared to Justice Chowdhury and Justice Rahman, Justice Shahabuddin Ahmed's view on amendment power is more explicit. Justice Shahabuddin was reluctant to accept the amendment power as a constituent power in its primary or original sense. He would rather accept it as derivative constituent power at best:

> As to the 'constituent power', that is power to make a Constitution, it belongs to the people alone. *It is the original power. It is doubtful whether it can be vested in the Parliament, though opinions differ.* People after making a Constitution give the Parliament power to amend it in exercising its legislative power strictly following certain special procedures. … *Even if the 'constituent power' is vested in the Parliament the power is a derivative one* and the mere fact that

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51 Ibid, at ¶ 184 (Justice Badrul Haider Chowdhury).
52 Ibid, at ¶ 523 (Justice M. H. Rahman).

> an amendment has been made in exercise of the derivative constituent power will not automatically make the amendment immune from challenge.[53] (Emphasis supplied)

Justice Badrul Haider Chowdhury's endorsement of amendment power as *derivative constituent power* was picked up by the dissenting judge Justice ATM Afzal. Justice Afzal rejected the argument of one of the lawyers who asked the court to see the parliament's amendment power at par with its *constituted power* of law making:

> It become[s] difficult to agree with him having regard to the views expressed by judges and [J]urists as to the position and quality of a law which is *enacted under the constituent power* of a Parliament *even though it is a derivative power* and [also] the position of Constitutional law, in relation to ordinary law made under ordinary legislative process.[54] (Emphasis supplied)

Concluding the discussion of this part, it appears reasonable to say that the basic structure judgments of both the Indian and Bangladeshi Supreme Courts see amendment powers as *secondary or derivative constituent power* which is higher than the legislature's constituted power of ordinary law making but lower than the peoples' original constituent power of *repealing or replacing* the constitution or altering its essential basic characteristics.

4. Problems of the Basic Structure Doctrine

The doctrine of basic structure drags the judiciary into the constitution amendment process. The judiciaries in South Asia claimed a responsibility to protect the constitutional edifice from the peril of an invincible parliamentary super-majority. The argument is that

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53 Ibid, at ¶ 381 (Justice Shahabuddin Ahmed).
54 Ibid, at ¶ 594 (Justice A.T.M. Afzal).

certain structural pillars of the constitution cannot be dislodged by parliament while amending it.[55] Though *Keshavananda Bharati* is identified as the progenitor of the doctrine, it started shaping up in an earlier case named *Golak Nath v. State of Punjab*.[56] In *Golok Nath* the Indian Supreme Court held that fundamental rights occupy a transcendental position in the Indian constitution and are therefore unamendable.[57] *Keshavananda* elaborated the argument towards all other provisions forming 'basic structure' of the constitution. Justice Khanna held:

> If the Basic Structure is retained, the old Constitution would be considered to be continuing even though other provisions have undergone change. On the contrary if the Basic Structure is changed, mere retention of some articles of the existing Constitution would not warrant a conclusion that the existing Constitution continues or survives.[58]

Golak Nath and *Keshavananda Baharati* were decided at a time when Indira Gandhi, then Prime Minister of India, was "using emergency powers, jailing opposition leaders, curtailing property rights of the elites and moving the country in a sharply socialist direction."[59] Hence the public complacency with the activist zeal of the Indian Supreme Court was understandable. The parliament however reacted sharply and appointed a parliamentary committee to study the new doctrine. It came out with a proposal for an amendment in the constitution that would confirm that parliament's amendment power

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55 J. U. Talukder and M. J. A. Chowdhury, *Determining the Province of Judicial Review: A Re-evaluation of Basic Structure of the Constitution of Bangladesh*, 2(1) Metropolitan University Journal 161, 163 (2008).

56 Golak Nath v. State of Punjab, AIR 1967 SC 1643.

57 Supra 49, at 4-5.

58 Ibid, at 8.

59 E. Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 Columbia Journal of Law and Social Problems 251, 269 (1996).

was unrestrained.[60] Though the 42nd amendment to that affect was passed, it was later held unconstitutional by the Supreme Court using the same basic structure doctrine.[61]

The Supreme Court of Bangladesh adopted the doctrine in 1989 in *Anwar Hossain Chowdhury*.[62] It invalidated the Eighth

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60 Supra 49, at 14-18.

61 Minerva Mills Ltd. and Ors. v. Union of India and Ors, AIR 1980 SC 1789.

62 Though *Anwar Hossain Chowdhury* is hailed as the first case to endorse Basic Structure doctrine, the doctrine was either argued by the parties or invoked by the court, implicitly though, in at least three cases previous cases. First one was in undivided Pakistan - Muhammad Abdul Haque v Fazlul Quader Chowdhury (1963) 15 DLR (Dacca) 355 (Dhaka High Court of undivided Pakistan) and Fazlul Quader Chowdhury v Muhammad Abdul Haque (1966) 18 DLR SC 69 (Federal Supreme Court of undivided Pakistan). In *Fazlul Quader Chowdhury,* Justice Mahboob Morshed of Dacca High Court denounced (and the Pakistan Supreme Court agreed with him) one of President Ayub Khan's orders allowing the ministers to retain their seat in Pakistani legislative assembly. Justice Morshed's view was that the allowing the ministers to be the members of the legislature would violate the separation of power structure of a presidential system – a 'major change' in the constitution (See R. Braibanti, *Pakistan: Constitutional Issues in 1964*, 5:2 *Asian Survey*, 79, 82-83 (1965)). The second case in the series was AKM Fazlul Hoque v. State 26 DLR (1974) (SC) 11 (Federal Supreme Court of undivided Pakistan). In this case the Provisional Constitutional Order (1972) of newly independent Bangladesh was challenged on the ground that the president's law-making power under the 1971 Proclamation of Independence did not extend to the introduction of 'fundamental changes' in the constitutional system. The argument was not however accepted as the Court found the war time Proclamation of Independence granting unlimited legislative authority to the President – the power to "do all other things that may be necessary to give to the people of Bangladesh orderly and just Government" (See M. Kamal, *Bangladesh Constitution: Trends and Issues*, 9 (1st ed., 1994)). The third case implicating a possible basic structure argument was Hamidul Huq Chowdhury v. Bangladesh, (1981) 33 DLR (HCD) 381 (High Court Division of Bangladesh Supreme Court). It was a challenge to the fourth amendment of 1975 which abolished the multi-party democracy and introduced a one-party system instead. Given the subsequent endorsement of some of its features (e.g., presidentialism) and nullification of some other (e.g., one party system) by the fifth amendment of 1979, the court refused to declare the amendment unconstitutional. It however passed an observation that the fourth amendment destroyed some 'basic and essential features' of 1972 constitution and the parliament's authority in doing so was doubtful (See R. Hoque, *Implicit Unamendability in South-Asia: The Core of the case for*

Amendment of 1988 to the constitution which sought to create some out-of-capital circuit benches of the High Court Division of the Supreme Court. The Court was of the opinion that unitary character of the republic was a basic structure of the constitution. Therefore, there could be only one Supreme Court with its sole site in the capital. Popular reaction to the decision was massively favorable.[63] The invalidation of a constitutional amendment passed by a military led government, was seen by all as a victory for judicial independence and activism. Problematic aspects of the doctrine, however, did not get much attention.[64] Unlike the Indian legislature, the parliament of Bangladesh did not question the limitedness of its amendment power. The government reprinted the constitution by omitting the invalidated eighth amendment. Though the opportune moments of political adversity helped both *Keshavananda Bharati* and *Anwar Hossain* become a "*cause celebre*"[65] in the constitutional jurisprudence of both the countries, confusions started appearing soon.

First and foremost, the judiciary got an apparently unlimited authority in defining basic structure which makes the concept an unpredictable and consequently bad. It further provided judges with leeway to introduce their own ideological leanings into constitutional discourse. The fluidity of basic structures allowed the judges to pick

the Basic Structure Doctrine, 3 (Special Issue) Indian Journal of Constitutional and Administrative Law 23, 28 (2018)).

63 K. Ahmed, *The Supreme Court's Power of Judicial Review in Bangladesh: A Critical Evaluation* presented in the Seminar titled 'Celebrate the 40th Anniversary of the Constitution of Bangladesh' on 20 October 2012. available at: http://dx.doi.org/10.2139/ssrn.2595364, accessed on 26/06/2020.

64 For a critical evaluation of the Anwar Hossain Chowdhury v. Bangladesh see R. Chowdhury, *The Doctrine of Basic Structure in Bangladesh: From Calfpath to Matryoshka Dolls*, 14 Bangladesh Journal of Law 33 (2014)*; S.* Khan, *Leviathan and the Supreme Court: An Essay on the 'Basic Structure' Doctrine*, 2 Stamford Journal of Law, 89 (2011).

65 Zakir Hossain and Imtiaz Omar, *Coup d' etat, constitution and legal continuity,* The Daily Star, 8 (Dhaka, 17/09/2005 and 24/09/2005).

and choose provisions that appeared 'basic' and strike down whatever did not.

The Indian Supreme Court in a 1988 case held that the secular character of the Union of India was a basic structure. The case, *S.R. Bommai v. Union of India*[66] concerned the dismissal by the central government of four state governments led by the *Hinduism* based Bharatiya Janata Party (BJP). The action was taken in the context of a communal riot following the destruction of a fourteenth century mosque by the *Hindu* extremists. The Supreme Court upheld the action of the central government on the ground of the BJP led state governments' failure to uphold the 'secular' character of the Republic. Now, if someone in India approaches the Court today for dismissal of a particular government on account of its capitalist policies that contradicts 'socialism' which happens to be another fundamental principle of the Indian constitution[67], the Court might end up in something completely inconsumable. Capitalism and market economy being firmly rooted in Indian economy, a socialism-oriented verdict may be doctrinally right but politically futile.

The Pakistani Supreme Court also made a mess with the doctrine in two of its early 'Pervez Musharraf' cases: *Zafar Ali Shah v. General Parvez Musharraf*[68] and *Wasim Sajjad v. Pakistan*.[69] These related to challenges to the unconstitutional usurpation of power and whimsical changes in the constitution by the then military chief General Parvez Musharraf. Pakistan has a checkered history of military forces capturing the state power and the court succumbing to the dictators. However, the judiciary has been known to reverse this

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66 S.R. Bonmai v. Union of India, (1994) 3 SCC 1.

67 St. Xavier College v. State of Gujarat, AIR 1974 SC 1389. See M. Nelson, *Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion*, 13 Asian Journal of Comparative Law, 333 (2018).

68 Zafar Ali Shah v. General Parvez Musharraf 2000 PLD SC 869.

69 Wasim Sajjad v. Pakistan 2001 PLD SC 233.

position once the military rulers are toppled and political government is established.[70] Though the Pakistani Supreme Court did not endorse the basic structure doctrine as such till then, *Zafar Ali Shah* case upheld the usurpation of power by General Parvez Musharraf and his martial law proclamation order, subject to a condition that Pervez Musharraf could not change the 'salient features' of Pakistan constitution.[71] It appears as if democratic governance was not a salient feature of Pakistani constitution in 1999. Could anything more 'basic' remain while an unconstitutional usurper made the constitution itself subservient to his sweet will?

Later, the Pakistani Supreme Court bypassed an invitation to endorse basic structure doctrine in *Nadeem Ahmed v. Federation of*

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[70] State v. Dosso, 11 DLR (SC) 1 (validating President Eskander Mirza's martial law proclamation in 1956); Asma Jilani v. The Government of Punjab, PLD 1972 SC 139 (Invalidating President Yahya Khan's capture of power after his fall in 1972); Begum Nusrat Bhutto v. Chief of Army Staff, 1977 PLD (SC) 657; Malik Ghulam Jilani v. Province of Punjab, PLD 1979 Lahore 564 (validating President Zia Ul Hoque's martial law and presidency in mid 1970s); Zafar Ali Shah v. General Parvez Musharraf, PLD 2000 SC 869 (validating President Parvez Musharraf's usurpation of power in 1999); Pakistan Lawyer's Forum v. Federation of Pakistan, PLD 2005 SC 71 (validating the seventeenth amendment and his continuance in both presidency and military chief); Iftikhar Muhammad Chaudhry v. Pervez Musharraf, PLD 2010 SC 61 (invalidating Pervez Musharraf's suspension and harassment of Chief Justice Iftikhar Muhammad in March 2007 in the face widespread public protest); Tikka Iqbal Muhammad Khan v. General Pervez Musharraf, PLD 2008 SC 178 (again validating General Musharraf's second declaration of emergency and suspension of constitution in November 2007 under a servile Chief Justice Hameed Dogar); lastly, Sindh High Court Bar Association v. Federation of Pakistan, PLD 2009 SC 879 (decided after the demise of Musharraf presidency, invalidating his November 2007 emergency proclamation and condemning the military coup). For details see T. A. Qureshi, *State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan*, 35(2) North Carolina Journal of International Law and Commercial Regulation, 485 (2009).

[71] S. A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf*, 35(4) *Law & Social Inquiry,* 985 (2010).

Pakistan.[72] In the 2015 decision of *District Bar Association, Rawalpindi v Federation of Pakistan*, [73] it acknowledged some implied limits on amendment power, noting that "certain features mentioned in the Preamble of the Constitution cannot be abrogated".[74] However, it ended up in cherry picking its judicial review power vis-a-vis parliamentary amendment of the constitution[75] and shredding other basics like the peoples' fundamental right to fair trial vis-a-vis the martial law courts.[76]

Examples of cherry picking 'basic structures' are also recorded in Bangladesh. The fifth and sixteenth amendment judgments of the Supreme Court of Bangladesh, so far as they relate to appointment and removal of supreme court judges, are criticized for aggrandizing the independence of judiciary over the principle of separation of power and judicial accountability.[77] Similarly, the thirteenth amendment judgement is criticized for pitching the 'non-representative' character of caretaker governmental irreconcilably against the people's right to free fair and election on the first place.[78]

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72 Nadeem Ahmad v. Federation of Pakistan, *PLD 2010 SC 1165 avoided declaring the eighteenth amendment (judicial appointment commission and parliamentary appointment committee) unconstitutional on the basis of basic structure of independence of judiciary. The amendment was rather was referred to the legislature with some recommendations. Parliament later passed the 19th amendment (See* S. Ijaz, *Judicial Appointments in Pakistan: Coming Full Circle*, 1(1) LUMS Law Journal, 86 (2014)).

73 District Bar Association, Rawalpindi v. Federation of Pakistan PLD 2015 SC 401.

74 Ibid, at 867

75 Ibid, at 858.

76 For a case comment on *District Bar Association Rawalpindi* see W. Mir, *Saying Not What the Constitution is … But What It Should be: Comment on the Judgment on the 18th and 21st Amendments to the Constitution*, 2 LUMS Law Journal 64, 69 (2015).

77 M J. A. Chowdhury and N. K. Saha, *Advocate Asaduzzaman Siddiqui v. Bangladesh: Bangladesh's Dilemma with Judges' Impeachment,* 3 Comparative Constitutional and Administrative Law Quarterly, 7 (2017).

78 R. Hoque, *Judicialization of Politics in Bangladesh: Pragmatism, Legitimacy and Consequences*, 261, 287 in *Unstable Constitutionalism* (Mark V. Tushnet and Madhav Khosla, 2015).

Secondly, constitution being a document of fundamental importance, it appears extremely difficult, if not impossible, to classify several provisions of the constitution as basic and some others as peripheral. Hence the list of 'basic structures' is an ever-expanding one. In *Anwar Hossain Chowdhury* itself, Justice Shahabuddin Ahmed gave a list of seven basic features.[79] Justice Mohammad Habibur Rahman added another one to the list.[80] Justice Badrul Haider Chowdhury felt that there were twenty-one 'unique features' in the constitution out of which 'some' were basic.[81]

Thirdly, the judicially imported immutability in the constitution was apparently against the intention of the framers of Indian, Bangladeshi and Pakistani constitutions. The framers intended an amendable constitution by all means. Nothing more than a qualified majority in the floor was required by the 1950 constitution of India,[82] 1972 constitution of Bangladesh[83] and 1973 constitution of Pakistan.[84] No substantive limits whatever was placed on the amendment power of parliament.[85] Moreover, it was never explained how the court could assume for itself a constituent power which was not vested in it. In *District Bar Association, Rawalpindi v Federation of Pakistan* The Pakistani

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79 Supra 19, at ¶ 416 (Justice Shahabuddin Ahmed enlisted Supremacy of the Constitution as the solemn expression of the people, Democracy, Republican Government, Unitary State, Separation of Powers, Independence of the Judiciary and Fundamental Rights as basic structures of Bangladesh constitution).

80 Ibid, at ¶ 496 (Justice Habibur Rahman added The Preamble to the list).

81 Ibid, at ¶ 292.

82 Art. 368, the Constitution of India requires either simple majority or special majority in the floor of the central parliament (Lok Sabha) or special majority in the central parliament coupled with ratification in required number of state legislatures.

83 Art. 142, Bangladesh Constitution requires a two-thirds majority in the floor of the House.

84 Art. 239, Pakistan Constitution vested a shared responsibility on each House of the central legislature (subject to two-thirds majority requirement in both the houses) and the provincial legislatures (simple majority or two-thirds majority in suitable cases).

85 Supra 49, at 14-15.

supreme court quite extra-ordinarily held that the judicial review of constitutional amendment is an inherent privilege of the judiciary but at the same time simply overlooked the fact that the Pakistani constitution clearly bars such judicial review on "on *any* ground whatsoever".[86]

Fourthly, the institutional consideration is even more problematic. The doctrine of 'basic structure' arguably enables the judiciary to have a final say over the parliamentary amendment power. In one sense, the Bangladeshi version of the doctrine was more extreme than the Indian one. While the Indian constitution could be amended by the parliament alone, the Bangladeshi constitution, on the other hand, could be amended either by parliament acting in itself or by parliament acting in conjunction with popular referendum. The Supreme Court of Bangladesh in 1989 did not note this distinctive process of amendment. It simply held that basic structure could not be destroyed. Had the Eighth Amendment been passed through a popular referendum, could the Supreme Court have placed itself above the people – the ultimate sovereign in the Republic and declare the amendment invalid?

Fifthly, it is questionable as to whether a mere likelihood of parliamentary abuse of amendment power may serve as an excuse for introducing judicial review.[87] The Sixteenth Amendment judgement in Bangladesh shows that the Supreme Court may, in fact, venture this path and invalidate an amendment on a suspicion that judges may be harassed by the parliamentarians sitting over their appointment and removal.[88] What happens, if the judiciary, as an institution, transgresses

86 Pakistan Constitution, Art. 239(5).
87 Supra 59, at 267-68.
88 Supra 77.

its limit and starts abusing the power?[89] How could the legislature and populace check counter-majoritarian body acting in unison? Vulnerabilities of democracies like Bangladesh to their own representatives[90] does not seem to offer a strong justification of 'basic structure' in the way it is preached by their judiciaries. These and other considerations have led even some pro-basic structure scholars to concede the 'minimal legitimacy'[91] of the doctrine and argue for scarce and limited application of the doctrine.[92]

5. A Place for Constitutional Referendum

As the discussion so far suggests, the doctrine of basic structure also faces charges of both judicial usurpation and uncertainty over its contents. This part will show that the unamendability doctrine also is full of uncertainties on the reach and breadth of the legislature's amendment power. Both the devices, unless very delicately articulated, are likely to clog the inter-generational adaptability of constitutions. It is argued that installation of a referendum requirement within the amendment process might answer many of the concerns involved with these doctrines.

5.1 The Institutional Issues

As suggested earlier, the eternity clause (article 7B) of Bangladesh offers almost no solution to institutional question posed above. It purports to entrench the core constitutional provisions by taking them away from the clutch of a super majority in parliament.

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89 R. Stith, *Unconstitutional Constitutional Amendments: The extraordinary power of Nepal's Supreme Court*, 11 American University Journal of International Law and Policy, 47, 73 (1996).

90 Anuranjan Sethi, *Basic Structure Doctrine: Some Reflections*, 41 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=835165, last seen on 10/07/2020.

91 S. Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine,* xxxii (1st ed., 2009).

92 R. Dixon and D. Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment,* 13(3) International Journal of Constitutional Law, 606, 623 (2015).

Yet it leaves open a scope for the judiciary to meddle in the process. In contrast, the referendum provision under the Fifth Amendment of 1979 had answers to these institutional conflicts. A similar system of combined legislative and popular action works well in Japan where a two-thirds majority of the House of Representatives and House of Councilors of the National Diet initiates and passes an amendment. It is then submitted to the people in a referendum or special election. People ratify or reject the amendment by a simple majority.[93] Bangladesh's Fifth Amendment mechanism involved a similar process except that the referendum would apply only to the amendments of selected provisions.

This provision, if kept in operation, would have solved the institutional questions in two different ways. First, the four corners of the legislature's amendment power would have been drawn more clearly. Second, much of the democratic deficit of judicial review would have been addressed. For the reasons discussed below, mere parliamentary amendments effected through two-thirds majority could be judicially reviewed, while amendments effected through the referendum may be put outside the ambit of judicial review.

5.2 Demarcation of the Amendment Power

As discussed earlier, much of the debate on the nature and limits of amendment power has been narrowed down by Roznai who accepted it as a constituent power but conditioned it with a theory of delegation and a principal-agent relationship between the original constituent power *i.e.,* the revolutionary authority or the people and the secondary constituent power, *i.e.,* the parliament. Roznai's amendment theories may be shaped into a Triple Floor Model of constituent and constituted power shown in the diagram below:

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93 Supra 59, at 257.

Now, if we consider the structure of the constitution of Bangladesh, it appears that the constitution recognizes a meta-distinction between constituent power of amendment and constituted power of legislation. It treats the secondary or derivative constituent power of amendment differently from the plenary legislative power. The power of amendment in Article 142 is not articulated in the Part V of the constitution that deals with composition, plenary legislative powers (Article 65) and functions of the Parliament. Thus, the distinction between constituent and constituted power being agreed upon, we get the lowest floor and the upper floor demarcated.

Now, Article 142 uncoupled with a referendum clause will remain uninformed of the possible distinction between the top two floors of the proposed Triple Floor Model. If the amendment power is sweepingly claimed as a constituent power, as the government lawyers in the eighth amendment case did,[94] the ground reality would become unexplainable. The Supreme Court of Bangladesh has time and again refused the claim of sole and pervasive 'constituent' amendment power. Like *Anwar Hossain Chowdhury,* a series of precedents have held that the amendment power is 'inherently' limited.[95] The Supreme Court did not offer any explanation as to how and from where these inherent limitations flow. All it offered is a

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94 Supra 19, at ¶¶ 553-54 (argument by Barrister M. Amir Ul Islam and Barrister Syed Ishtiaq Ahmed).

95 Ibid, at ¶ 603 (Justice A.T.M. Afzal).

justification based on the constitutional supremacy clause.[96] According to this view, unlimited power of amendment would turn Bangladesh into a British like parliamentary supremacy which was never contemplated by the framers. It appears that such a literal reading of the constitutional supremacy clause would suppress the exercise of the peoples' sovereign authority in deciding the nation's political course. Constitutions are supreme because they reflect the will of the people. If the popular will cannot be injected in the constitution through amendments, since there is no other way of doing this, the Supreme Court and its basic structure doctrine would stand between the people and a change they are looking for. This would lead the Republic towards a judicial supremacy or 'government by the court'.[97] Definitely, that was also was not contemplated by the framers.

Given the situation, if we introduce a referendum in the amendment process, amendments get separated into two distinct classes. Amendments of fundamental or basic principles made through referendum would directly involve the original or primary constituent authority – the people.[98] Referendum-based amendments would

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[96] Article 7 of the Constitution of Bangladesh embodies the constitutional supremacy clause in following terms: '(1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution and other law shall, to the extent of the inconsistency, be void.'

[97] Imtiaz Omar and Zakir Hossain, *Constitutionalism, parliamentary supremacy, and judicial review: A short rejoinder to Hoque*, The Daily Star 12 (Dhaka, 26/11/2005).

[98] While commenting on Article 7B of Bangladesh constitution, Roaznai argues: "Limitations upon the delegated secondary constituent power can solely be imposed by the higher authority from which it is derived – the primary constituent power. Unamendable amendments may lose their validity when they face a conflicting valid norm that was formulated by the same authority. Accordingly, provisions created by the amendment power could subsequently be amended by the amendment power itself. Because both amendments are issued by a similar hierarchical authority, their conflict is governed by the principle of *lex posterior derogat priori*. Therefore, I claimed that an 'implicit limit' exists,

possess the necessary authority to make all sorts of fundamental changes in the constitution including permanent entrenchments of basic structures. On the other hand, amendments made through a two-thirds majority would mark a secondary or derivative constituent power and be subject to the principal-client relationship with the original constituent power. Now, the upper two ceilings of the Triple Floor Model become clear.

5.3 Boundaries of Judicial Review

Institutional issues with judicial reviews are more complex. While judicial review of laws passed by parliament is marked as a precursor of constitutional supremacy, judicial review of the constitutional amendments is seen with both "reverence and suspicion".[99] The typical arguments disputing the judicial review of constitutional amendment are twofold. First, judiciary should protect the Constitution as it is and check that ordinary laws do not violate the Constitution as it is. It should not define how the Constitution should or should not be.[100] If the court ventures this path, it would amount to a judicial supremacy or government by the court. Secondly, constitutional amendments being matters of political choice, the judiciary should remain disinterested in them.[101]

according to which a constitutional amendment cannot establish its own unamendability. Accordingly, two possible solutions exist: attempting to get the approval of the the people " to such a constitutional amendment, for example, through a national referendum (after its formal enactment in Parliament), which would provide a legitimation elevator to such unamendability in a "constitutional moment". Alternatively, and perhaps more practically, such an amendment can simply be regarded not as constitutive but as declarative of an already limited legal power" (See *Interview of Yaniv Roznai*, 2 Indian Journal of Constitutional and Administrative Law, 129, 132-3 (2018)).

99 M. Kamal, *Bangladesh Constitution: Trends and Issues*, 139 (1st ed., 1994).

100 Supra 55, at 161, 165.

101 Supra 97.

The Supreme Court, however, has rejected these arguments. In the context of the volatility of Bangladesh politics, it is argued that the notion of constitutional supremacy requires its extra-ordinary entrenchment. The requirement of two thirds majority is just one of the many other ways to ensure this. The judiciary as a "guardian of the constitution"[102] should have a say in this process of constitutional amendment. Some believe that this argument is extremely relevant in the intensely politicized environment of Bangladesh. Once elected, it has been argued that the parliamentarians do not acquire a blanket power, to do everything they wish until they are de-elected in the next election.[103] Just as Ely seeks judicial intervention to rescue the "discreet and insular minority" that is often systematically sidelined by the political process,[104] the Supreme Court of Bangladesh here seems to have a role in rescuing the constitution from viciousness of politics. Absent judicial involvement in the process, the constitution runs the risk of being a plaything in the hands of the party ridden parliament leading towards an unguarded parliamentary supremacy.[105]

The next argument for judicial review of constitutional amendments seeks to refute the political question argument. Amendments do have political motives. However, is this also not the case with almost every law passed by the parliament? Does law-making by a particular ruling party not reflect its political ideology and convenience? So, if political question is not evoked to refute judicial review of ordinary laws, why should it be preached for the constitutional amendments? With a concept of limited government in

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102 Secretary of Ministry of Finance v. Masder Hossain, (2000) 20 BLD (AD) 104 (Appellate Division of Bangladesh Supreme Court).

103 R. Hoque, *On coup d' etat, constitutionalism, and the need to break the subtle bondage with alien legal thought: A reply to Omar and Hossain*, The Daily Star 11 (Dhaka, 29/10/2005).

104 G. R. Stone, *Constitutional Law*, 524 (2nd ed., 2009), quoting J. H. Ely, *Democracy and Distrust* (1st ed., 1980).

105 Ibid at 525.

place, none can transgress this limit by hiding under a cloak of political question.[106] The Appellate Division of the Bangladesh Supreme Court had earlier rejected the political question doctrine straightforwardly when it remarked:

> There is no magic in the phrase 'political question'. While maintaining judicial restraint the Court is the ultimate arbiter in deciding whether it is appropriate in a particular case to take upon itself the task of undertaking a pronouncement on an issue which may be dubbed as a political question.[107]

In fact, judicial review of constitutional amendments has already become an accepted norm in Bangladesh. The Supreme Court has adjudged the validity of the Fifth Amendment in *Bangladesh Italian Marble Works Ltd,*[108] Seventh Amendment in *Siddik Ahmed Chowdhury v. Bangladesh,*[109] part of the Eighth Amendment in *Anwar Hossain Chowdhury v. Bangladesh,*[110] *and* Thirteenth Amendment in *Abdul Mannan Khan v Bangladesh*,[111] Tenth Amendment in *Dr. Ahmed Hossain v.*

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106 M. Islam, *Constitutional Law of Bangladesh*, 456 (4th ed., 2012).

107 Special Reference No 1 of 1995 (1995) 47 DLR (AD) 111 (Appellate Division of Bangladesh Supreme Court).

108 Bangladesh Italian Marble Works Ltd v. Bangladesh 14 (2006) BLT (Spl) (HCD) 1 (High Court Division of Bangladesh Supreme Court) and Khandker Delwar v. Bangladesh Italian MW 15 MLR (AD) 1 (Appellate Division of Bangladesh Supreme Court).

109 Writ Petition No 696 of 2010 before the High Court Division of Bangladesh Supreme Court. Full Text of the Judgment available at www.supremecourt.gov.bd, last seen on 19/04/2018.

110 Supra 19, at ¶ 78.

111 Abdul Mannan Khan v. Bangladesh 64 DLR (AD)(2012) 1007 (Appellate Division of Bangladesh Supreme Court); Mashihur Rahman v. Bangladesh (1997) 17 BLD (HCD) 55 (High Court Division of Bangladesh Supreme Court) and M Saleem Ullah v. Bangladesh (2005) 57 DLR (HCD) 171 (High Court Division of Bangladesh Supreme Court).

Bangladesh[112] and *Fazle Rabbi v. Election Commission*,[113] part of the Fourteenth Amendment in *Farida Akter v. Bangladesh*[114] and lastly, the Sixteenth Amendment in *Bangladesh and Others v Advocate Asaduzzaman Sidddiqui.*[115] Though most of these judicial review decisions have been hailed, the courts in Fifth, Seventh, Thirteenth and Sixteenth amendment cases, involving fundamental and policy changes in the constitution, have been accused of adventurously meddling into the political process.[116]

While a constitutional supremacy-based argument is offered and taken for granted in all of the above exercises, the charges of democratic deficit and counter-majoritarian usurpation by the court never received serious attention from the Court. Judicial non-consideration of an issue, however, should not mean that it is dead. The democratic deficit in judicial decision-making is bound to be an issue of constant relevance and an initiative towards perpetual entrenchment of constitutional provisions cannot ignore the phenomenon. While advocates of Basic Structure like Krishnaswamy invite us to consider the 'overall moral, political and sociological legitimacy'[117] of basic structure doctrine - which he claims the doctrine has attained over the years of Indian legal history,[118] he concedes that 'sociological legitimacy' of the doctrine would flow from its potential

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112 Dr. Ahmed Hossain v. Bangladesh (1992) 44 DLR (AD) 109 (Appellate Division of Bangladesh Supreme Court).

113 Fazle Rabbi v. Election Commission (1992) 44 DLR (HCD) 14 (High Court Division of Bangladesh Supreme Court).

114 Farida Akter v. Bangladesh (2006) 11 MLR (AD) 237 (Appellate Division of Bangladesh Supreme Court).

115 Bangladesh and others v. Advocate Asaduzzaman Siddqui (2017) CLR (Spl) 1 (High Court Division of Bangladesh Supreme Court); Advocate Asaduzzaman Siddiqui v. Bangladesh and others, 2012, 41 CLC (HCD) (High Court Division of Bangladesh Supreme Court).

116 R. Hoque, *Can the Court Invalidate an Original Provision of the Constitution?*, 2(2) University of Asia Pacific Journal of Law & Policy, 13 (2016).

117 Supra 91, at 165.

118 Ibid, at 223-227.

to enhance "the degree of political participation in radical expansive constitutional change by requiring a higher level of deliberative decision-making to support such constitutional amendment".[119] It appears that, in a clientelist political system like Bangladesh,[120] a brute parliamentary majority is less likely to deliberate an amendment more rigorously in anticipation of possible judicial nullification of such amendment. Instead, the Triple Floor Model proposed in this paper would be more within the socio-political reality here. Amendments made by referendum, being the exercise of original constituent power, stay above judicial review.[121] On the other hand, amendments made by parliament being the exercise of derivative constituent power, the courts must see whether or not the principal-agent trusteeship has been respected. This formulation would explain and justify the previous judgments of Bangladesh Supreme Court except the ones on the Fifth, Seventh and Thirteenth amendments.

5.4 Delimiting the breadth of 'basic structures'

While there is no denying of the existence of certain fundamental and basic principles in the constitution, a certainty about the list of such basics will solve the problem of ambiguity. The legislature and judiciary may also be relieved of the duty of second guessing the basics.[122] The textual entrenchment of specific basic structures through referendum would possess "more institutional

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119 Ibid, at 228.

120 M. M. Islam, *The Toxic Politics of Bangladesh: A Bipolar Competitive Neopatrimonial State?*, 21(2) Asian Journal of Political Science, 148-168 (2013).

121 Supra 34, at 175. "[T]he more an amendment process contains inclusive and deliberative democratic mechanisms, the more closely it resembles 'the people's' primary constituent power. Congruently, since primary constituent power is by its nature unlimited, popular secondary powers, which present a fuller – while still limited – presence of the people's sovereignty, should be allowed greater latitude when it comes to constitutional changes."

122 P.B. Mehta, *India's Living Constitution: Ideas, Practices and Controversies,* 105, 110 in *The inner conflict of constitutionalism: Judicial review and the Basic Structure* (E. Sridharan, 1st ed., 2002).

legitimacy than would be the case for implicit substantive constraints announced by the judiciary."[123] As mentioned in Part II of this paper, the Fifteenth Amendment of 2011 provides a textually settled list of basic structures but keeps it open by inserting a vague reference to other basic structures at the end. Revival of the referendum clause in Article 142 and omission of the broad eternity clause in article 7B would solve the dilemma significantly.

5.5 Elimination of the 'Dead Hand'

Installation of the system of referendum would serve another important purpose. Both the entrenched unamendable rule and a judicially articulated doctrine of basic structure have a common problem of dead hand and perpetual fixation. Constitutions then become a "stale and hollow"[124] instrument. Now, if the task of enlisting the basic structures is left to the political opinion of the people expressed through referendum and not to the legislators and judges, it can probably offer a better and practical solution to the dead hand problem. The initial entrenchment list shall not foreclose the list of basics. If any new basic structure emerges in future, a legislative amendment along with a popular referendum shall add that new provision in the entrenchment list. Any basic structure provision becoming redundant later on will likewise be deleted from the list.

While politics remain the most influential arbiter of public opinion, the characteristic restlessness of Bangladeshi politics remains a concern here as well. The public opinion may be tailored through populist regimes to propose and successfully pass frequent referendums. The common-sense trend of politics, however, does not lend much support for the proposition that fundamental changes in

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123 M Galston, *Theocracy in America: Should Core First Amendment Values Be Permanent?,* 37 Hastings Constitutional Law Quarterly, 65, 121 (2009).

124 Shamima Sultana Seema v. Bangladesh (2005) 57 DLR (HCD) 201 (High Court Division of the Supreme Court of Bangladesh), ¶ 108 (Justice A.B.M. Khairul Huq).

the constitution through popular amendment will be as frequent as the regular changes effected through parliamentary two-thirds majority-based amendment process.[125]

6. Problems of Referendum

Referendum being pressed as viable alternative in the eternity clause and basic structure dilemma, the question for consideration now is - to what extent and how would referendums deliver in terms of democratic legitimacy? While referendum has been a very useful contemporary tool of deliberative democracy in modern day constitutional processes, there are questions about the quality of the process followed, the actual deliberation that follows it, and level of understanding the citizens have on the critical constitutional issues involved. The referendum system that was devised for Bangladesh in 1979 was a post legislative formality where a question would be put to universal suffrage as to whether people would agree to the parliamentary amendment made or not. Roznai has rightly termed it as "a mere acclamation – a soccer-stadium democracy".[126]

Understandably, the aye or nay type participation that was introduced by the military rulers in 1979 was a manifestation of the acclamatory constitution-making technique followed by the military dictators of erstwhile undivided Pakistan.[127] While the referendum clause in the fifth amendment was about constitutional changes, Bangladesh had experienced two referenda arranged for the purpose of legitimizing the military coup of General Ziaur Rahman (1977) and General Ershad (1985). With exceptionally high voter turn-out, above

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[125] In this regard, Professor Bruce Ackerman's thesis on 'fundamental moments of constitutional change' in the U.S. context might offer an interesting insight to the proposition that overwhelming popular consensus is infrequent and hard to come by (See B. Ackerman, *We the People: Volume 1: Foundations*, 40-50 (1st ed., 1991)).

[126] *Interview of Yaniv Roznai*, 2 Indian Journal of Constitutional and Administrative Law, 129, 133 (2018).

[127] M Jashim Ali Chowdhury, *Pre-emptive(!) hartal: Ill-legal if not illegal*, The Daily Star 12 (Dhaka, 29/05/2010).

85 percent in both cases, those opposition less referenda resulted in more than 90 percent support for the military rulers.[128] It has been a lived experience of the Asian continent that referendum is used by the rogue rulers as a manipulative tool more convenient than a competitive election.[129] Keeping Bangladesh's consistent problem with electioneering in mind,[130] any proposal for electoral participation of the people in the democratic process must be well articulated beyond a one-time participation over a craftily devised referendum question. A meaningful participation of the people would therefore require an engagement before, during and after the formal amendment process.[131] In this scenario, the 1979 formula of post legislative referendum could be seen as one of the, and not the only, important instrument of public participation in the process. For the amendment of constitutionally entrenched basic structures, such as those agreed upon in the twelfth amendment or even some found in the current article 7B eternity clause, special mechanisms like calling of constitutional convention may supplement the post legislative referendum method. Recommendation for introduction of such supplementary devices within the amendment process may be justified in terms of Albert's "escalating structure" framework whereby the deadlocks of codified

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128 T. B. Smith, *Referendum Politics in Asia*, 26(7) Asian Survey, 793 (1986).

129 M. Rashiduzzaman, *Bangladesh in 1977: Dilemmas of the Military Rulers,* 18(2) *Asian Survey*, 126 (1978); *S. Ali and S. Kamaluddin*, *Bangladesh: A Margin of Surprise*, 128 *Far Eastern Economic Review*, 20 (1985).

130 N. Ahmed, *Non-Party Caretaker Governments and Parliamentary Elections in Bangladesh: Panacea or Pandora's Box?*; 11(1) South Asian Survey, 49 (2004); A. S. Hoque and M. A. Hakim, *Elections in Bangladesh: Tools of Legitimacy,* 19(4) Asian Affairs: An American Review, 248 (1993); M. J. Ali Chowdhury, *Elections in Democratic Bangladesh,* in *Unstable Constitutionalism,* 192 (Mark V. Tushnet and Madhav Khosla, 2015).

131 Y. Roznai, *"We the People", "Oui, the People", and the Collective Body: Perceptions of Constituent Power*, 295-316 in *Comparative Constitutional Theory Research Handbooks in Comparative Constitutional Law series* (Gary Jacobsohn and Miguel Schor, 1st ed, 2018).

unamendability is sought to be overcome by ensuring an escalated rigidity in the amendment process.[132]

Within the referendum process itself, Tierney has argued for introduction of plural modes and multiple stages of deliberation within the referendum process so that referendums do not fail to foster meaningful participation.[133] Tierney seeks to see the referendum as comprising a series of three stages (initiation, issue framing and deliberation generated at the campaign stage) and envisaging two theatres for deliberation (micro level and macro level).

A 'deliberative referendum' could be deliberated at the micro level (expert level) by checking the populist reasoning through considered reasoning of constitutional experts and jurists in bodies specially designated towards that end.[134] A special consultative authority given to the Swiss Federal Assembly in initiating referendum might be a good example to look at.[135] Again at the macro level, the desired level of deliberation might be achieved through rules like fixation of a minimum lowest percentage of voter turn-out in the referendum beyond the support of merely 50 per cent plus 1 of those who turn out to vote.[136]

As regards the generation of informed and enlightened public deliberation, there might be several ways like vesting the electoral responsibility in an independent commission, introducing public information campaigns for better informing the voters about the options and issues at hand. The 2011 experiment of online public drafting of the referendum question, whereby an earlier draft of the

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132 Supra 6, at 201-202.

133 S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation*, 185-225 (1st ed., 2012).

134 Ibid, at 226-259.

135 Art. 139(5), the Swiss Constitution (As per the art. 139(5), the Federal Assembly has the power to react to any popular initiative for referendum by issuing a recommendation or a counter proposal over the issue at hand).

136 Supra 133, at 260-283.

referendum question was put in an online consultation process, in Iceland might provide a good example to look at.[137]

7. Conclusion

The constitutional supremacy clause of the Constitution of Bangladesh is, in essence, a popular sovereignty clause. It makes the Constitution a "solemn expression of the will of the people" and "the supreme law of the Republic." It is therefore quite logical that all the sovereign organs - Parliamentary, Judicial or Executive – must give way to the supremacy of the people. The Referendum-based entrenchment suggested in this paper is better served to give expression to the will of the people. There is a need to guard constitutional coherence from both the day to day scratches of political rivalry, hence judicial review of constitutional amendments cannot be rejected outright. Again, the need for inter-generational adaptability of the foundational pillars of constitution requires that both codified and interpretative unamendability to be discouraged. The system of referendum has the potential of achieving all these together. While the referendum has some problems of its own, it is suggested that it might be accompanied by other devices, such as within a broader 'escalating structure' of amendment process.

Interestingly, support for the referendum-based amendment process can be found in *Anwar Hossain Chowdhury* itself. Mohmmad Habibur Rahman J, one of the occurring judges in the case, stood in a marked contrast to the other judges.[138] He agreed in the result of the case but offered a unique reasoning. He did not claim a permanent immutability for the so-called basic structures but rather asserted that the Parliament cannot *'by itself* impair or destroy the fundamental aim of our society.'[139] This impliedly leads us to the system of referendum.

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137 H. L. Kong, *Deliberative Constitutional Amendments*, 41 Queen's Law Journal,105, 142 (2015).

138 Supra 99, at 109.

139 Supra 19, at ¶ 496.

After all, 'fixation' of constitutional norms will not guarantee its ultimate survival unless it accommodates a breathing space for public opinion and sentiment and intergenerational adaptability. Quite opposite to the popular truism, a constitution's survival has been empirically linked more to its flexibility than to its rigidity.[140]

[140] Z. Elkins, T. Ginsburg and J. Melton, *The Endurance of National Constitutions,* 99-103 (1st ed., 2009).

THE MOVEMENT AGAINST CRIMINAL DEFAMATION: LESSONS FOR A POSTCOLONIAL INDIA

*Devashri Mishra & Muskan Arora**

Abstract

This paper seeks to consolidate tools in the form of uncanvassed constitutional arguments that must be considered by the Supreme Court in a challenge to the law of the criminal defamation, as they ought to have been in Subramanian Swamy v. Union of India. We move past anecdotal accounts of the colonial origins of this law to examine its history, and intent, as well as its presence in modern India as the 'afterlife of colonialism'. Viewing it, thus, from a postcolonial standpoint, we critically examine case laws, which prove mainstream arguments of this law being misused by the political and corporate elite, replicating structures of oppression reminiscent of the colonial era. This sets up the case for another challenge to this law, which we argue, if it follows modern constitutional jurisprudence, should be struck down for falling foul of the standard of a 'reasonable restriction' under Article 19(2). To prove this, the primary tool that we propose the Court must take up is the proportionality review, a test arguably befitting the role envisaged for the Court according to the Constitution of India. A comparative analysis to this effect draws from Kenya, Lesotho and Zimbabwe, countries socio-legally

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comparable to India, which are adapting to stricter judicial review. Using primarily the proportionality review as well as constitutional values that India's jurisprudence espouses, we criticise the Swamy judgment to finally advocate that defamation must be solely a civil offence.

Keywords: Criminal defamation, proportionality, Subramaniam Swamy v. Union of India, reasonable restriction, post-colonial India

1. Introduction

The law on criminal defamation has subsisted on the statute books of India since its first inclusion by the British during the colonial era. The criminal defamation provisions, namely, Sections 499 and 500 of the Indian Penal Code, 1872, ("IPC") are comprehensive provisions, which make it punishable to communicate any imputations regarding a person, while having intent to harm or having good reason to believe will result in harm, to the reputation of the said person. Section 499 provides four explanations and nine exceptions to the definition of criminal defamation, covering the categories of persons, who can be said to be defamed, the manner in which defamation can take place, as well as the exceptions to the application of this law.[1] The crime of defamation is punishable with two years of imprisonment, or fine, or both.[2] As is known, Article 19(1)(a) of the Constitution of India, 1950 ("Indian Constitution") provides citizens of India with the right to freedom of speech and expression, circumscribed by the exceptions provided in Article 19(2) which enumerates 'defamation' as one such exception.[3]

Criminal defamation is not unique to India, and as will be discussed in this paper, it has been found on the statute books of many countries and continues to be in active use. However, the

1 S. 499 & 500, The Indian Penal Code, 1869.
2 S. 500, The Indian Penal Code, 1869.
3 Art. 19, the Constitution of India.

normalisation of the use of this law as a political and corporate tool in oppressive settings, as well as the principle level acceptance of imprisonment for defamation have been continually challenged.[4] India has not been an exception to this; the Supreme Court faced a challenge to the constitutionality of the criminalisation of defamation in 2016, which was rejected by a two-judge bench.[5] However, criticism of the judgment followed, based on a number of arguments put forth by scholars, lawyers, members of the political class, media professionals, and civil society alike.[6] These criticisms emerged from various conclusions of the Court, ranging from the overbreadth of the rights read into Article 21 including the right to reputation, the erosion of the public/private divide and the chilling effect on free speech. This paper will also canvas some of these criticisms but will frame them argumentatively within a framework of postcolonial transformative constitutionalism. The larger objective will be to underscore arguments and tools to be used in a future challenge to this provision before a larger bench, and therefore this paper will avoid reiterating earlier arguments. As argued by Pratap Bhanu Mehta,[7] the judgment

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4 Infra, discussion in Part III.

5 Subramanian Swamy v. Union of India, AIR 2016 SC 2728.

6 See for eg., B. Acharya,, *Criminal Defamation & the Supreme Court's Loss of Reputation*, The Wire (14/05/16) available at https://thewire.in/law/criminal-defamation-and-the-supreme-courts-loss-of-reputation, last seen on 23/05/20; V. Bhandari, *Defamation: where the Supreme Court got it wrong*, Caravan, (22/05/16), available at https://caravanmagazine.in/vantage/defamation-supreme-court-got-wrong, last seen on 23/05/20; Internet Democracy Project, *Unshackling expression: A study on laws criminalising expression online in Asia,* available at https://internetdemocracy.in/reports/unshackling-expression-a-study-on-laws-criminalising-expression-online-in-asia/, last seen on 23/05/20; Gautam Bhatia, *The Supreme Court's Criminal Defamation Judgment: Glaringly Flawed,* Indian Constitutional Law & Philosophy, available at https://indconlawphil.wordpress.com/2016/05/13/the-supreme-courts-criminal-defamation-judgment-glaringly-flawed/, last seen on 23/05/20.

7 P. B. Mehta, *Supreme Court's judgment on criminal defamation is the latest illustration of a syndrome*, Indian Express (18/05/16),

upholding constitutionality of Sections 499, and 500 of the IPC and Section 199 of the Criminal Procedure Code, 1973 ("CrPC"), is indicative of larger trends and flaws in legal theory, which must be addressed comprehensively so as to challenge the prevailing culture of silencing debate and dissent.[8]

Recently, while quashing a criminal defamation suit, Justice GR Swaminathan of the Madras High Court recorded his observations on this law, stating that "it is a matter of record that criminal defamation proceedings have become a tool of intimidation [...] before corporate bodies and powerful politicians whose pockets are tunnel deep."[9] One of the infamous recent uses of this law has been the complaint filed by editor and former Minister of State for External Affairs, MJ Akbar against Priya Ramani, his former employee, for making allegations of sexual harassment against him in the context of the #MeToo movement.[10] This has been amid various other cases filed using this law, usually by the political class against other political leaders, or against the media, or those placed disadvantageously in the society, as will be discussed in this paper.

In this paper, we examine political discourse as the ultimate victim of the weaponisation of criminal defamation. The nature of legal action faced by the press is distinct from that faced by the political class, the latter is often engaged in a tussle of sorts with each other,[11] whereas almost all politicians uniformly launch attacks on the press unilaterally. Although this misuse of the law leads to persistent

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https://indianexpress.com/article/opinion/columns/supreme-court-criminal-defamation-law-subramanian-swamy-2805867/, last seen on 20/05/20.

8 S. 199, Code of Criminal Procedure, 1973.

9 Sandhya Ravishankar v. V.V Minerals Pvt Ltd, Crl MP(MD) 4493 & 4494 of 2016.

10 *MJ Akbar's criminal defamation case against journalist Priya Ramani to be heard tomorrow*, Indian Express (17/10/18), available at https://indianexpress.com/article/india/metoo-mj-akbar-defamation-case-priya-ramani-5406367/, last seen on 15/05/20.

11 Arvind Kejriwal v. Arun Jaitley, Crl.M.C. 2417/2016.

discourse on this 'Victorian-era law' and its colonial origins, which have no place in India, there is little discourse on its antecedents and records of its usage to indicate a pattern of misuse. This paper seeks to examine cases decided in this context by the Indian judiciary, including the Swamy judgment, and compare these with our findings from African jurisprudence.

Our arguments are framed in a liberal approach to free speech theories but will consistently approach the application of these theories with the challenges posed by a postcolonial Indian context, now in the midst of recognising its origins of transformative constitutionalism. Thus, by taking a comparative perspective, we will compare the Court's decision in Swamy with landmark decisions from the pan-African movement towards decriminalisation. The central argument, therefore, is that a constitutional challenge to this law to be situated in the postcolonial transformative origins of the Indian Constitution, requiring the Court to engage on a higher standard of review with the issue, as done also in the comparator jurisdictions. We argue, then, that the criminal provisions must be struck down for want of constitutionality, and defamation must be solely a civil offense. The tools that must be employed in a future challenge to the law are derived from comparative law, as well from the Constitution and its origins itself, which have been overlooked in the Swamy judgment by our estimation. The primary among these is the argument for the *correct* use of the proportionality review.

Part 2 contains two sub-chapters. The first will trace the history of the provision to its colonial origins and will provide background to these laws in the purposes it sought to meet. The second will create a history of case laws deciding criminal defamation in modern India, which can establish the aforementioned pattern of suppression of dissent. In doing so, our argument will be that the law is misused and replicates structures of oppression reminiscent of the colonial era, lending proof to the constant refrain against the law. Part 3 will entail a thorough examination of the Swamy judgment and its shortcomings,

as per scholarly analysis and setting up the deficiencies, which necessitate learning from the comparison in the following parts. The first sub-chapter will address omissions whereas the second will check for consistencies in the rationale. It will also test the judgment against domestic jurisprudence and precedents, as well as the relevant constitutional provisions. Infusing a transformative constitutional approach to this issue, the analysis will be supplemented by a social analysis of reputation, one of the rights emphasised in the verdict, but not adequately defined.

Part 4 will explain the reasons for comparability among nations posed similarly in a modern post-colonial constitutional dilemma. The countries that comprise Africa have made public commitments, in addition to judicial decisions, to the move towards decriminalisation, which is unprecedented in the Indian context. By examining the pathologies of the judicial decisions so far, we hope to advocate for trans judicial influence in the answers to similar questions raised in India. However, in acknowledging that lessons must also be learnt from the errors made in the comparator jurisdictions, the following section will delve into a comparison under each prong of the structured proportionality test as enunciated by Professor Aharon Barak, in *R v. Oakes*, and other precedents. We will use the general trend of adoption of proportionality review as well as the relatively more structured approach by other Courts to shed light on the gaps in reasoning in the Swamy judgment. Finally, the paper will offer concluding remarks.

2. Historical Background of Sections 499 & 500 of the IPC

2.1. *The History & Law of Criminal Defamation*

The origin of the press and the regulatory environment policing the press can be traced back to colonial India. Legislations like the Vernacular Press Act, 1878, Press Act, The Newspaper (Incitement to Offences) Act, 1908, the particularly harsh Indian Press Act, 1910, and much later the Indian Press Emergency Powers Act, 1931 were passed with the subliminal objective of suppressing criticism of the Empire in vernacular languages, especially in the regional newspapers

established by leaders of the time.[12] A parallel method to crack down on dissenters of the government was through the sedition law, which has judicially been termed as an offence of 'defamation of the government' as well as criminal defamation.[13] These will be discussed in greater detail below.

A brief history of defamation law prior to delving into its colonial past in India is instructive in understanding how this law was and continues to be used as a tool by the political and corporate elite, and further how we may advance the case against it. Criminal libel can be traced from its origins in the Anglo-American legal context.[14] Although British and American libel jurisprudence has diverged after the mid-twentieth century, the libel law in the two nations was largely identical upto the 1960s.[15] The difference between criminal and civil libel in both nations was presented as certain kinds of libel could lead to a breach of peace, which would warrant criminal sanctions. The breach of peace itself, which was the violence emerging from the defamed seeking to avenge said libel, was considered the essence of the crime, initially rendering the defense of truth as irrelevant.[16] This crime relates back to a case in the Star Chamber, *De Libellis Famosis*,[17]

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12 A. Arikaka, *5 Fearless Journalists Who Rose Against the British Raj During the Freedom Struggle,* The Better India (24/01/19), available at https://www.thebetterindia.com/128932/journalists-freedom-fighters-british-raj/ last seen on 15/05/20; A.R Desai, *Social Background of Indian Nationalism***,** 217 (2015).

13 New York Times v. Sullivan, 376 U.S. 254, 276 (1964).

14 *Constitutionality of the Law of Criminal Libel*, 52(4) Columbia Law Review, 521-553 (1952).

15 V. R. Johnson, *Comparative Defamation Law: England and the United States*, 24 U. Miami Int'l & Comp. L. Rev. 1 (2017); Andrew Kenyon, *Libel, Slander, and Defamation,* The International Encyclopedia of Journalism Studies (2019); V. V. Veeder, *The History and Theory of the Law of Defamation,* Columbia Law Review, 546, 573 (1903).

16 *Constitutionality of the Law of Criminal Libel*, 52(4) Columbia Law Review, 521-553 (1952).

17 De Libellis Famosis, 77 Eng. Rep. 250 (1606).

wherein the Court held that any charge against an individual must be litigated in court rather than aired in public, as even the truth can be libellous if it threatened to 'disturb peace'. Almost a century ago, in 1904, Van Vechter Veeder and others argued[18] breach of peace to no longer be the rationale for criminalisation of libel. They argued that libellous truth would more likely instigate a breach of peace, but truth was being slowly allowed as a defense to criminal libel. They argued that the true unwritten basis for the law could only be assumed, then, to be the sanctity of an individual's reputation. This understanding of the underpinnings of defamation law has prevailed in the analysis of several jurisdictions thereafter and can be used to explain the disjunction between its intended use and the present deployment of the law.[19]

Despite the unending desperation of the British government in regulating the press, there was never a uniform law for governing the press and regulations were mounted relentlessly. Where the Acts should have specifically targeted the newspapers that endorsed yellow journalism, rules were imposed which discriminated against those newspapers that brought the true public opinion, with those newspapers that favoured the dogmas of the British.[20] There is a contradiction intrinsic to the notion of regulating what are supposed to be the free means of expression and information in a modern society. The output of blind censorship pre or post-independence has suppressed the opportunity for the press to refine its quality for the

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18 V. V. Veeder, *The History and Theory of the Law of Defamation,* Columbia Law Review, 546, 573 (1903); Schroeder, *Constitutional Free Speech Defined and Defended in an Unfinished Argument in a Case of Blasphemy* (1919).

19 M. T. Moran, *Criminal Defamation and Public Insult Laws in The Republic of Poland: The Curtailing of Freedom of Expression*, Michigan State International Law Review 576-622 (2018).

20 S. Kumar, *Distrust of Dissent: Underpinnings of The British Colonial Rule Vis-À-Vis Regulation of The Indian Press*, NLS Socio-Legal Review (2018).

formation of public opinion.[21] It is in this context that the rise of criminal defamation as a tool for suppressing dissent emerged, particularly when the abovementioned licensing and regulatory laws were no longer available as a means to control political debate.[22]

In modern India, many argue that among the various laws criminalising speech at present, including criminal defamation, the law is employed often to keep information from the public, in a deliberate and concerted manner by the executive, contrary to its outlined historical intent.[23] Examples abound of executive power exerted to punish those who offend majoritarian sentiments, through criminal defamation, as well.[24] This is in direct collision with the role of free speech in a democratic governance model, as propounded by Alexander Meikeljohn, where the ultimate decision-making power indirectly rests with the citizens, who must deliberate upon issues and form their opinions which would reflect in their voting power.[25] Some may argue that India is bending away from deliberative democracy, particularly in the 2010s which is a long way from the level of deliberation witnessed in the previous decade which saw the rise of, for example, the Right to Information Act, 2005.[26] However,

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21 I. Gujral, *The Indian Press-Challenge and Opportunity* (2004).

22 See also Mrs. Annie Besant v. The Government of Madras, 37 Ind Cas 525, an example of the manner in which licensing and registration legislations were used to quell dissident publications.

23 Infra 61.

24 For eg., *Journalist Abhijit Iyer-Mitra gets bail, Twitter trends #IStandWithAbhijit*, NewsLaundry (20/09/18) https://www.newslaundry.com/2018/09/20/abhijit-iyer-mitra-gets-bail-he-was-arrested-over-a-video-on-konark-temple, last seen on 15/05/20.

25 A. Meikeljohn, *Free Speech And Its Relation To Self-Government* 26 (1948); C. R. Sunstein, *Democracy And The Problem Of Free Speech* (1993); R. J. Vangelisti, *Cass Sunstein's "New Deal" for Free Speech: Is It an "Un-American" Theory of Speech*?, Kentucky Law Journal 85(1) (1996).

26 *Right to Information: The Promise of Participatory Democracy and Accountability,* EPW Engage (27/08/19), available at https://www.epw.in/engage/article/right-information-promise-participatory-democracylast seen on 15/05/20; Dhruva Gandhi & Unnati Ghia, *The Erosion of Deliberative Democracy in India,* Young

substantial analysis exists to prove that a deliberative model must remain, and still constitutes the underpinnings of the common law based Indian democracy, which has sustained itself through consistent and vibrant public debate.[27] Ramya Parthasarathy and Vijayendra Rao agree that the theory of such deliberation must be premised in equality of all citizens who participate in this process, as argued by John Rawls and Jurgen Habermas.[28] We will examine the concept of a transformative, participatory democracy, and situate the role of the Supreme Court in such a democracy while discerning the examples set for the Court to follow in the form of a stricter judicial review as traced in the cases decided in Africa. We frame our discussion by stating that criminal defamation, insofar that it has a chilling effect on speech and suppresses dissent as argued, greatly hampers this equality by restricting the flow of information in India.

The cumulative effect of the views advanced above, and below, means that criminal defamation must be reviewed far more broadly than it was in the *Swamy* judgment, it must be examined for the threat it poses to Indian democracy, and the manner in which this undermines the postcolonial transformative ideals embodied in the Constitution. Before delving into theory, comparative lessons and why these are important, we must unpack criminal defamation and its presence in India briefly.

Bhartiya (4/11/19), available at https://www.youngbhartiya.com/article/the-erosion-of-deliberative-democracy-in-india, last seen on 15/05/20.

27 R. Parthasarathy & V. Rao, *Deliberative Democracy in India*, Policy Research Working Paper, 6, Working Paper Number WPS7995, World Bank Research Group (2017); Gautam Bhatia, *Basic Structure – VII: Deliberative Democracy and the Common Law*, Indian Constitutional Law & Philosophy, available at https://indconlawphil.wordpress.com/category/deliberative-democracy/deliberative-democracy-and-basic-structure/, last seen on 15/05/20.

28 Ibid.

The criminal defamation provisions were drafted in 1837, and thereafter codified into the IPC in 1860.[29] Pursuant to Section 499, any imputation about an individual, be it written, spoken or otherwise, which is either intended to or is likely to affect the reputation of the individual is considered as criminally defamatory. Among the nine exceptions, the first makes absolute truth for public good an exception to defamation. Section 198 of the Criminal Procedure Code establishes an exception to the general rule that any person, aggrieved or not, may file a complaint under the IPC, to hold that only an aggrieved person can file a defamation complaint.[30] The definition of an aggrieved person is outlined in the Section and its explanations, and has been discussed extensively by the Courts.[31] The essential conclusion to be drawn from this string of judgments on locus standi as under Section 198 is that the defamatory statement must make reference to a definite individual, set of individuals, or an association for the suit to stand. This requirement in essence can be argued to be such that, as it eliminates public locus standi, it does so because there is in practicality no effect on public society when an offence of defamation takes place against an entity. Ironically, the absence of public harm in criminal defamation was one of the principal arguments in the case for its decriminalisation in *Subramanian Swamy* v. *Union of India* but was cast aside by the Court.[32]

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29 *Criminal Defamation: A 'Reasonable Restriction' on Freedom of Speech?*, Obhan & Associates, available at https://www.obhanandassociates.com/blog/criminal-defamation-a-reasonable-restriction-on-freedom-of-speech/, last seen on 15/05/20

30 S. 198, Code of Criminal Procedure, 1973; G. Narasimhan & Ors. Etc v. T. V. Chokkappa, 1972 AIR 2609.

31 G. Narasimhan & Ors. Etc vs T.V. Chokkappa, 1972 AIR 2609; Ritesh Bawri v. M/s Dalmia Bharath (Ltd.), CRL.O.P.(MD)11759 of 2017; Ratanlal and Dhirajlal, *Law of Crimes* 1317 (23rd ed., 2013) 1317; Wahid Ullah Ansari v. Emperor, AIR 1935 All 743.

32 Supra 5.

Pursuant to Article 19(1)(a) all citizens are guaranteed the fundamental right to freedom of speech and expression while Article 19(2) provides for defamation as one of the grounds for reasonable restriction of this freedom. The Supreme Court in *Chintaman Rao* v. *State of MP*[33] had held that, "the phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right *should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public*". It was in *Chintaman Rao* that the Supreme Court spoke of 'balancing' of the restriction and the fundamental right. Later, in *VG Row* v. *State of Madras*,[34] it enunciated the elements of what we know to be the proportionality review to ascertain the constitutionality of restrictions. In this paper, we will focus purely on defamation and the deference of the Supreme Court to the Legislature on this particular restriction to freedom of speech and expression. This will be explored in the next chapter.

An individual's right to criticism is intertwined in its right to freedom of speech and expression under Article 19 of the constitution.[35] The objective of defamation law is to limit this right of criticism and prevents its unfair use. However, the distinction between the practice of the right of criticism and defamation is undefined and is left for interpretation by courts. Courts have often reiterated that while addressing a criminal defamation charge under section 499, one has to keep in mind that any statement even if not true but made in good faith and in public interest is taken to be in the nature of fair comment or criticism and cannot invite criminal prosecution.[36] This threshold is not sufficient on a standalone basis and the ambiguity between the two concepts continues to persist. To some extent, the Madras HC has resolved the ambiguity in the rule of malice's earlier

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33 Chintaman Rao v. State of MP, 1951 AIR 118.
34 VG Row v. State of Madras AIR 1952 SC 196, ¶15.
35 Government of Andhra Pradesh & Ors. v. Smt. P. Laxmi Devi, 2008 4 SCC 720.
36 Supra 5.

inapplication to the criminal provisions, but this remains open to reinterpretation by other High Courts or the Supreme Court itself. [37]

The power structure, that we argue replicates the threat posed by colonialism and perpetuates its afterlife in India, is further strengthened by the application of Section 199 of the CrPC. This protects public servants and certain officials of the Government doubly by allowing the Public Prosecutor to *suo motu* prosecute the accused even if the affected individual does not make a complaint.[38] The aspects of this power imbalance will be discussed further in light of demonstrated instances of it in the next section of this chapter. This, we argue, forms the social cost, which must form part of the Court's review of this law, while balancing the State's interest as against the freedom of speech. There exists no comprehensive report on the cases decide by the Courts on criminal defamation prior to, or post India's independence. In the pre-Constitutional era, sedition was also used in the manner that seditious libel is prosecuted in countries where such an offence is on the statute books.[39] For instance,[40] a complainant made such an argument attempting to read Section 124-A with Section 499 of the IPC. The phrase 'seditious libel' appears in other cases, defined roughly as:

> his object was to excite not merely passive disaffection, which in itself is an offence within Section 124A of the Indian Penal Code, but active disloyalty and rebellion amongst his Muhammadan fellow-subjects. […]That offence he committed regardless of the ruin, misery, and

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37 Sandhya Ravishankar v. V.V Minerals Pvt Ltd, Crl MP(MD) 4493 & 4494 of 2016.

38 S. 199, Code of Criminal Procedure, 1973.

39 Queen-Empress v. Taki Husain, (1885) ILR 7 All 205; Queen-Empress v. Jogendra Chunder Bose & Ors., (1892) ILR 19 Cal 35; Queen-Empress v. Amba Prasad, (1898) ILR 20 All 55; W.N. Srinivasa Bhat & Anr. v. The State of Madras & Anr., AIR 1951 Mad 70.

40 Queen-Empress v. Jogendra Chunder Bose & Ors., (1892) ILR 19 Cal 35.

> punishment which would have fallen on any of his fellow-countrymen who *might have been so ignorant as to believe that the statements which be published were true, and who, acting on such belief, might have entered upon a course of active disloylaty (sic) to the Government*.[41] (Emphasis supplied)

In this case, the British Government had instituted this case against Amba Prasad who was an editor, proprietor and publisher of a newspaper called Jami-ul-Ulam, which they claimed, was being used to incite disaffection against the government. The abovementioned definition overlaps substantially with the manner in which the standard for defamation is defined, except that seditious libel appears to be defined solely in terms of the lowered reputation, in the estimation of right-thinking members of society, *of the government*.

Pre-constitutional India saw several instances of the exercise of this law. These were often public-interest sensitive cases, ranging from reportage about police violence,[42] or defamation of public officials,[43] and in newspapers famous for being critical of the press, many a time in vernacular languages.[44] In a case, the Court specifically noted that the press did not occupy a position of privilege merely because of its role in functioning of the country and must apply 'due care and attention' before publication.[45]

In these cases, public good has often been instigated as the exception to prevent criminal sanction even if the material was false or indeed, defamatory by lowering the reputation of the individual, and Courts in contemporary cases sometimes recognise public good and good faith as the precepts in which criminal defamation ought to be decided. The Court in the *C. Gopalachariar* judgment has provided some

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41 Queen-Empress v. Amba Prasad, (1898) ILR 20 All 55.
42 Emperor v. J.M. Chatterji, 145 Ind Cas 126.
43 P. Balasubramania Mudaliar v. C. Rajagopalachariar, AIR 1944 Mad 484.
44 Janardan Karandikar v. Ramchandra Tilak, (1946) 48 BOMLR 882.
45 Emperor v. J.M. Chatterji, 145 Ind Cas 126.

guidance on what is to be adjudicated as 'good faith', "words 'we strongly believe' and the word 'perhaps' in the passage in question clearly negative the contention that they were made as positive averments of facts."[46] Here, the Court emphasised that as long as careful language is used taking care for another's reputation, good faith must be understood to mean that material having reasonable doubt must also be published with appropriate disclaimers to fulfill the role of the media as a public function. The good faith exception is intricately linked to our central argument that decriminalisation of defamation must be founded in the role of free speech in a deliberative democracy, as this exception at the very least must be broadened to strengthen the role of free speech and to reduce criminal convictions for dissenting opinions. As stated in *New York Times* v. *Sullivan*,[47] free speech must be allowed to make errors and be given breathing space so that those who exercise it practice self-imposed good faith restrictions rather than external sanctions which may prevent any constructive debate at all. Erroneous statements were argued to be inevitable, and Judge Edgerton in *Sweeney* v. *Patterson*,[48] stated "errors of fact, particularly in regard to a man's mental states and processes, are inevitable […] Whatever is added to the field of libel is taken from the field of free debate." The Constitution of India was forged with the constituent power of the people, holding the State accountable to the people, envisaging a 'culture of justification' as opposed to a 'culture of authority'.[49] In such a context, the Court is empowered with judicial review, one that must not be deferential as argued below, to take cognisance of the social cost of the chilling effect, and the disproportionate impact of this law on those who dissent, while conducting the proportionality test to balance state interest against

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46 C. Gopalachariar vs Deepchand Sowcar**,** (1940) 2 MLJ 782.

47 New York Times Co. v. Sullivan, 376 U.S. 254, Brennan, J.

48 Sweeney v. Patterson**,** 128 F.2d 457 (D.C. Cir. 1942).

49 V. Narayan & J. Sindhu, *A historical argument for proportionality under the Indian Constitution,* 2:1 Indian Law Review 1, 5 (2018).

Article 19(1)(a). These foundational constitutional principles are continually challenged in criminal defamation cases in modern India, in its consistent misuse, which is inevitable given the current body of jurisprudence.

2.2. *Criminal Defamation, Dissent and Debate in Modern India*

The jurisprudence of criminal defamation is demonstrative of the nature of its use for suppression of political debate. While this is often argued anecdotally, we attempt to prove this by establishing a pattern specifically over the past decade in the absence of any reports, which have done the same. We reviewed the reported judgments of criminal defamation within 2010-2020 to indicate a pattern of cases relating to the press and the political class, i.e. private wrongs with a public good element. In doing so we found that such reported petitions have been on the rise in this decade.[50] We found a total of fifteen instances specifically relating to our argument in the past decade alone.[51] These instances may not be exhaustive as they do not include

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[50] This is based on data provided upon a case-law search on Manupatra which reports judgments from across the country's Courts, its auto-generated graph indicates an increase in cases under criminal defamation.

[51] *Supreme Court asks Jay Shah, The Wire to try to settle criminal defamation case*, Scroll.in (18/04/18) available at https://scroll.in/latest/876133/supreme-court-asks-jay-shah-the-wire-to-try-to-settle-criminal-defamation-case, last seen on 15/05/20; Sandhya Ravishankar v. V.V Minerals Pvt. Ltd., Crl MP(MD)Nos. 4493 & 4494 of 2016; Smt. Minu Dey @ Mandira Dey v. The State of West Bengal, S/L.361. C.R.R. No.3927; Arvind Kejriwal v. Arun Jaitley & Ors, Crl.M.C. 2417/2016; Tathagata Satpathy v. Santilata Choudhury & Others, Criminal Revision No. 391 of 2001; Dr. Shashi Tharoor v. Arnab Goswami & Anr., CS(OS) 253/2017; Vijay Gulati v. Radhika, (2010) 119 DRJ 482; Md. Ayub Khan v. The Editor, RFA 09 of 2013; Indrajit Lankesh v. K.T. Dhanu Kumar, 2015 (3) RCR (Crl) 14; *MJ Akbar's criminal defamation case against journalist Priya Ramani to be heard tomorrow*, The Indian Express (17/10/18) available at https://indianexpress.com/article/india/metoo-mj-akbar-defamation-case-priya-ramani-5406367/, last seen on 15/05/20. See also J. Bajoria & L. Lakhdhir, *Stifling Dissent: The Criminalization of Peaceful Expression in India*, Human Rights Watch, (24/05/16), available at https://www.hrw.org/report/2016/05/24/stifling-dissent/criminalization-peaceful-expression-india, last seen on 23/05/20.

all unreported judgments, or withdrawn complaints, or stays on FIRs, all of which have nevertheless have contributed to a climate of silencing.[52] To illustrate our point, we have discussed cases having particular bearing on the political climate in India, by being sensationalised or by culminating in violence or inordinate jail terms. When wielded by the political class, this tool has been used across party lines and is hardly a partisan matter, as is demonstrated below. The Courts have, for their part, urged amicable settlements and sough to quash criminal proceedings in various instances.

For instance, it is illustrative to examine the cases of journalists such as Gauri Lankesh whose deaths were controversial, in large part because of their investigative journalistic work.[53] Two Members of Parliament had filed suits of defamation against Gauri Lankesh regarding an article published in her newspaper 'Lankesh Patrike' in 2008.[54] The allegedly defamatory article had implied that the politicians were involved in criminal activities, including cheating a businessman. Although the other journalist implicated in these proceedings was acquitted as he denied his involvement with the newspaper, Lankesh was sentenced to six years of imprisonment and a penalty fine.[55] She

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52 For eg., *Stayed by High Court, Essel Group's Defamation Case Against The Wire Now Withdrawn***,** The Wire (06/10/17) available at https://thewire.in/business/essel-groups-defamation-case-against-the-wire-now-withdrawn, last seen on 23/05/20.

53 J. Gettleman & H. Kumar, *In India, Another Government Critic Is Silenced by Bullets,* The New York Times (06/09/17) available at https://www.nytimes.com/2017/09/06/world/asia/gauri-lankesh-india-dead.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer, last seen on 15/05/20.

54 *Gauri Lankesh convicted of defamation, sentenced to six months in jail,* The Hindu (29/11/16) available at https://www.thehindu.com/news/national/karnataka/gauri-lankesh-convicted-of-defamation-sentenced-to-six-months-in-jail/article16716016.ece, last seen on 15/05/20; Indrajit Lankesh v. K.T.Dhanu Kumar : 2015 (3) RCR (Crl) 14.

55 *Gauri Lankesh convicted of defamation, sentenced to six months in jail,* The Hindu (29/11/16) available at https://www.thehindu.com/news/national/karnataka/gauri-lankesh-convicted-of-defamation-sentenced-to-six-months-in-jail/article16716016.ece, last seen on 15/5/20.

managed to secure release on bail, but consistently argued that defamation had not taken place because one of the alleged victims had won an election thereafter, and that therefore, his reputation had not been lowered in any tangible manner.[56] Lankesh Patrike had faced litigation prior to Gauri Lankesh's leadership as well, and was charged with criminal defamation under its former editor P. Lankesh.[57] The case was dismissed for want of jurisdiction, but is nevertheless notable for the deterrent sanctioning that resulted.

Focused litigation has been witnessed with The Wire as well, against whom Jay Shah, a prominent public figure with political capital, filed a criminal defamation case and a civil defamation case of INR 100 Crore for which the Supreme Court has not pronounced the judgment.[58]

The nature of litigation as deterring freedom of the media is inherent in the positions that the parties occupy, particularly when politicians are able to subject activists and journalists to criminal sanctions.[59] The question of power must be considered while discussing the question of decriminalisation, as argued by Chinmayi Arun, in that these laws are more often used by big corporates and the political elite so the argument of protection of reputation cannot stand

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[56] Johnson TA, *What was the defamation case against slain journalist Gauri Lankesh?*, The Indian Express (07/09/17), available at https://indianexpress.com/article/explained/what-was-the-defamation-case-against-slain-journalist-gauri-lankesh-4832061/, last seen on 15/05/20.

[57] P. Lankesh and Anr. v. H. Shivappa and Anr., 1994 CriLJ 3510.

[58] *Jay Shah defamation case: 'The Wire' withdraws its plea from Supreme Court, says will stand trial,* Scroll, (27/08/19) available at https://scroll.in/latest/935353/jay-shah-defamation-case-the-wire-withdraws-its-plea-from-supreme-court-says-will-stand-trial, last seen on 15/05/20; Rohini Singh v. State of Gujarat, Gujarat High Court R/SCR.A/8885/2017.

[59] P. Nagaraj, *Gauri Lankesh (1962-2017): Journalist who raged like a fire as she championed just causes*, Scroll.in (6/09/17), available at https://scroll.in/article/849701/gauri-lankesh-1962-2007-journalist-who-raged-like-a-fire-as-she-championed-just-causes, last seen on 15/05/20.

if such protection is disparate.[60] In 2016, the Press Council of India raised concern over the rising cases of criminal defamation against journalists as well as the emerging violence against the same journalists, and consequently ordered fact-finding reports on two recent deaths at the time.[61] In this report, the PCI noted that Ranjan Rajdeo's death was most likely on the basis of his critical political reportage, as per an independent fact-finding committee.

Narendra Dabholkar was also charged with criminal defamation by the Hindu spiritual organisation, Sanatan Sanstha.[62] As per his own account, Dabholkar was not only charged with criminal defamation for his movement against magic remedies and superstition, but that the organisation had also claimed Rupees One Crore as damages in its suit.[63] The total number of lawsuits filed by Sanatan Sanstha against Dabholkar amounted to fourteen at the time of publication of his book.[64] A similar case was filed by the Sanatan Sanstha in June, 2018 against the weekly newspaper, Goan Observer, for publishing an article titled 'Protecting Hinduism – Sanatan Sanstha'. The judgment of the Senior Civil Judge in Ponda, Goa is distinctive in that it did not grant the charge of defamation to the organisation and held that, journalists are responsible for reporting facts to the public and are entitled to discuss such matters without

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60 C. Arun, *A question of power,* The Indian Express (25/05/16), available at https://indianexpress.com/article/opinion/columns/criminal-defamation-law-supreme-court-2817406/ last seen on 15/05/20.

61 Press Council of India, *Annual Report 2016-2017*, available at http://presscouncil.nic.in/WriteReadData/userfiles/file/ANNUAL%20REPORT%2016-17%20eng.pdf, last seen on 13/07/20,

62 Narendra Dabholkar, *"I Should Not Allow Myself to be Scared": Narendra Dabholkar on Facing Threats from Religious Organisations,* The Caravan (20/08/18) available at https://caravanmagazine.in/religion/narendra-dabholkar-pressure-religious-organisations, last seen on 15/05/20.

63 Ibid.

64 Ibid.

being served with legal notices.[65] Although judgments such as the Goan judgment are distinctive and notable, the overarching trend of filing such complaints undeterred is still contrary to a liberal approach to free debate, in conformity with our constitutional ideals.

Specific newspapers have often been the target of criminal defamation cases in a demonstrable manner, as indicated to an extent in the Lankesh Patrike example. The newspaper Karivali Ale, a regional newspaper in Karnataka has faced litigation in this realm on more than one occasion.[66] But the most significant Indian example of a newspaper facing consistent litigation from a government are the two hundred and thirteen cases filed by the All India Anna Dravida Munnetra Kazhagam (AIADMK), of which more than fifty were against the press.[67] Eventually, most of these cases were withdrawn by the State Government vide a Government Order to the Public Prosecutor which ordered the withdrawal of one hundred and twenty five petitions against the media at the trial court level.[68] This was contended by many to be in response to the respondents of these defamation suits filing a case to challenge the constitutionality of Section 499.[69] The AIADMK government had done the same with

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65 N. Kashyap, *Journalists Are Not Liable For Defamation For Bringing Facts To The Public And Commenting On These Facts: Goan Court Dismisses Sanatan Sanstha's Suit*, Live Law (06/22/18), available at https://www.livelaw.in/journalists-are-not-liable-for-defamation-for-bringing-facts-to-the-public-and-commenting-on-these-facts-goan-court-dismisses-sanatan-sansthas-suit/, last seen on 15/05/20.

66 Ashok K.M., *SC Sets Aside HC Order That Quashed Defamation Case Against Kannada Daily Newspaper Owner*, Live Law (05/12/17), available at https://www.livelaw.in/sc-sets-aside-hc-order-quashed-defamation-case-kannada-daily-newspaper-owner-read-judgment/, last seen on 15/05/20.

67 A. Vishwanath & D. Thangavelu, *Supreme Court pulls up Jayalalithaa for misusing defamation law,* Live Mint (25/08/19) available at https://www.livemint.com/Politics/0YoIjK4oK4WXOAezvD7Q3I/Supreme-Court-pulls-up-Jayalalithaa-for-misusing-defamation.html, last seen on 15/5/20.

68 *Tamil Nadu files affidavit to withdraw 125 defamation cases against media*, The Hindu (21/09/04), available at https://www.thehindu.com/2004/09/18/stories/2004091803051300.htm, last seen on 15/05/20.

69 Ibid.

Subramanian Swamy's defamation suit, and had submitted a withdrawal affidavit for the several pending cases against him, upon his filing a case before the Supreme Court, challenging the constitutionality of the provisions.[70] Evidently, in the absence of any significant steps by the judiciary, the existence of criminal defamation provisions have served as impetus to the government, indiscriminate of parties, to use the law in this regard for their own motives. However, it is worthwhile to note that not only has this law been used, it has served as a condonation for bills such as Rajiv Gandhi's Defamation Bill in 1988.[71]

Political leaders have also engaged in filing of criminal defamation suits.[72] For instance, in *Arvind Kejriwal* v. *Arun Jaitley*, filed by Jaitley for allegations of financial irregularities in the DDCA during his tenure as its president in which Kejriwal was ultimately acquitted upon rendering an apology.[73] Further, often politicians resorted to filing cases against their rivals who flag issues of governance. For instance, over the years, the Jayalalithaa government has filed a slew of such cases against its opponents and dissidents including but not limited to union human resource development minister, Murli Manahor Joshi and leader of opposition, Vijayakanth, Tamil Nadu Communist Party of India (Marxist) leader N. Varadarajan and Dalit

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[70] S. Swamy, *Defamation litigation: a survivor's kit,* Interesting News, (21/09/04) available at http://genworldnews.blogspot.com/2017/05/defamation-litigation-survivors-kit-by.html?m=0, last seen on 15/05/20.

[71] *Defamation Bill-High Political Status,* 23(37) Economic & Political Weekly (1988) available at https://www.epw.in/journal/1988/37/uncategorised/defamation-bill-high-political-status.html, last seen on 26/07/20.

[72] *Decriminalising defamation***,** The Statesman (9/04/19) available at https://www.thestatesman.com/opinion/decriminalising-defamation-1502744042.html**,** last seen on 15/05/20.

[73] P. K Dutta, *Arvind Kejriwal: Slander man of Indian politics now has 8 defamation cases against him*, India Today, (22/05/17) available at https://www.indiatoday.in/india/story/arvind-kejriwal-indian-politics-defamation-cases-aap-978600-2017-05-22**,** last seen on 15/05/20.

leader Krishnasami.[74] Additionally in 2019, there were also instances of criminal defamation filed by the ruling party BJP against the former leader of India's opposition Congress Party leader Rahul Gandhi pertaining to certain statements made during a general election campaign. [75]

The ninth and the third exceptions to Section 499 prima facie exclude matters reported in furtherance of public interest or relating to a public question from the purview of criminal defamation.[76] Nonetheless, the laws failure in defining public interest not only smears the process with uncertainty and direction but also fosters and encourages individuals to file criminal defamations lawsuits clearly protected by the ninth exception.[77] A prominent instance was the lawsuit filed by the owner of a hotel for hosting 'obscene dance' in his hotel.[78] In accordance with the material stated in the press release by the police and the FIR, various newspapers published articles to this effect. Alleging that the news was defamatory, the owner pressed charges of criminal defamation against the journalists. The Delhi HC ruled in favor of the journalists and correctly so holding that "a fair reporting

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74 *As apex court weighs idea of criminal defamation, Jaya files yet another case against media,* Scroll.in (15/07/15) available at https://scroll.in/article/741016/as-apex-court-weighs-idea-of-criminal-defamation-jaya-files-yet-another-case-against-media, last seen on 15/05/20; B. Sinha, *Defamation law can't be used as political weapon: SC to Jayalalithaa govt,* Hindustan Times (07/29/16) available at https://www.hindustantimes.com/india-news/defamation-law-can-t-be-used-as-a-political-weapon-sc-to-jayalalithaa-govt/story-5P2sgPrkQ565JcRq04MrMI.html, last seen on 15/05/20.

75 *Rahul Gandhi pleads not guilty in defamation case filed by BJP legislator*, The Print (10/10/19) available at https://theprint.in/india/rahul-gandhi-pleads-not-guilty-defamation-case-filed-bjp-legislator/303876/, last seen on 13/07/20.

76 S. 499, Indian Penal Code, 1869.

77 Vineet Jain v. NCT Of Delhi & Ors., CRL.M.C.2111/2007; Grievances Redressal Officer v. S.Krishnamurthy, Crl MP(MD)Nos.4493 & 4494 of 2016; Sh. Rajinder Kumar Gupta v. Sh. Sudhakaran K. P CR No.5 3/2008; M. Nedunchezhian v. The Bar Council of Tamil Nadu, Writ Petition No.10673 of 2015.

78 Vineet Jain v. NCT Of Delhi & Ors., CRL.M.C.2111/2007.

pertaining to a matter of public concern, without insinuations and innuendos" is not actionable for the offence of criminal defamation.[79]

Economic Times faced litigation for an article about illegal beach sand mining of atomic minerals conducted along the southern coastline of Tamil Nadu, which in turn had exposed the local villagers to serious health hazards.[80] The private complainant argued that it was defamatory and worthy of attracting criminal sanctions. In a rather positive ruling, the court absolved the journalists of criminal defamation while acknowledging that the matter at hand involved a question of public interest and was protected by the third exception to Section 499.[81]

These instances are certainly not comprehensive but necessarily provide a distressing picture of the nature of cases filed in the past decade, clearly warranting a reconsideration of the decision in the *Swamy* judgement, when read with the several other arguments made in this regard.

3. The Shortcomings of the Subramaniam Swamy Judgement

This Part of the paper will consider the constitutional challenge to criminal defamation to discern the specific arguments contained therein, and the merits, which will be further compared in the chapter on African jurisdictions. The Swamy judgment addressed a batch of twenty-four writ petitions filed under Article 32 of the Constitution.[82] Filling the void deliberately left by *R. Rajagopal* v. *State of Tamil Nadu* (the Auto Shanker case),[83] the Swamy judgment tested the constitutionality of Sections 499 and 500 on Article 19(1)(a) and

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79 Ibid, at ¶17.

80 Grievances Redressal Officer v. S. Krishnamurthy, Crl MP(MD)Nos.4493 & 4494 of 2016, ¶1.

81 Ibid, at ¶15.

82 Supra 5.

83 R. Rajagopal v. State of Tamil Nadu, 1995 AIR 264.

19(2).[84] The arguments made by the Petitioners attacked the provisions substantively, as well as Section 199 of the Code of Criminal Procedure, 1974.[85]

3.1. *The Supreme Court's Omissions in Swamy*

The flaws of the Swamy judgment have been widely recorded, as part of a broader socio-legal trend of over-criminalisation,[86] as having ignored precedents of the Supreme Court itself and therefore being per incuriam,[87] simply as being detrimental to the human rights jurisprudence of the nation,[88] or merely as adding to the growing number of judgments which are curtailing free speech and media freedom in the nation.[89] However, very little substance has been lent to the socio-legal argument that the abuse of the criminal defamation provisions in India, by political parties and the influential elite, create scales of inequality between parties, although often reiterated in brief. [90] This is essential to note in context of the argument made in this paper that political dissent and debate are the inevitable victims of this branch of law, and in context of the factor of reputation that is discussed in the Swamy judgment. Reputation is one of the major planks on which the Swamy judgment rests, and the case is seminal in part due also to its reading of reputation as one of the elements of

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84 Ibid.

85 Supra 5, at ¶9, 12-13.

86 *Over-Criminalisation: An Insidious Placebo*, 8 NUJS L. Rev. [vi] (2015).

87 G. Bhatia, *Why the Supreme Court's Criminal Defamation Judgment is Per Incuriam*, Indian Constitutional Law & Philosophy, available at https://indconlawphil.wordpress.com/2016/05/18/why-the-supreme-courts-criminal-defamation-judgment-is-per-incuriam/, last seen on 15/05/20.

88 C. Arun, *A question of power*, The Indian Express (25/05/16), available at https://indianexpress.com/article/opinion/columns/criminal-defamation-law-supreme-court-2817406/, last seen on 15/05/2020.

89 G. Bhatia, *The Supreme Court's Criminal Defamation Judgment: Glaringly Flawed*, Indian Constitutional Law & Philosophy, available at https://indconlawphil.wordpress.com/2016/05/13/the-supreme-courts-criminal-defamation-judgment-glaringly-flawed/, last seen on 15/05/20.

90 Ibid.

Article 21.[91] There are several flaws in its reasoning of the concept of reputation, which will be discussed in the following section. Keeping this in mind, the following part of this section will discuss the Swamy judgment to criticise its omissions, especially those which are glaringly discussed in the comparator jurisdictions in the next chapter.

The decriminalisation of defamation by Britain is also of note because it is the source of the law governing us today, and the rationale employed for striking it down in England is applicable in India in the absence of any contradicting context.[92]The Swamy judgment does not trace the origins of the law, or draw a nexus with the earlier British law to compare with. Along with the African Court of Humans' and Peoples' Rights case, omissions such as these are notable because under the themes of defamation and reputation, the Court delves into the 'views of the ancients', the opinions of creative thinkers and philosophers, as well as a litany of judgments from Canada, UK, USA, and South Africa.[93]

It ignored the *Issa Konate* judgment which examined the proportionality of the punishment, allowing the reading down of the law to *exclude custodial sentences* even if other civil or administrative fines are levied as a criminal sanction.[94] This would not resolve the issue of overburdening of an already crumbling criminal justice system, or over-criminalisation. However, the terror and trauma that accompanies custodial sentences for the expression of an opinion is noticeable in the accounts of journalists who fear targeting even within judicial custody, which is an issue within incarceration in general that ought to have been addressed by the Court in light of arguments

91 Supra 5, at ¶75.
92 S. 73, The Coroners and Justice Act, 2009.,
93 Supra 5, at ¶21 onwards.
94 Infra discussion in Part 4.1.

made.[95] Learning from this judgment, the Court could have shed light on the role of the process as punishment in such cases, more so in a heavily backlogged justice system. The Court did not address the process of defamation litigation as stigmatising and exclusionary either, which is inherent to the social theme of the law. The mere threat of criminal defamation, specifically, or generically, has been used to quell peaceful expression of speech. This is evidenced by the cases dropped against Arvind Kejriwal when he apologised to the concerned parties in a suit,[96] or in tweets that politicians have written, about the threat of litigation based on earlier convictions, to name some examples of a common phenomenon.[97]

The threat to reputation is countered privately by individuals themselves who use means outside the law, threatening criminal action to induce apologies. These thematically build to a larger concern of the Swamy judgment as bending towards over-criminalisation, without examining the necessity of this law as against the State interest, whereas modern constitutional jurisprudence has been bending in favour of civil liberties and countering criminalising of harms.[98] This is particularly as the threat of over-criminalisation has been left to the wisdom of 'law-makers and experts' (a recurring theme which African jurisprudence is able to address through the proportionality review) as

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95 *Karnataka journalist held in defamation case, handcuffed*, The Hindu (06/01/09), available at https://www.thehindu.com/todays-paper/ Karnataka-journalist-held-in-defamation-case-handcuffed/article16346688.ece, last seen on 15/05/2020.

96 *Delhi court acquits CM Arvind Kejriwal in criminal defamation case filed by former aide of Sheila Dikshit*, The Economic Times (05/11/17), available at https://economictimes.indiatimes.com/news/politics-and-nation/delhi-court-acquits-cm-arvind-kejriwal-in-criminal-defamation-case-filed-by-former-aide-of-sheila-dikshit/articleshow/66511424.cms, last seen on 15/05/2020.

97 Amit Malviya, Twitter (29/11/16) available at https://twitter.com/malviyamit/status/803550880754647040?ref_src=twsrc%5Etfw, last seen on 15/05/202020.

98 B. R. Rubin, *The Civil Liberties Movement in India: New Approaches to the State and Social Asian Survey*, 371-392 (1987).

per the Report on the Draft National Policy on Criminal Justice, which nonetheless acknowledges this threat.[99] It has been suggested that the judiciary must discuss the threat by pitting it against constitutional morality, as done to decriminalise consensual sodomy in Section 377, rather than resting on colonial precedent and public morality.[100] Strides in this direction are clearly observable in the movement being made across Africa, discussed in the subsequent section.

The discussion on criminal defamation having been created to prevent a breach of peace, which might occur due to violence incited to protect the honour of the defamed in UK,[101] was also ignored while making this decision. In fact, Justice Misra stated "we are of the considered opinion that there is no warrant to apply the principle of noscitur a sociis to give a restricted meaning to the term "defamation" that it only includes a criminal action if it gives rise to incitement to constitute an offence." This becomes pivotal in the final determination of proportionality review, along with the Court's deference to legislative wisdom discussed below, which are arguably contrary to its role in India's Constitution.

3.2. *Its Inconsistent Reasoning in Addressing Petitioners' Arguments*

Although certain arguments were altogether dismissed and omitted in the judgment, yet other arguments and strands of reasoning were inconsistently addressed. The aspects of the decision which appear logically inconsistent, particularly pertaining to the central focus

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99 Ministry of Home Affairs, Government of India, *Report of the Committee on Draft National Policy on Criminal Justice*, 12, available at https://www.scribd.com/document/41432012/ Menon-Committee-Report-on-Criminal-Justice-System last seen on 29/07/20.

100 L. Vashist, *Re-Thinking Criminalisable Harm In India: Constitutional Morality As A Restraint On Criminalisation,* 55(1) Journal of the Indian Law Institute 73, 80 (2013), available at https://pdfs.semanticscholar.org/2e3a/59434b144ad43fc59f749d0d0c2e28dff9d1.pdf, last seen on 15/05/20.

101 Supra, discussion in Part 2.

of this paper on the interplay of postcolonial transformative constitutionalism and criminalisation as a tool of oppression, are discussed below.

First, one of the core arguments of the petitioners was that the private injury of reputational damage cause by defamation could not be sanctioned criminally. In this regard, the Court argued a collectivist community based approach, arguing that speech, which derogates the reputation of an individual, is injurious to society itself.[102] The Court held that defamatory speech causes injury that can be best prevented or rather, the member themselves can be best protected as a member of a social order and that prescription of such an offence is done with certain legislative wisdom.[103]

There are two issues with the Court's holding. On the issue of legislative wisdom, Justice Misra in the Swamy judgment acknowledged the pre-constitutional nature of the law but continued to apply the rationale of 'legislative wisdom' and the 'presumption of constitutionality', which accompanies the former. This deference is also accompanied by the burden of proof shifting procedurally to the petitioner to prove unconstitutionality. Justice Misra himself recorded "the ultimate goal of our magnificent constitution is to make right the upheaval which existed in the Indian society before the adopting of the Constitution" in Navtej Singh Johar v. Union of India ('Navtej').[104] There, he appears to be cognisant of Section 377 having been drafted by the British in a context far removed from modern India, but this same reasoning is missing in his analysis of Sections 499, 500 and 199. In Navtej, Justice Nariman too questioned deference to legislative wisdom with a pertinent holding, "where, however, a pre-constitution law is made by either a foreign legislature or body, none of these

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[102] Supra 5, at ¶75.
[103] Supra 5, at ¶90.
[104] Navtej Singh Johar v. Union of India, Writ Petition (Criminal) No. 121 of 2018, ¶79.

parameters obtain. It is therefore clear that no such presumption attaches to a pre-constitutional statute like Indian Penal Code."[105] In *Anuj Garg* v. *Union of India*,[106] the Court similarly did away with the presumption of constitutionality of a colonial era law, acknowledging that the law was regressive and reflected the orthodox belief systems of the time. It specifically stated that the burden would be on the State to prove constitutionality if such laws are challenged. The import of these holdings is not immediately clear due to intervening cases such as Swamy, but the treatment of the IPC with a degree of skepticism necessarily paves the way for a recall of the decision in Swamy, when read with other issues with the judgment, carved out elsewhere.[107] This also demarcates the post-colonial approach that must be taken to challenge pre-constitutional statutes as done in Africa, and moving towards transformative constitutionalism whose objective has been to challenge the social order reinforced by colonialism in the pre-independence era. This argument has been canvassed in greater detail elsewhere,[108] but the closely associated concept of proportionality review will be dealt with in greater detail below.

The second issue is that, while characterising this right to reputation as a public right, deserving of State action, the Court fails to distinguish why this private wrong can lead to an affront of the community but not other private wrongs, rendering the holding quite vague and open to misconstruction.

The right of reputation itself ought to have been examined with more gravitas. The Court, instead lent credence to ancient religious texts for a portion of the judgment's information on

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105 Ibid, ¶90.

106 Anuj Garg v. Hotel Association of India, AIR 2008 SC 663, ¶20.

107 Supra 6.

108 Tarunabh Khaitan, *On the presumption of constitutionality for pre-constitutional laws,* Indian Constitutional Law & Philosophy (11/07/18) available at https://indconlawphil.wordpress.com/2018/07/11/guest-post-on-the-presumption-of-constitutionality-for-pre-constitutional-laws/, last seen on 15/05/20.

'reputation' before diverting its attention to English jurisprudence.[109] It also selectively examined African jurisprudence in the form of a South African case which is one of the countries that remains in the process of decriminalisation, as well as the European Court of Human Rights.[110] It was safely neglectful of the fact that despite any prior jurisprudence on reputation, the English jurisprudence has progressed to a free speech protective regime. Similarly, it refused to acknowledge the larger political movement that South Africa was located in, wherein other countries have moved towards a free speech regime, and South Africa's ruling party has pledged to follow suit.[111] The characterisation of reputation, however, was limited to the conventional understanding of an honour that has become inseparable from Article 21, deserving of protection equally by 'the privileged and the downtrodden', ignorant of the cases, which selectively favour the former.[112]

To delve into the possible rationale, reputation has been examined academically in the context of criminal defamation earlier, and categorised in three forms, as 'property'; as 'honour'; and as 'dignity'.[113] The Indian context assumes the role of a 'deference society' as argued by Post in 1986, where reputation is in the form of 'honour' such that the reputation is not a private possession but rather, a public one.[114] This is because the deference society functions on the notion that society collectively invests its perceptions in the reputation of an individual, thus reaffirming it.[115] This theory appears most coherent

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109 Subramanian Swamy v. Union of India, AIR 2016 SC 2728, ¶32.

110 Ibid, at ¶41.

111 *Decriminalising defamation in Africa*, Southern Africa Litigation Centre (03/03/17), available at http://www.southernafricalitigationcentre.org/2017/03/03/decriminalising-defamation-in-africa/, last seen 15/05/20.

112 Supra 5, at ¶47 -53.

113 Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 California Law Review 691, 704 (1986).

114 Ibid.

115 Ibid.

with the analysis of the Swamy judgment, as it is also specific to the concept of 'public power'.

This is the argument that is core to the case, and relevant for the scope of this paper, i.e. the argument concerning Section 199 of the Criminal Procedure Code. This Section provides for the prosecution of an individual on the complaint of 'some person aggrieved', and that the Public Prosecutor is to take up such complaints when they concern the President, Vice-President or any other public servant. The argument that the Section is attacking Article 14 of the Constitution by creating a different class of citizens, i.e. the public servants, was addressed by the Court, which held that they do constitute a separate class by virtue of their public functions.[116] However, even this justification of class does not demonstrate a 'public wrong' nature as such and does not necessitate a provision for public prosecution of the accused. A primitive deference society can justify such a provision by arguing that the function of an individual as a public official is intertwined with the institution of that role itself. For instance, defamation of the President attacks the institution of presidency. However, Post argues that in our modern world replete with rational legal authority, we must distinguish between the two, in conformity with egalitarian ideals, which do not lend credence to this notion of 'honour'.[117]

Third, a most significant feature of the African cases that the Indian judiciary had earlier failed to take note of is the structure of the proportionality test. Prima facie, the argument by the petitioners was that even if reputation is read into Article 21, the fundamental rights are only enforceable against the State, and therefore any private wrong ought to fall outside of it. The Court made a passing reference to the horizontality of enforceability of rights, but did not clarify the scope

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116 Supra 5.

117 Supra 113, at 706-707.

of such horizontality to any degree.[118] However, even under the assumption that this restriction can be permitted in a private wrong to yield the criminal law of defamation, the Court ought to have justified its constitutionality on the well-accepted test of proportionality, now a test that has been relied upon by the Supreme Court in *Justice Puttaswamy* v. *Union of India*.[119] The test of proportionality would, we argue, necessarily expose the costs to fundamental rights that are not otherwise visible in the Court's deferential form of review in Swamy. This will form the substance of the primary tool to be derived from the comparative analysis that follows.

It is argued that in an egalitarian democratic society, we must necessarily move towards a more marketplace understanding of reputation, distinguishing it from the concept of honour, to characterise it as something that the individual creates himself rather than as honour created by society. It is also important to make this departure from the honour-oriented concept as it necessitates criminal sanctioning which is a process disregarding the truth (as reflected in the Court's neglect of the 'actual malice' test), unlike civil proceedings. This marketplace definition treats reputation as a self-created commodity, which can be compensated for by monetary damages, eliminating the need for custodial sentences. Departure from the honorific concept is essential not just in terms of its sanctioning, but also in its emphasis on the protection of public servants' roles, as treating them not merely as a separate, but superior class. This strengthens our argument on the replication of hierarchies as under British rule in the present context where the political, and affluent elite now occupy the position of the colonisers.

4. Locating Criminal Defamation Across Africa

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[118] Supra, at ¶88.

[119] Justice Puttaswamy v. Union of India, Writ Petition (Civil) No. 1014 Of 2017.

4.1. *Comparing Jurisdictions: India and the African Nations*

Scholars, as well as the press itself, across the African continent have written extensively about the colonial history of their criminal defamation provisions as well.[120] While Ghana specifically decriminalised defamation in 2001, many countries in Africa with similar political and legal histories as India continue to carry criminal defamation on their penal statutes.[121] In recognition of the widespread impact of such provisions, the African Commission on Human and Peoples' Rights passed a Resolution in 2010, calling on nations to remove criminal defamation from their penal codes.[122] In the aftermath of this Resolution, four nations of the African continent, i.e. Burkina Faso, Lesotho, Kenya, and Zimbabwe, have decriminalised defamation, as the constitutional courts have declared the provisions regarding criminal defamation unconstitutional.[123]

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[120] *It's time for Africa to throw off its colonial legal shackles*, DW Akademie (28/04/16) available at https://www.dw.com/en/its-time-for-africa-to-throw-off-its-colonial-legal-shackles/a-19212556, last seen on 15/05/20; Jonathan Rozen, *Colonial and Apartheid-era laws still govern press freedom in southern Africa,* Quartz Africa (07/12/18) available at https://qz.com/africa/1487311/colonial-apartheid-era-laws-hur-southern-africas-press-freedom/, last seen on 15/05/20; *Stifling Dissent, Impeding Accountability Criminal Defamation Laws In Africa*, PEN Report (22/11/12), available at https://africanlii.org/content/pen-report-criminal-defamation-used-stifle-dissent-africa, last seen on 15/05/20.

[121] *It's time for Africa to throw off its colonial legal shackles*, DW Akademie (28/4/16) available at https://www.dw.com/en/its-time-for-africa-to-throw-off-its-colonial-legal-shackles/a-19212556, last seen on 15/05/20.

[122] The Assembly of Delegates of PEN International, meeting at its 81st World Congress in Quebec, Canada, *Resolution #19: Criminal Defamation and Insult Laws*, October 13-17, 2015
https://pen-international.org/app/uploads/Resolution-on-Criminal-Defamation-88155.pdf.

[123] Lohe Issa Konate v. Burkina Faso, Application 004/2013 (The African Court on Human and Peoples' Rights); Basildon Peta v. Minister of Law, Constitutional Affairs and Human Rights and 2 Others, Constitutional Case No. 11 of 2016 (Constitutional Court of Lesotho); Jaqueline Okuta & Jackson Njeru v. Attorney General & Director of Public Prosecution, Petition no. 397 of 2016 (High Court of Kenya).

There are several grounds of comparison of African nations and India, in terms of their socio-historical context and their constitutional frameworks.

Much like India, Tukumbi Lumumba-Kasongo argues that the African Constitutions cannot be examined in isolation of their histories as no Constitution emerges from a 'tabula rasa'.[124] African Constitutions at large, while inseparable from colonial oppression have borrowed from colonisers' Constitutions just as India has, however, Lumumba-Kasongo argues that this does not automatically prevent Africans from embodying these constitutional values in a manner that reflects African peoples and their struggles. The persistent criticism of African Constitutions as 'Consitutions without constitutionalism' is then challenged further by H. Kwasi Prempeh,[125] who sets out the argument that there is a need to appreciate judicial review in Africa thus far while noting certain pivotal constitutional moments, and acknowledging the need for further empowerment. By turning to Africa and its experience with criminal defamation, the proportionality test and the overarching postcolonial experience, we attempt to remedy the belief that African problems are exceptionalist, and thus to be sidelined in comparative analysis. Drawing on the histories of postcolonial nations, Upendra Baxi argues, the comparative methodologies employed in constitutional law can benefit from a reorientation towards a South-South frame of reference.[126]

Constitutionalism includes, as is generally accepted by constitutional scholars, the element of rights protection, which is essential to the Constitution of any nation as the scope of rights

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[124] Lumumba-Kasongo T., *The Origin of African Constitutions, Elusive Constitutionalism, and the Crisis of Liberal Democracy* 63, 66, in *Democratic Renewal in Africa* (S. Adejumobi, 2015).

[125] Kwasi Prempah, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80(4) Tulane Law Review 40-42 (2006).

[126] *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa,* 23 (O. Vilhena, U. Baxi & F. Viljoen, 2013).

protection defines the role of the State.[127] The comparison of South Africa and India has been made specifically in many realms of law founded on the thesis that the constitutionalism of these nations is comparable.[128] The history of both nations is rooted in colonialism, which leads to their visions of human rights, constitutional supremacy, and judicial review over rights protection to be geared towards a transformative form of constitutionalism.[129] India had a decisive influence on the liberation of South Africa as well, in its vocal opposition to the practice of apartheid, and South Africa finally adopted provisions and derived inspiration from the Indian Constitution.[130] As will be discussed below, references to South African constitutionalism have been referred to in judgments of Lesotho, Zimbabwe, and Kenya as well. Moreover, South Africa and India share several features in common with Kenya, Zimbabwe and Lesotho. First, each country follows the common law system; second, each country has a colonial history; third, each country is in the continual process of still defining the implications of judicial review. Whereas perhaps the judicial review in African nations was criticised in its early years, these cases mark indications of a departure from the understanding of judicial review under the colonial legal order.[131] The

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[127] U. Baxi, *Constitutionalism as a Site of State Formative Practices,* 21 Cardozo L.Rev. 1183, 1184 (2000).

[128] M. Bennun, Malyn D.D. Newitt**,** *Negotiating Justice: A New Constitution for South Africa* (1995); A. R. Picess, *Judicial Review In India And South Africa: A Comparative Study*, Journal of Legal Studies And Research 4(3) (2018); See S. Choudhry, *How to do Constitutional Law & Politics in South Asia* in *Unstable Constitutionalism* (M. Tushnet & M. Khosla, 2015).

[129] V. Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 Tul. J. Int'l & Comp. L. 49 (2007). The trend towards transformative constitutionalism, as discussed below, has been particularly emboldened in recent Supreme Court decisions; See supra 127.

[130] V. Sripati*, Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective,* 16 Tul. J. Int'l & Comp. L. 49 (2007).

[131] Supra 126, Prempeh deals with a strand of criticism by human rights lawyers directed at the judiciary for its deferential review of laws, citing interestingly the

underlying reasons for this shift are outside the scope of this paper, however, we argue that India has existing rationale for such a shift, and in its legal methodology it must consider the experience of comparable nations.

It is also of note that the fundamental rights provisions guaranteeing free speech in the Constitutions of several African nations, including Lesotho, Kenya, Burkina Faso and Zimbabwe, mirror the freedom of speech provision in the Indian Constitution. The African nations' provisions also provide for restrictions on freedom of speech in the interest of national security, to prevent disorder, but most importantly, some of these provisions provide for restrictions based on protecting reputation of others.[132] The allowance of restrictions premised in the ideal of protecting 'reputations' is noteworthy, as India has fairly comparable allowance for laws of defamation in Article 19(2) of the Constitution of India.

Prof. Makau W. Mutua argues that,[133] the human rights development of African nations is greatly stunted, and that the 'postcolonial state' has failed its people. He argues vehemently that it is the political class that benefits from the control of the State, and that, a new human rights jurisprudence must be sought for, as do other contemporaries.[134] In this context, the decision of the of the regional Human Rights Court leaves interesting takeaways for how the role of the press and freedom of speech can be reimagine in human rights to propel the development of the 'postcolonial state'.[135] It is also notable for having initiated the movement in Africa, providing the bedrock for

example of a case of sedition in which the Nigerian Court had decided in favour of the law. The present cases present an alternate, stricter form of review.

132 Art.10(2), Constitution of Ghana, 1993; S.14, Constitution of Lesotho, 1993.

133 Makau wa Mutua, *Conflicting Conceptions of Human Rights: Rethinking the Post-Colonial State*, Proceedings of the Annual Meeting (American Society of International Law 487-490 (1995); Mahmood Mamdani, *Citizen and subject: decentralized despotism and the legacy of late colonialism* (1996).

134 Supra 29.

135 Lohe Issa Konate v. Burkina Faso, Application 004/2013.

the domestic judgments, as well as for its application of the *Oakes* test. However, we do not delve into this decision, as it does not share the same role that the Courts in Kenya, Lesotho and Zimbabwe occupy, that of a constitutional role. We distinguish it for its reliance on regional rights instruments, which fall beyond the scope of this paper, which rests on the constitutional mode of comparison.

The following sections of this Part will delve into an in-depth analysis of the law in these African nations, in the context of the 2010 Resolution, to characterise a pan-African Movement towards decriminalisation of defamation. Whereas, the Indian judiciary has rejected many arguments or simply neglected them,[136] the following judgments lend interesting lessons as they address these and incorporate the proportionality review as they address most of them. It is most pertinent that all these landmark precedent-setting judgments involve the political class or the corporate elite. It is to be noted that we do not claim that this is likely to reflect the pattern of liberal approach in the described domestic jurisdictions, but that these cases individually offer constitutionally relevant lessons.

4.2. *Deriving Proportionality Review from Comparator Jurisdictions*

In the context of Swamy, we briefly canvassed observations made in *Navtej* and *Anuj Garg* regarding the judiciary's deference to legislative wisdom, particularly in pre-constitutional statutes. The criticism directed at the judiciary for its deference ties into a broader theme of the practice of judicial review in the judgment.

Constitutional rights adjudication, comprises, not exclusively, the interest analysis and the nexus analysis stages. In the interest analysis, the Court is intended to determine the precise state interest in restricting the right in question, and the Court may even conduct a legitimacy analysis wherein it will examine the veracity of the state

[136] See discussion in Part 4.

interest.[137] Khaitan states that interest analysis does include legitimacy analysis, although some judgments have not done so. Here, this would involve the question of whether the State has claimed a *constitutionally legitimate* interest in criminalising defamation. This would be in addition to the test itself, be it manifest arbitrariness, procedure established by law, reasonableness, any other tests or combinations of these.[138] The next step would depend upon the test advocated. We argue in favour of a proportionality review to comprise the elements as we will list them from the comparative analysis. We will root our understanding in Tarunabh Khaitan's articulation of the test as – suitability, necessity and balancing, while acknowledging that the precise composition of this test is contested but that the objective of this paper is not to settle that debate.[139]

There has been lament in India over the ambiguous and opaque manner in which the judiciary applies standards of review in rights litigation, and moreover that standards applied are deferential.[140] In answer to these questions, the approach of the African movement indicates answers not much different from the reading of the Indian Constitution.[141] It is that, the role of judicial review in a robust Constitution such as ours is to examine the legitimacy of State interest rather than apply deferential standards of review, say the reasonableness review, which do not examine the State interest and the legislation in question, to examine its legitimacy, necessity and

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137 Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement*, 50 (II) JILI (2008).

138 Ibid.

139 Supra 137.

140 Ibid; M. Satish and A. Chandra, '*Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror Related Adjudication'* 21 (1) National Law School of India Review 51 (2009); Moiz Tundawala, *Invocation of Strict Scrutiny in India: Why the Opposition*, 3 NUJS L. Rev. 465 (2010).

141 V. Narayan & J. Sindhu, *A historical argument for proportionality under the Indian Constitution,* Indian Law Review 1, 5 (2018).

efficacy.[142] The answer to this would then be to adopt the stricter standard of review known to be the proportionality review, glaringly ignored in substance by the Bench in Swamy, despite citing Justice Sikri's opinion in *Modern Dental College and Research Centre v. State of Madhya Pradesh*,[143] which had held the proportionality review as the in-built mechanism for reviewing reasonable restrictions.

While we advance our argument from lessons learnt from the following postcolonial nations, the argument in favour of proportionality as the standard of review has been made previously through other means. Aditya Narayana and Jahnavi Sindhu situate their argument for the adoption of a stricter standard of review in a 'culture of justification', as articulated by Etienne Mureinik in the context of the South African Bill of Rights.[144] They argue that deferential standards of review have seeped into Article 19(1) jurisprudence as well, wherein, the only requirement has become that the offending law have a rational nexus with the explicit restrictions mentioned, without any real examination of whether it is legitimate, necessary and least restrictive in doing so.[145] Most importantly, they rely on the debates of the Framers of our Constitution to argue that the Courts were to review the soundness of the choices of the Legislature within the rights-framework set out in the Constitution. A reading of the debates lends the meaning that the Framers did not merely intend for the Government to defend laws which violate civil liberties by virtue of their 'democratic will' but rather, to actively *justify* the law. Khaitan, as well as Narayana and Sindhu argue that this would mean the State would have to approach policy making, through a lens of rights-based enquiry, requiring cogent evidence to prove legitimacy, necessity and

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142 Ibid.

143 Modern Dental College and Research Centre & Ors. v. State of Madhya Pradesh & Ors., 2016 (4) SCALE 478.

144 Supra 141.

145 Ibid; OK Ghosh v. EX Joseph, AIR 1962 SC 814.

efficiency. The debates under Article 19 and 32 reveal the Framers as discussing the constituent elements of the proportionality test, underscoring the constitutional intent for judicial review of laws in respect of restrictions such as 'defamation'.[146]

As Aparna Chandra argues, there is a substantive component of the proportionality review as well as the evidential.[147] The evidential components are required to assess whether the substantive prongs have been met. A strict standard of scrutiny as said in R v. Oakes,[148] requires the Court to produce cogent and clear evidence to prove its substantive arguments, rather than abstract inferences it makes in its own defense.[149] A prima facie reading as well as the analysis below reveals the Court to have relied on a lower standard of scrutiny. Arguments that are made on the substantive prongs have considerable impact on the evidential prongs as well, however this and evidential analysis itself is outside the scope of this paper.

The structure of the proportionality test itself is unclear from the judicial approach, where cases have been divergent in nomenclature, substance and analysis of this standard of review. For our purposes we will rely on the test as articulated by David Bilchitz, having received approval in various jurisdictions.[150]

4.2.1 *Analysis of State Interest*

In Swamy, the Court briefly (while examining the nexus between the law and public good to justify the element of criminality) discusses reputation as a fundamental right, but more immediately delves into the definition of crime and the manner in which "crimes cause a dent in society."[151] In doing so, the Court absolutely steps over

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146 Supra 141.

147 A. Chandra, *Proportionality in India: A Bridge to Nowhere,* University of Oxford Human Rights Hub Journal, Vol 3(2) (2020).

148 R v. Oakes, [1986] 1 SCR 103.

149 Supra 147.

150 D. Bilchitz, *'Necessity and Proportionality: Towards a Balanced Approach?'* 49, in *Reasoning Rights: Comparative Judicial Engagement* (Liora Lazarus et al., 2014).

151 Supra 5, at ¶76-89.

the question of the legitimacy of the State's interest in protecting an individual's reputation which was submitted as a private wrong. Beyond abstract statements of the individuals constituting the collective, as well as rejecting that 'incitement of offence' ought to be read into the restriction of defamation, it is unclear how the Court has established State interest. While arguing that defamation of a private individual is a public wrong as well, the Court further blurs the line between private and public wrongs.[152]

The analysis of legitimacy of state interest is blurry in several judgments, and particularly the ones that follow which are, much like India, still evolving towards the proportionality review and a befitting judicial review. However, observations of the Courts have been analysed where we have found them to question the State interest, even if under the prong of necessity or balancing of State interest and rights.

In *Jaqueline Okuta v. Attorney General*,[153] interestingly relied on India's understanding of noscitur a sociis to hold that the restriction on freedom of speech must be in *public interest,* as was argued in the Constituent Assembly of India as well.[154] In doing so, it simultaneously held that the law of criminal defamation is directed at protecting the individual and not the public. In order to do so, the Court reasoned that the restricting clause must be construed narrowly, and not the rights-giving clause, as is the scheme of the Constitution. By holding that the criminal defamation provision is thus directed at the individual, the Court was able to reason that the clause restricting freedom of speech cannot be the authority for this law, and thus the legitimacy of the objective is not established. In *Madanhire v. Attorney*

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[152] Ibid.

[153] Jaqueline Okuta & Jackson Njeru v. Attorney General & Director of Public Prosecution, Petition no. 397 of 2016, ¶2.

[154] Constituent Assembly of India Deb 2 December 1948, vol VII http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C02121948.html.

General ('Madanhire'),[155] the Constitutional Court of Zimbabwe confirmed that the objective of the criminal defamation provision to protect individuals and their reputations is important, and the provision shares a rational connection to this law. Here, much like in Swamy, the Court does not delve into the legitimacy of 'reputation' as a *State* interest, only briefly articulating that this is a laudable goal.[156] In *Basildon Peta v. Minister of Law* ('Basildon Peta'),[157] the Court similarly held that the Government was constitutionally ordained to fulfill the objective of protecting reputations owing to a specific provision to this effect in their Constitution.[158] It is clear from the foregoing discussion that the task of establishing an objective which is legitimate and sufficiently important is not quite as straightforward as it appears in Swamy, and there is sufficient confusion on the State's interest in choosing to protect individuals deriving authority from a restriction intended to protect the public as a collective.

Having completed the interest analysis, the Courts proceeded to apply the proportionality test itself. The test, as noted above comprises the stages of suitability, necessity and balancing.

4.2.2 *Suitability*

In this prong of the test, a Court is tasked with determining how far the impugned law is able to, efficiently, further the legitimate objective it claims to be following. The role of an evidentiary review is crucial in this prong, as discussed by Chandra in context of the Aadhar case.[159] As we have shown above, there are severe consequences to the law, in the manner exercised by governments at times as well, where

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155 Madanhire v. Attorney General, Judgement No. CCZ 2/14.

156 Ibid at 10.

157 Basildon Peta v. Minister of Law, Constitutional Affairs and Human Rights and 2 Others, Constitutional Case No. 11 of 2016.

158 Ibid; The Penal Code Act, 2010, §14(2)(b).

159 Supra 147.

such complaints are filed in pursuance of seeking to subdue debate and information relevant to the public.[160]

Despite arguments made in this regard, particularly regarding the chilling effect on speech, the Court simply cited several cases, which had isolatedly spoken about the right to reputation and held this right to prevail. Without delving into the substantive benefits of a criminal defamation law in furthering this objective through cogent evidence, it is doubtful whether this prong can be said to be fulfilled.

In *Jacqueline Okuta*, the Kenyan Court again glossed over this prong despite its articulation of the test in very clear terms, but seemed to imply that while the law may very well be in pursuance of this objective, several deleterious consequences cannot be ignored.[161] Its analysis in this prong appeared to seep into its analysis of the necessity prong, but the approach taken by the Court was to examine the chilling effect of the law. It did so by noting the deep impacts of criminalisation, arrest and incarceration, particularly through reliance on the development of human rights law on this subject.[162] While continuing to rely on abstract arguments rather than asking the State to prove the efficiency of the law, the Court engaged in more analysis of consequences than the Bench in Swamy. In *Madanhire* as well, the Zimbabwean Court took an identical approach to that of the Kenyan Court, relying on the same arguments and sources.[163] In *Basildon Peta*, the Lesotho Court referred to this prong as the 'rational connection' prong and simply held on a prima facie abstract sense that the law is rationally connected to protecting reputations. It did not check whether evidentially, it can be said to be advancing this laudable goal.

4.2.3 *Necessity*

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[160] Supra 62.

[161] Jaqueline Okuta & Jackson Njeru v. Attorney General & Director of Public Prosecution, Petition no. 397 of 2016.

[162] It relied on the regional instrument as well as the denunciation of criminal defamation by the United Nations.

[163] Madanhire v. Attorney General, Judgement No. CCZ 2/14.

All Courts apart from the Bench in Swamy have focused on the necessity prong, often at the cost of the other elements of the test as demonstrated above. Here, the Court would be expected to examine whether the impugned law is necessary in the absence of any other alternatives.

In *Swamy*, the Court did not structure its analysis of the proportionality test, and therefore any analysis discussed here is that which has been inferred by the authors to be in pursuance of satisfying this element. The Court referred to the civil action for defamation, holding it to be necessary beyond a doubt as arguments had proceeded against this as well.[164] However the Court appeared to think it needless to evaluate the civil action as an alternative for the criminal provision, as it exalted the values of a reputation, which it believed would be best served by protection as a public criminal wrong.[165] Ultimately then, the Court's analysis of necessity, at best, seems to be that the protection of the right to reputation is a 'constitutional necessity'.[166] It is crucial to note that the Court deferred to the ratio of other cases, and that of legislative wisdom on the point of reputation, without delving into its own analysis of the necessity of protecting this right through this law alone.[167] In fact, by its own analysis, the civil action is crucial to protect the right to reputation, but the Court does not elucidate why it is alone insufficient.

In the Kenyan judgment (Jacqueline Okuta), so as in the Zimbabwean judgment (Madanhire), the Courts clearly stated that the less restrictive remedy of a civil action is available, and is directed at a private wrong for individual redress.[168] So also in the Lesotho

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164 Supra 5, at ¶ 33, 36.
165 Ibid, at ¶89.
166 Supra 5, at ¶139.
167 Supra 5, at ¶140.
168 Jaqueline Okuta & Jackson Njeru v. Attorney General & Director of Public Prosecution, Petition no. 397 of 2016; Madanhire v. Attorney General, Judgement No CCZ 2/14, p. 12.

judgment, which adjudged civil action to be sufficient, while additionally finding the criminal provision to be over-broad and vague owing to unique phrasing in their laws, incomparable to ours.[169]

4.2.4 *Balancing the State Interest and the Fundamental Right*

The analysis under the balancing prong is slightly convoluted here, as pointed out by Gautam Bhatia elsewhere,[170] because the Court analysed the right to reputation itself as against the right to freedom of speech and expression. As he rightly points out, this seems to be a an analysis that the Article 19(1)(a) right is inevitably set to lose based on the precedents of the Court having undermined it as against rights read into Article 21. Whether the Court compares the State interest in the right read into Article 21,[171] or the right itself against the right to freedom of speech is important and it is clear that the Court has engaged in the latter. In *K.S. Puttaswamy v. Union of India*,[172] the Court famously concretised the proportionality test in Indian constitutional law, and since then there seems to be growing agreement on the application of the proportionality standard itself. However, in this case, the Court held that balancing requires comparison of "importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right."[173] In Swamy, the importance of the proper purpose would be to examine reputation against speech itself, and use the analysis in the preceding prongs to arrive at a determination of which value is worth protecting. Now, the issues that are traceable in the previous prongs cumulatively challenge the analysis in this prong. First, there is absolute ambiguity on what constitutes the

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169 Basildon Peta v. Minister of Law, Constitutional Affairs and Human Rights and 2 Others, Constitutional Case No. 11 of 2016, ¶19.

170 G. Bhatia, *The Balancing Test and its Discontents,* Indian Constitutional Law & Philosophy, available at https://indconlawphil.wordpress.com/2016/05/20/the-balancing-test-and-its-discontents/, last seen on 23/05/20.

171 Umesh Kumar v. State of A.P., (2013) 10 SCC 591

172 Justice K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1.

173 Ibid, at 369.

right to reputation or the exact scope of this right upon reading into Article 21, casting aside even the criticism of the overbreadth of Article 21 as well. To test the right to freedom of speech which textually enumerated and, thus, limited as against an expansive right to reputation is indicative of the failure in the first prong itself, of determining a precise legitimate objective with a clear scope. Second, upon balancing these two rights, however they may be defined, the Court ought to infuse its analysis with the immense social costs outlined in Part II, as *Puttaswamy* itself dictates that the social importance of the right affected must bear importance. In doing so, the Court must also be cognisant, tying back to the original criticism of private v. public wrongs, that not only is it protecting the right to reputation but so also the State's interest in it, and right to prosecute it as a criminal wrong involving the several consequences of carceration.

The comparison of two competing rights has been done in *In Central Public Information Officer* v. *Subhash Chandra Agrawal*, balancing the right of an individual to reputation and privacy under Article 21 and the right to information of third-party parties under Article 19(1)(a), under proportionality review.[174] Here, Justice Chandrachud assumed for this to imply the application of the proportionality test to both competing rights as legitimate aims. However, we argue that for criminal defamation, the Court must revisit the right to reputation as a legitimate aim in itself.

In the Kenyan and Zimbabwean Courts, the judgment unequivocally decriminalised defamation, specifying that a restriction on the freedom of speech, with criminal sanctions may be applied for only those restrictions enumerated in public interest on specified grounds.[175] The Court in Lesotho aligned itself with these decisions as well. It is worthwhile to note that several of the criticisms sustained

[174] Central Public Information Officer v. Subhash Chandra Agrawal, CIVIL APPEAL NO. 10045 of 2010 ¶ 1.41.

[175] Supra 168.

against the Swamy judgment persist in this prong as well. As mentioned earlier, the three jurisdictions did not examine the right to reputation with sufficient gravity, apart from the Kenyan Court, which read the restrictions using nosciter a sociis, as Swamy refused to do. The pivotal difference between the African cases and Swamy appears to be that irrespective of the analysis of reputation, the Courts in Africa appear to have seen the civil remedy as sufficient to cover reputational harm without delving into the issue of it being a private wrong. In India, we argue, the Court must not make the same mistake in reasoning and arrive at the same conclusion in the manner argued in Part III.B. In doing this, it will be able to rectify the error made in determining a legitimate objective itself, following which the elements thereafter will be closed for analysis immediately.

5 Conclusion

The departure that we argue for is one that is taking place, clearly observable from our earlier analysis of the jurisdictions in Africa, and the strides made by regional human rights bodies and courts. In examining the history and political context of this law in India, and proving its misuse, we reiterate the theme and costs of this law. These considerations, shown by the history, of the lapse legislative intent, the misuse and the weaponisation of this law, must form part of the Court's analysis while reviewing this law for its constitutionality. The cost of these laws remaining on the books is consistently rising, concurrently leading to overburdening of an overwhelmed justice system.[176] Other arguments of over-criminalisation and the sheer cost of criminal trials are equally important consequences to figure into the Court's proportionality analysis, so that it may examine how the law actually works, rather than merely its intent. It is clear that such considerations did not figure in the Court's analysis in Subramanian Swamy, in 2016, which we argue was a mistake, as have many others.

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[176] K. Gautam, *Judicial Delays, Mounting Arrears and Lawyers' Strikes,* 52(32) Economic and Political Weekly 23, 23-24 (2017).

Although the two judge bench in the Swamy judgment could find sufficient grounds in Part IV and notions of fraternity to justify the constitutionality of Section 499 and 500 within Art. 19(2), any future judgment must necessarily broaden the scope of its enquiry, and impose a strict proportionality review as is demonstrated in the paper. It must ask the State to show cogent reasons and evidence to prove the various elements under the proportionality test, an implementational failure in the African Courts, which deployed this test, as well. While Kenya, Zimbabwe and Lesotho have been able to utilise this test to arrive at progressive decisions, the manner of doing so has been less than the ideal proportionality test proposed by scholars and other Courts in strictness and structure. India must learn its lessons from these jurisdictions, while drawing inspiration from their underlying rationale. As outlined in this paper, it must examine the socio-historic context of these laws, the State objective of preventing reputational harm, the judicial approach of other nations to these laws, the irregularities in the 2016 judgment. Our conclusion remains that, defamation must be solely a civil offence.

WHO ARE OUR JUDGES? ASSESSING THE INFORMATION DISCLOSURE PRACTICE OF INDIAN SUPREME COURT JUDGES

*Rangin Pallav Tripathy & Chandni Kaur Bagga**

Abstract

Judges in India often expect the public to trust their capacity and integrity. The requirement of public trust in judges is not simply a question of what the judges desire but is an essential element of the democratic structure. We argue that it is insincere to expect the public to trust judges when people have limited information about them. Just as voters deserve information about the candidates to make an informed choice, people need information about the judges they are expected to trust. We contend that judges have the primary responsibility to adopt robust disclosure practices and share more about themselves. It is based on a simple premise that the people are not obligated to trust a public functionary and it is the job of the public functionary to generate trust. In this paper, we have examined the disclosure practices of the judges in the Supreme Court of India and have found a pervasive reluctance in judges to disclose essential educational and professional details.

Keywords: Judges, Supreme Court, public functionary, disclosure, trust.

The Rhetoric of Trust

The Indian judiciary in general and the Supreme Court in particular have quite often exalted idea of trust- trust in the judiciary. There seems to be almost a sense of entitlement in this regard. The message is that we should trust our judges to be honest individuals

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who will never abuse or misuse their power. The most categorical assertion of this rhetoric can be seen in *Supreme Court Advocates of Record Association* v. *Union of India*[1] (the Fourth Judges' case) wherein the Supreme Court struck down the constitutional amendment concerning the National Judicial Appointments Commission.[2] In the judgement, the court highlighted multiple instances of moral compromise by the political executive to assert that it cannot be trusted to handle the power of judicial appointments in an appropriate manner.[3] The other part of the narrative was that while the executive cannot be trusted, judges can be. This reliance on the idea of trust can also be seen whenever there is any request for a judge to be recused from a judicial, quasi-judicial or even administrative capacity.[4] Such requests, whether

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1 Supreme Court Advocates on Record Association v. Union of India, (2016) 5 SCC 1.

2 The amendments sought to abolish the collegium system of appointment which has been in place since 1993 through a series of judicial decisions. Under the collegium system, The Chief Justice of the Supreme Court and four senior-most judges in the Supreme Court constitute the collegium which decides on the appointment of judges to the Supreme Court. For the High Court judges, the collegium consists of the Chief Justice and two senior-most judges in the Supreme Court. The executive has mostly a formal role in this process as the collegium has the final authority on all judicial appointments.

3 Supra 1, at 394-396.

4 In April 2019, the Chief Justice of India, J. Ranjan Gogoi was accused of sexual harassment. In response, an in-house committee of three judges was constituted (by J. Gogoi) to examine the matter. The complainant objected to the presence of J. N.V. Ramanna in the committee on the ground that he shared a close personal relationship with J. Gogoi. While J. Ramanna recused himself from the committee, he was stern in his recusal letter that his capacity to be impartial could be doubted. He considered the apprehensions of the complainant as aspersions. He categorically stated that he is not recusing due to the complainant's concerns but because of the extra-ordinary situation. While the entire is issue is highly sensitive and possibly involves intricate political machinations from unknown actors, it is important to note that a concern regarding possible conflict of interest reflects a very natural human concern. Such concerns need not be based on a belief regarding the malice of a judge but may also be based on an understanding of how a normal person is likely to behave in a given situation.
See *Full Text of Justice N.V. Ramana's Letter To Recuse Himself From The Judges Committee To Probe Against The CJI*, The Hindu (25.04.2019), available at

accepted or not, are frequently met with a sense of bewilderment among the judges that their capacity to put aside all human failings is being doubted by the public. The sanctioned narrative from the judiciary seems to be that we should never doubt the honesty, integrity, impartiality, and moral character of our judges.

The Idea of Trust

Trusting someone is not the same as relying on someone. Reliance may be placed on people without having a clear expectation that they will fulfil their commitment.[5] This is not the case with trust. Often, the test of trust is in the feeling of being betrayed when the person/institution fails to honour a commitment. Trust can also be contextual and purposive. A person who might be trusted in relation to a specific task might not be trusted in relation to another one.

Trust can either be a leap of faith or based on evidence. There are people we trust because we have known them to be trustworthy in their dealings, with us or with others. We know details about them which allow us to harbour a favourable opinion towards them. However, there is often no designated benchmark of knowledge about someone's skills or character which triggers trust in our minds.[6] A completely thorough and verified account of all aspects of a person's qualifications is not always essential for him/her to be trusted.[7] It also may not be important to know more than what is related to the specific assignment or responsibility for which the person is being trusted. However, a minimal degree of information can be considered indispensable.

On certain other occasions, trust is not based on adequate evidentiary support. We decide to trust even though we do not have

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https://www.thehindu.com/news/resources/full-text-of-justice-nv-ramanas-letter-to-recuse-himself-from-the-judges-committee-to-probe-complaint-against-cji/article26945616.ece, last seen on 04.08.2019.

5 Katherine Hawley, *Trust: A Very Short Introduction* 5 (1st ed., 2012).

6 T Peperzak, *Trust: Who or What Might Support Us?* 18 (1st ed., 2013).

7 Ibid.

compelling reasons to do so. The reasons for such a leap of faith can be many- intuition, compulsion, assessment of risk involved, impatience etc.

An Element of Democratic Structure-The Context of Trusting Judges

When we trust someone, it may be because of their competence or character or both.[8] The rhetoric of trust by the judiciary touches upon both, especially while asserting the primacy of judiciary in matters concerning judicial appointments. Generally, the judiciary insists on the ethical credentials of judges in all their official capacities. The contention about competence of judges does not fit within the framework of this paper and is best addressed separately. We are concerned about the context in which judges expect to be trusted by the public in good faith.

As outlined in the beginning of the paper, judges expect that they should be trusted not to abuse their office and position, to decide impartially under all official capacities and to operate in good faith. However, in this paradigm, it is equally important to consider the expectations of the other side- the general public. This is because public trust and confidence in the judiciary is an indispensable element of any democratic structure.[9] That judges should be trustworthy is an essential social requirement for the operation of constitutional democracies.[10] The foundation of a civilized democracy is the non-violent resolution of disputes. If people turn away from courts and

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8 Supra 5, at 7.

9 Shimon Shetreet, *Judicial Independence and Accountability: Core values in Liberal Democracies* 1, 6 in) *Judiciaries in Comparative Perspective* (H.P. Lee, 1st ed., 2011).

10 See Edward J. Schoenbaum, *Improving Public Trust and Confidence in Administrative Adjudication: What an Administrative Law Judge Can Do*, (21) 1 Journal of the National Association of Administrative Law Judiciary 1,1 (2001).

judges having lost their faith in the possibility of an impartial and just resolution of disputes, the core of our societal existence is threatened.[11]

Furthermore, judges need to secure the obedience of their decisions. It is well established that there is a limit to the degree of compliance which can be secured through coercive methods. Under normal circumstances, governmental agencies depend on the voluntary acceptance from people to ensure that their decision are obeyed.[12] Such voluntary acceptance is strongly linked to the measure of trust that the public reposes on such authorities.[13] In any case, as the least powerful of the three organs,[14] the judiciary does not have a wide or incisive range of coercive methods at its disposal. Thus, the need to establish trustworthiness is more fundamental to the existence of judicial institution than it is to the existence of the executive or the legislature.[15]

In this regard, it is interesting to note the judiciary's approach regarding information disclosure requirements for candidates contesting elections to the parliament and the state legislatures. The Supreme Court has quite clearly established the right of the voters to know about the antecedents of the candidates so that they can make an informed choice.[16] Voters repose their faith in the candidate to discharge his/her duties and to keep his/her promises. The court has

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11 Rangin Pallav Tripathy, *Access to Justice and Judicial Performance Evaluation*, 2 (1) NLUO Law Journal Special Edition on Access to Justice 106,110 (2015).

12 Tom R Tyler, *Trust and Democratic Governance*, 1, 271 in V. Braithwaite and M. Levi, *Trust and Governance* (1st ed., 2003).

13 Supra 12, at 273. See also Russell Hardin, *Trust in Government*, 1, 10 in V. Braithwaite and M. Levi, *Trust and Governance* (1st ed., 2003).

14 Hamilton describes the judiciary as the most innocuous with regards to the danger it poses to the rights of people. This is a direct reflection of the limited power the judiciary has to affect the lives of people against their will. See Alexander Hamilton, *The Federalist No. 78*, available at http://www.constitution.org/fed/federa78.htm, last seen 05.08.2019.

15 James L Gibson, Gregory A Caldeira and Vanessa A Baird, *On the Legitimacy of National High Courts*, (92) 2 The American Political Science Review 343, 350 (1998).

16 Union of India v. Association for Democratic Reforms, 2002 (3) SCR 294; People's Union for Civil Liberties v. Union of India, 2003 (2) SCR 1136.

emphasized that before they vote, the voters have a right to know about various aspects of the candidates' past, including their criminal antecedents, educational qualifications, assets etc.

Undoubtedly, the act of voting in elections is on a different footing as compared with the act of trusting judges. While the former is an active assertion of choice guaranteed under the constitution, the latter is in the form of a passive acceptance which is not officially tracked. Voting for a candidate operates as an act of entrustment. Similarly, reposing confidence in the judiciary and in individual judges is also an act of entrustment. Voting merely happens to be a more formal, regulated, and protected exercise of entrustment when compared with the act of reposing faith in judges. Both acts are built on the foundation of entrustment. Politicians play a vital role in actualizing the political demands of the voters. Thus, the disclosure by politicians helps voters make more informed choices about the individual on who they wish to entrust their political demands. The same rationale is equally applicable to judges. Judges adjudicate disputes spanning across various segments of the society and maintain peace in the society. Thus, disclosure by judges will help individuals, whether they are citizens or not, to repose trust in their adjudicators.

Thus, if the public deserves to be aware about antecedents of a candidate before trusting him/her with their vote, then surely the public deserves to know about the judges before trusting them to be fair and impartial. In this regard, a distinction must be drawn between the extent of informational need of a voter and that of a common person being asked to trust judges. Voting is an active choice and it would be reasonable to argue that the voters need more information about the candidates. Thus, it could be argued that electoral candidates must discharge a greater informational burden than judges. However, this does not refute the fact that judges do need to discharge an informational burden, albeit lower than that of politicians.

The Supreme Court has also emphasized on the significance of transparency in enhancing the credibility of the judiciary. In *CPIO,*

Supreme Court of India v. *Subhash Chandra Agarwal*[17] the court held that the Chief Justice of India is a "public authority" under the under the Right to Information Act, 2005 and is thus, liable to the share relevant information in their possession when a request is placed under the Right to Information Act, 2005. In the judgement, the court has emphasized on the rights of citizens to access information concerning the judiciary.[18] The court has also categorically asserted that the idea of an open and transparent government does not simply concern the executive but also includes the judicial apparatus.[19] The court observed that transparency in functioning is one the surest ways to generate assurance in the minds of the people regarding the quality of the administration.[20] The court agreed with the proposition that public perception towards the independence of the judiciary is affected by the standards of transparency adhered to by the judiciary currently.[21] The court established a clear connection between lack of transparency and a corrosion in public trust towards the judiciary's impartiality.[22]

There have also been sufficient empirical enquiries establishing a positive relation between judicial transparency and the trust of the public in the judges.[23] While the effect of transparency does seem to get influenced by the prior disposition that people might have towards the judiciary, the positive effect of transparency has been proved to be tangible. Although there has been some literature on the negative impact of transparency on public perception in relation to other

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17 CPIO, Supreme Court of India v. Subhash Chandra Agarwal, Civil Appeal No 10044 of 2010 (Supreme Court of India, 13.11.2019).

18 Ibid, at 11.

19 Supra 17, at 100.

20 Supra 17, at 78.

21 Supra 17, at 57.

22 Supra 17, at 58.

23 Stephan Grimmelikhuijsen and Albert Klijn, *The Effect of Judicial Transparency on Public Trust: Evidence from a Field* Experiment, (93) 4 Public Administration 995, 997 (2015).

political institutions[24], the evidence in relation to the judiciary suggests that the judicial system stands to benefit greatly when people know more about the institution and its functioning.[25]

Thus, if the question regarding antecedents of candidates is wedded into the democratic form of government,[26] the issue regarding antecedents of judges can be characterized as being wedded into the idea of an independent judiciary which enjoys public confidence.

Who are our Judges?

Trust in judges is essential. However, does not mean it is inevitable. Trust, as the adage goes, must be earned. The argument for trustworthiness that is being used by the judiciary at present, per the logic of the Fourth Judges' case,[27] is an exercise in relativity. The reason in the minds of the judges for them to be trusted upon seems to be that they are more trustworthy than others. It is not based on any threshold of trustworthiness which they have acquired. A construct of trust on such precarious foundation is likely to collapse sooner or later. We do not think it requires persuasion to argue that our trust in public officials, including judges, should have an evidentiary foundation and should not be a leap of faith. That public officials should not expect public trust as a matter of entitlement seems too obvious a point to elaborate.

An evidentiary foundation, as discussed, is usually built on knowledge about the person who is being trusted.[28] Admittedly, there

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24 B Worthy, *More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government*, (23) 4 Governance 561, 570 (2010); J. De Fine Licht, *Do We Really Want to Know? The Potentially Negative Effect of Transparency in Decision Making on Perceived Legitimacy*, (34) 3 Scandinavian Political Studies 183, 195 (2011).

25 See JL Gibson and GA Caldeira, *Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People* (1st ed., 2009).

26 See Union of India v. Association for Democratic Reforms, 2002 (3) SCR 294, at 3.

27 Supra 1.

28 Supra 6.

is no objective benchmark about the extent of such knowledge.[29] However, a minimal level of knowledge seems to be an obvious requirement.

This begs the question: what do we know about our judges? To trust someone requires trustworthiness on the part of that person.[30] Do we know enough about our judges to enable us to reasonably assess their trustworthiness?

Which college did Judge A go to? How good a student had Judge B been? How many relatives of Judge C are also in the legal profession? Is Judge D the first person in his/her family to become a judge? Has there been a change in the assets of Judge E after assuming judgeship? Have the relatives of Judge F become wealthier after F became a judge? Which private companies had Judge G on their payroll before he/she became a judge? Has Judge H ever been an active member of a political party before assuming judgeship? How many cases did Judge J win when he/she was a lawyer? When was Judge K was a lower judicial officer, how many decisions by him/her were overturned on appeal?

These are just a few things which may seem relevant when we are trying to believe in the impartiality of a person. Some of these pieces of information is in the form of innocuous biographical detail. Some others touch upon our understanding of an individual in terms of his/her conflict of interest and the sphere of influence they wield and are subject to.

There can be an argument that we learn the most about our judges from the judgements authored by them. This argument has limited utility. Firstly, the judgements of the court are accessible to only a minority that is well versed in the language of the court and the study

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[29] Supra 6.

[30] Supra 5, at 1.

of law. Secondly, it is difficult to understand a judge from him/her judgements without a substantial body of work forming the foundation of such an analysis. This body of work will necessarily have to include the biographical and personal information stated above.

Should Judges Practice Information Disclosure?

Once we agree on the need to know at least something about our judges, we need to identify the source(s) from which we should expect that information. Is it incumbent on the judges to share information about themselves as a matter of practice without members of the public having to look for it? Standards of transparency suggest that instead of the public having to search for information, information ought to be provided to them as part of a streamlined information disclosure practice.[31] Also, as judges have established the rhetoric of trust in their favour, it is incumbent on them to facilitate an assessment of their trustworthiness. They also stand to lose the most if the public does not place its trust in them. Public confidence in their capacity and impartiality is the most critical asset of judges. The judiciary loses its indispensability as soon as the public decisively refuses to put its faith in the judges.

The appointment process of judges in India is shrouded in secrecy. There is no official notification about vacancies based on which people can apply for the job. Though there are some broad eligibility criteria, there is no clarity on the parameters for selection. Though the Supreme Court Collegium has started the practice of publishing the resolutions of its meetings,[32] the resolutions are opaque and uninformative. If there was a public event in the nature of the

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[31] JM Balkin, *How mass media simulate political transparency*, (3) 4 Journal for Cultural Research 393, 398 (1999).

[32] Available at https://sci.gov.in/pdf/collegium/2017.10.03-Minutes-Transparency.pdf, last seen on 04.08.2019.

confirmation hearings in the United States of America,[33] it would provide the public with an open platform to be aware about the credentials of a judge. However, the overall secrecy of the process means that the judges seen on the bench are strangers to the public.

While other stakeholders (government, academic researchers, bar associations etc.) are free to take steps to make more information about our judges available to the public,[34] judges themselves should do so in their own self-interest and in the interest of the institution. In order to do so, it might not be a great idea for judges to give wide-ranging interviews like politicians or celebrities. Without a doubt, the lives of judges cannot be subject to a similar public scrutiny. Judges also cannot always afford to be definitively vocal about contentious issues as it might affect litigant behavior and it might also compromise their own decision -making in future cases.

However, at the least, judges could provide a professional and comprehensive account of themselves in the profiles that are uploaded in court websites. For most of the people in the country, the official profile of a judge provides the only insight they have about the judge. One can enquire about a judge among lawyers but that would be akin to canvassing opinions and not to soliciting facts. Furthermore, one's impression would be governed by the lawyer or group of lawyers that the person speaks to. Thus, it is important that judges maintain an informative profile. The kind of information judges share and do not share in their profiles may speak about their casual approach to the issue amidst the various other matters of importance which occupy their attention. It may also speak about a deliberate reluctance to share

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33 Mark Tushnet, *Judicial Selection, Removal and Discipline in the United States*, 135, 147 in *Judiciaries in Comparative Perspective* (H.P. Lee, 1st ed., 2011).

34 The most seminal work in this respect has been done by George Gadbois Jr. In his book titled "*Judges of the Supreme Court of India 1950-1989*", one can find detailed biographic and professional information of all Supreme Court judges in India who were appointed between 1950 and 1989. See George H. Gadbois Jr., *Judges of the Supreme Court of India (1950-1989)*, (1st ed., 2011).

details of their professional life. While the first is easier to redress, the second is more problematic. A deliberate reluctance would create more suspicion about the reasons for such reluctance. Judges, as much as possible, should not be seen as wanting to conceal more information than what they are willing to disclose.

In the rest of the paper, we will be looking at the information disclosure practices of judges in the Supreme Court of India.

Source and Limitation of Data

For this study, we have looked at the information shared by the judges in the Supreme Court in their official profiles on the court website.[35] We have only considered judges who have held office on or after July 11, 2000. This is the date of the oldest archived page of the Supreme Court website that we could trace. It is known with certainty that on July 11, 2000 , the Supreme Court had a website with a specific link for the profiles of the sitting judges.[36] Thus, every individual who has been a judge on and after the said date has had clear knowledge that their profiles will be uploaded on the court website. Similar knowledge cannot be attributed to the judges who held office before July 11, 2000.

The purpose of this study is not to check the level of information otherwise available in relation to an individual judges or judges in general, especially in scholarly research. The purpose of this study is to analyze the kind of information that the judges themselves are willing to share in public. For example, one will find excellently detailed account of all the supreme court judges from 1950 to 1989 in the book by George Gadbois Jr.[37] However, it is safe to presume that

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[35] Available at https://sci.gov.in/chief-justice-judges, last seen on accessed 08.08.2019.

[36] Available at http://web.archive.org/web/20000711065648/http://supremecourtofindia.nic.in/new_s/wl_p1.htm, last seen on 08.08.2019. Earlier, the website had the domain name of supremecourtofindia.nic.in which was later changed to https://main.sci.gov.in/.

[37] Supra 34.

the book is known mostly among niche legal scholars and is not in the reference list of a common person.

Before we looked into the profiles, we set a minimalist threshold. We established the minimum expectation that we hoped to secure through this study was that of being informed about the basic educational and professional details about the judges. We had no expectation of finding more nuanced information such as track record as a lawyer or ratio of overturned decisions as a judicial officer. We expected the following details about the educational and professional background to be included as a standard disclosure in the profiles:

EDUCATIONAL DETAILS	PROFESSIONAL DETAILS
Schooling Institution We expect to be informed about the name(s) of the school(s) attended by the judge. We have not taken cognizance of profiles which mention only the name of the district or city, without mentioning the name of the school.	**Year of Enrolment at the Bar** In relation to the judges who practised in the courts before becoming a judge,[38] we thought it would be natural to share the year in which they enrolled with the Bar.
Graduating Institution Similarly, we have taken into cognizance only those profiles in which the graduating institution has been clearly identified, and not those profiles in which only the name of the town, district etc. has been mentioned.	**Area of Practice** It is understood that the practice of many lawyers is not unidimensional and spreads into multiple areas of law. Even then, most lawyers often affirm their predominant expertise in certain areas more than they do in other areas. Thus, the areas in which the judges practised and gained expertise was considered by us as an important professional detail.

[38] This covers almost all the judges. There has hardly been a judge in the supreme court who was in judicial service only without having a practice. Also, no jurist has ever been appointed to the Supreme Court till date.

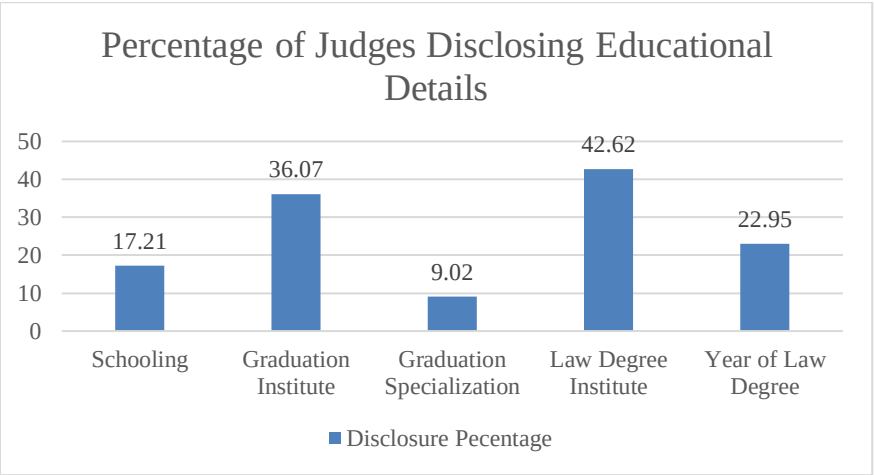
Graduation Specialization Under this field, we expect to be informed not simply about the graduation degree (B.A, B.SC etc.) but also about the subject (History, Accounting, Physics) in which the judges have specialized in.	**Chamber Details** The traditional path for an aspiring lawyer in India has been to join the offices of a senior counsel and learn the nuances of the profession. This is generally known as joining a chamber. The chamber a lawyer joins can be safely categorized as part of his/her employment history, although the typical arrangement is not always formal. Thus, it is an essential professional detail which a judge can be expected to share.
Institution attended for 'qualifying law degree' The qualifying law degree is the degree without which a person cannot enter the legal profession in any capacity. For lawyers and judicial officers, it is the degree of LL.B. For academics, it is LL.M. Thus, we hoped to know the institution from which a judge secured their qualifying law degree. **Year of being awarded the law degree** Apart from the institution which they attended for their qualifying law degree; we also expect the judges to share with us the year in which they degree was awarded.	**Government Empanelment** Over the course of their careers, successful lawyers tend to be empaneled with government departments, public sector undertakings and statutory bodies. Such empanelment is usually a recognition of a lawyer's stature or ability and at times, good connections. Information about such empanelment also sheds light on possible conflicts of interest which a judge might encounter. Thus, one would hope that such important professional information would be shared by the judges.
	Private Empanelment Apart from being empaneled with government departments, lawyers are also often on the payroll of private companies and banks. From the perspective of possible conflicts of interest, information about a judge's past private employment as a lawyer is an important information for the public.

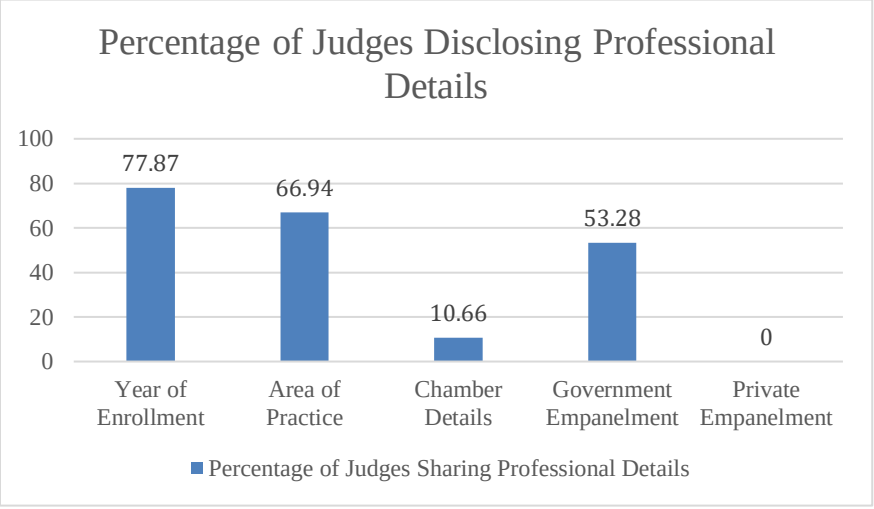
A Practice of Non-Disclosure?

It is evident from the data that most judges are reluctant to share even the most innocuous details about their lives. The only three indicators where more than 50% of the judges have disclosed affirmative information are the 'Year of Enrollment', 'Area of Practice' and 'Government Empanelment'.

The pattern of disclosure in relation to education details is relatively even across various indicators and the variation is not as steep as it is in case of professional details. The difference between the indicators related to educational details having the highest of percentage and the lowest percentage of disclosure from judges is 33.6 (42.62% of judges have disclosed information about the institute which awarded their law degree and 9.02% of judges have disclosed their subject of specialization during graduate studies). In case of indicators related to professional details, the difference is 77.87 (77.87% of judges have disclosed information on 'year of enrollment' and not a single judge has disclosed information on private empanelment).

It is important to note that even when judges have disclosed information in relation to an indicator, the extent of information shared is often minimal. For example, when judges have disclosed the details of their Government Empanelment, the disclosure is not exhaustive. Judges seem to be most reluctant about revealing the names of the private companies, banks etc. on whose payroll they were on. Not a single judge has shared any detail pertaining to his/her empanelment in the private sector. This is especially interesting in the context of judges who were appointed to the Supreme Court directly for the Bar and had no experience of High Court judgeship. Their appointment is, presumably, based entirely on their record as lawyers. Even such judges have not disclosed a single instance of private empanelment. There also seems to be a great reluctance to share details about the chambers the judges practiced in previously. Only 13 out of the 122 judges have shed any light on this aspect.

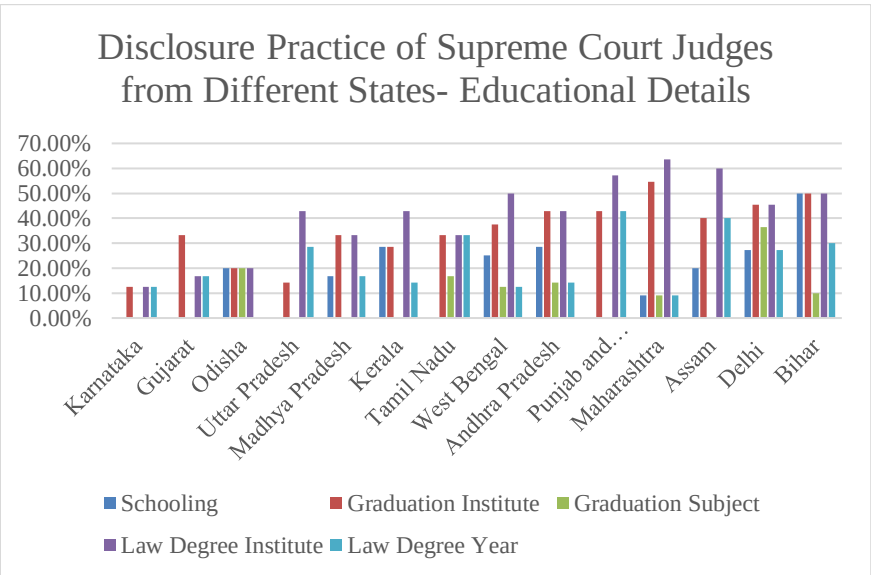


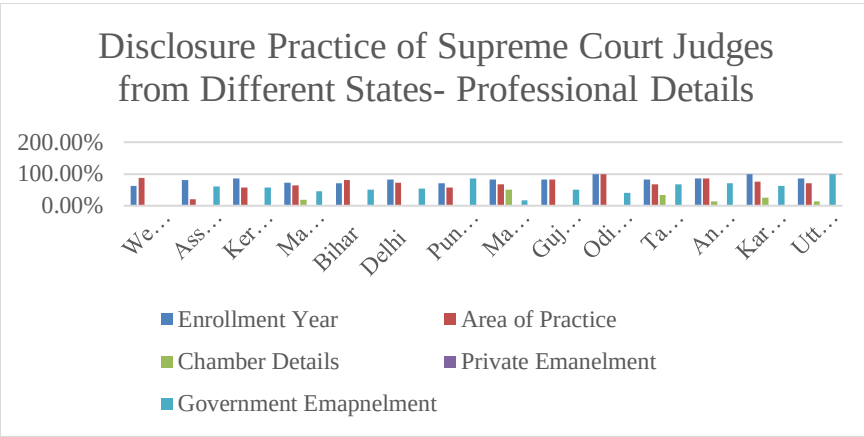


Regional Trends

For looking at the regional trends, we have considered only the states from where there have been at least 5 judges in the Supreme Court. In relative terms, judges from Karnataka, Gujarat, Odisha and Uttar Pradesh disclose the least amount of information pertaining to their academic background. Interestingly, judges from Karnataka and Uttar Pradesh top the charts in disclosing professional details.

The percentage of disclosure in relation to professional details must be understood precisely. It is primarily determined by three indicators- year of enrollment, area of practice and government empanelment. Most of the judges have not shared any details about the chambers in which they practiced prior to their appointment in the judiciary and not a single judge has shared details of their empanelment with the private sector. Judges from six states (Madhya Pradesh, Tamil Nadu, Karnataka, Maharashtra, Andhra Pradesh and Uttar Pradesh) have disclosed details of the chambers where they practiced previously. The number of judges from each state making such disclosures is so small that it has negligible impact while calculating the overall figures in relation to the states. Of the four southern states which have had representation among the Supreme Court judges, only the judges from Kerala have not shared the details of the chambers that they practiced in.





The Missing Judges

As stated earlier, the inadequacy of information disclosed by judges may be because of various reasons. It may be because judges accord lesser importance to disclosure of personal information as compared to their other responsibilities. It may also be because judges are deliberately reluctant. While the first scenario is slightly easier to address than the second, both reflect a disregard for the right of the public to know about their judges.

Profiles of three judges are completely blank. No information whatsoever is available about these judges on the Supreme Court website. The data for this article is based on the data available on the Supreme Court website as on August 8, 2019. One of the judges with a blank profile had assumed office in January 2019. The other two judges had assumed office in July 2018. Thus, for months and years, not even basic biographical information is available in relation to these judges, even as they have assumed office and continue to decide on the rights and liabilities of people.

Conclusion

There is nothing inherently wrong in a person's belief that he/she should be trusted. However, the belief is misplaced if the person does not take any steps to earn it. This is especially true for public functionaries. Public functionaries cannot take public trust for

granted and expect it to be based on anything other than an evidentiary foundation. It is the job of the public functionaries to generate trust and not the duty of the public to repose it.

While deliberating on the extent of information that candidates in elections should disclose, the Supreme Court has made some interesting observations regarding privacy and public interest. The court stressed that while imposing disclosure requirements on the candidates, their right to privacy cannot be ignored. At the same time, the court insisted that such claim to privacy is always subject to the "overriding public interest".[39]

Judges can, no doubt, assert their right to privacy in relation to many aspects of their lives. Due to the nature of the job, a judge's claim to privacy can possibly be more expansive than that of a politician. At the same time, it is difficult to ignore the overriding public interest of ensuring public confidence in the judges. Judges need to generate trust in a much wider constituency than the politicians. While politicians can confine their focus to voters, judges need to remember that they cater to the people at large- citizens, including voters and those eligible not eligible to vote, and non-citizens.

It would be wrong to assume the existence of such trust with the fragmented pieces of information that judges are willing to disclose about themselves. There is no sense in not disclosing information which will help the public understand the judges better. As the data suggests, judges are not habituated to disclosing even basic education and professional details about themselves. In such a scenario, other vital information like the assets of the judges and their family members, their income tax returns, list of family members practicing in the same court and their disciplinary records as students are far from being available for public scrutiny.

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[39] See People's Union for Civil Liberties v. Union of India, 2003 (2) SCR 1136, at 10.at

A rhetoric of trust is empty without the earnestness to earn it. If judges continue to be hidden and obscure personalities, there is not much possibility of continued trust in the judges. Judges cannot expect unwavering public faith to be reposed on them faith while being secretive about even the most basic aspects of their lives.

Judges need to recognize that the onus of earning public trust is on them. People are not obligated to trust the judges or any other public functionary. Public functionaries must make an effort to convince the people of their trustworthiness. Judges could mark the beginning of this effort by telling us a bit more about who they are.

THE ABROGATION OF ARTICLE 370 AND BIFURCATION OF JAMMU AND KASHMIR – A BRIDGE TOO FAR

*Kashish Mahajan**

Abstract

On 5th August 2019, the State of Jammu and Kashmir, while under President's rule, witnessed unprecedented and potentially historic changes that fundamentally redefined its constitutional relationship with the Union of India. Broadly, these landmark changes include the effective abrogation of Article 370 of the Constitution of India and the reorganisation of the State of Jammu and Kashmir into two Union territories, Jammu and Kashmir and Ladakh, thus, bringing to an end the special status of Jammu and Kashmir under the Constitution of India. This paper outlines the legal measures adopted to effectuate these changes and then proceeds to examine their constitutional validity. The paper contends that the Legislative Assembly of the State can be construed to mean the Constituent Assembly of the State thereby keeping the mechanism for the abrogation of Article 370 alive. The paper also lays down a legal standard for the kinds of decisions that may be taken by the President and the Parliament during the operation of President's rule and argues that the actions of abrogating Article 370 and bifurcating the State of Jammu and Kashmir are unconstitutional when tested against this standard. Lastly, the paper discusses the scope of judicial review in the instant case by analysing previous decisions of the Supreme Court on matters of executive and legislative policy.

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Keywords: Jammu and Kashmir, reorganization, Article 370, abrogation, President's rule

Introduction

The State of Jammu and Kashmir holds a unique place in modern Indian history and its polity. As is well known, the origin of the dispute between India and Pakistan over Jammu and Kashmir dates back to the initial years of Indian independence. The princely state of Jammu and Kashmir had the peculiar distinction of having a Hindu ruler with a Muslim majority populace. By August 15, 1947, it was the only one of three princely states which was yet to take a decision on whether to accede to the Dominion of India or to Pakistan.[1] However, in October 1947, a number of tribesmen from Pakistan invaded the State, prompting Maharaja Hari Singh, the then ruler of Jammu and Kashmir, to sign the Instrument of Accession in return for military assistance from the Indian Government.[2]

The Instrument of Accession conferred on the Dominion Legislature the power to legislate on the subjects of Defence, External Affairs and Communications in relation to the State.[3] Given that war continued to prevail in the State till 1949, the drafters of the Constitution of India ("the Constitution") sought to incorporate some of the terms of the Instrument of Accession into the Constitution in order to reflect the legal relationship between the Union and the State as it existed at the time.[4] This ultimately led to the crystallization of Article 370, which gave recognition to the special status of Jammu and Kashmir within the framework of the Constitution. This special status (as it stood prior to its de-operationalisation) is evident from the following *sui generis* aspects of Article 370:

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1 V.P. Menon, *Integration of the Indian States*, 109 (1956).
2 Sarvepalli Gopal, *Selected Works of Jawaharlal Nehru: Second Series*, 274 (1987).
3 Schedule, Instrument of Accession of Jammu and Kashmir.
4 B. S. Rao, *The Framing of India's Constitution: Select Documents*, 567 (1967).

(i) The power of Parliament to make laws for the State is limited to the matters in the Union List and Concurrent List which correspond to the matters specified in the Instrument of Accession (defence, foreign affairs and communications) as declared by the President in consultation with the Government of the State;[5]

(ii) The power of Parliament to make laws on others matters in the above Lists is contingent on the concurrence of the Government of the State;[6]

(iii) Article 1 and Article 370 aside, other provisions of the Constitution may be extended to the State (with possible exceptions and modifications) only by way of a Presidential Order issued either in consultation with or in concurrence of the Government of the State;[7]

(iv) Specific recognition is given to the existence of a separate Constitution for the State of Jammu and Kashmir;[8]

(v) Provides for its own abrogation / amendment procedure which requires a mere declaration by the President pursuant to a recommendation of the Constituent Assembly of the State.[9]

Against this backdrop, the paper seeks to analyse the constitutionality of the legal measures adopted to effectively abrogate Article 370 and divide Jammu and Kashmir into two separate Union Territories. Part II of this paper outlines in detail the legal steps taken by the President and Parliament to effectuate the said changes which raises key issues of constitutional law. In light of these legal measures **(2)**, Part III focuses on whether the Constituent Assembly of Jammu and Kashmir can be validly succeeded by the Legislative Assembly of Jammu and Kashmir for the purpose of complying with the requirements for abrogation of Article 370 as laid down in clause (3) **(3)**. Part IV discusses the basic structure doctrine in relation to Article

5 Art. 370(1)(b)(i), the Constitution of India.
6 Art. 370(1)(b)(ii), the Constitution of India.
7 Art. 370(1)(d), the Constitution of India.
8 Art. 370(2), the Constitution of India.
9 Art. 370(3), the Constitution of India.

370 **(4)**. Part V analyses the contours of the powers of the President and the Parliament during President's rule with specific reference to the Proclamation in Jammu and Kashmir **(5)**. Part VI comments on the power of the Parliament to enact the Jammu and Kashmir Reorganisation Act, 2019 which provides for the bifurcation of the (erstwhile) State of Jammu and Kashmir into two Union Territories **(6)**. Part VII analyses the scope of judicial review in the present case **(7)**. Part VIII concludes **(8)**.

The Impugned Legal Measures

At the outset, it is imperative to expound on the legal measures executed to abrogate Article 370 and bifurcate the State of Jammu and Kashmir in order to assess the same on the touchstone of the Constitution. The foremost among them is the Constitution (Application to Jammu and Kashmir) Order, 2019 ("C.O. 272") issued by the President under sub-clause (d) of clause (1) of Article 370 with the "concurrence of the Government of the State of Jammu and Kashmir", which acts as the lynchpin for all subsequent legal measures. However, since the State of Jammu and Kashmir was under President's rule in accordance with Article 356 of the Constitution at the time,[10] the concurrence obtained as per C.O. 272 was in reality the concurrence of the Governor of Jammu and Kashmir acting on behalf of the President.[11]

C.O. 272 contains three significant clauses: (i) It supersedes all previous Presidential Orders that had extended various provisions of the Constitution to the State of Jammu and Kashmir; (ii) It extends all provisions of the Constitution, as amended from time to time, to the State of Jammu and Kashmir; (iii) It modifies Article 367 of the Constitution in relation to the State of Jammu and Kashmir by

[10] Proclamation No. G.S.R. 1223(E), dated 19th December, 2018, available at http://egazette.nic.in/WriteReadData/2018/194042.pdf, last seen on 17/12/2019.

[11] Ibid, at Cl. (c)(i).

replacing the expression "Constituent Assembly of the State" with "Legislative Assembly of the State" in the proviso to clause (3) of Article 370.

Consequently, on the recommendation of Parliament, acting on behalf of the Legislative Assembly of the State under Article 356, the President issued a notification ("C.O. 273")[12] declaring that Article 370 had ceased to be operative barring an amended clause which provided that all provisions of the Constitution, as amended from time to time, and without any modifications or exceptions would be applicable to the State of Jammu and Kashmir. Additionally, Parliament expressed its "views"[13] on behalf of the Legislative Assembly of the State and accepted the Jammu and Kashmir Reorganisation Bill, 2019 thereby fulfilling the necessary prerequisite for the Bill to be passed as an Act of Parliament[14].

The aforesaid changes give rise to four vital questions of law. *First*, whether the President can validly amend Article 367 to replace the Constituent Assembly of the State with the Legislative Assembly of the State in the proviso to clause (3) of Article 370? *Second*, whether the concurrence of the President in C.O. 272 and the recommendation of the Parliament in C.O. 273 is legally permissible given that the State of Jammu and Kashmir was under President's Rule at the time? *Third*, is the Parliament vested with the requisite constitutional power to bifurcate the State of Jammu and Kashmir into two separate Union territories during the operation of President's rule? *Fourth*, what is the

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[12] Declaration under Article 370(3) of the Constitution, G.S.R. 562(E), dated 6th August, 2019, available at http://egazette.nic.in/WriteReadData/2019/210243.pdf, last seen on 17/12/2019.

[13] Rajya Sabha, *Uncorrected Verbatim Debates*, dated 5th August, 2019, available at http://164.100.47.7/newdebate/249/05082019/Fullday.pdf, last seen on 17/12/2019; Lok Sabha, *Text of Debate*, dated 5th August, 2019, available at http://loksabhadocs.nic.in/debatestextmk/17/I/05.08.2019f.pdf, last seen on 17/12/2019.

[14] Art. 3, the Constitution of India.

extent to which the judiciary may intervene in such a case? The subsequent parts of this paper attempt to provide an answer to each of these questions in detail.

Legislative Assembly as a Valid Successor to the Constituent Assembly of the State

At the center of the discourse on the constitutional validity of C.O. 272, is the proviso to clause (3) of Article 370 which requires the recommendation of the Constituent Assembly of the State of Jammu and Kashmir before the President can declare Article 370 inoperative or operative only with such "exceptions" and "modifications" as may be specified. Therefore, from a bare perusal of clause (3), it is clear that the recommendation of the Constituent Assembly is required not only to cease the operation of Article 370 but also to amend Article 370 through "modifications" and "exceptions".

However, due to the dissolution of the Constituent Assembly of the State post the adoption of the Jammu and Kashmir Constitution ("J&K Constitution"), compliance with the letter of the proviso had become an obvious impossibility. To address this legal conundrum, C.O. 272 uses the power of the President under Article 370(1)(d) to amend Article 367, the interpretative clause of the Constitution, in relation to the State of Jammu and Kashmir and substitutes the words "Constituent Assembly of the State" with "Legislative Assembly of the State" in the proviso to clause (3) of Article 370. The logical question that then arises is whether the said substitution amounts to a "modification" under clause (3) of Article 370 and is therefore unconstitutional in the absence of a recommendation of the Constituent Assembly of the State.

The case of *Mohd. Maqbool Damnoo v State of Jammu and Kashmir* ("*Maqbool Damnoo*")[15] is illustrative of the issue. In this case, the Supreme Court ("Court") addressed the question of whether "Sadar-i-Riyasat" was validly replaced by "Governor" in the Explanation to

[15] Mohd. Maqbool Damnoo v. State of Jammu and Kashmir, AIR 1972 SC 963.

"Government of the State" in clause (1) of Article 370 through the exercise of a Presidential Order that amended Article 367. The main contention before the Court was that the change in definition amounted to an amendment of Article 370(1) through the back-door since it was introduced without the invocation of clause (3) of Article 370. However, the Court upheld the new Explanation primarily on the ground that it was in pursuance of an amendment to the J&K Constitution which had provided for the appointment of a Governor in place of the Sadar-i-Riyasat and thereby recognized the constitutional position in the State as it existed on that date. Thus, the Court reasoned that the new definition only gave legal meaning to the phrase "Government of the State" which had previously become redundant and was something which the Court would have done by way of interpretation in any case. Therefore, the concerned change in definition was not in the nature of a "modification" to clause (1) of Article 370, which would have necessarily required the recommendation of the Constituent Assembly.

Interestingly, the Court also rejected the contention that Section 147 of the J&K Constitution prevented the Legislative Assembly of the State from replacing "Sadar-i-Riyasat" with "Governor" in the J&K Constitution in so far as it amended Section 147 itself. This contention arose from the language of Section 147 in its unamended form, which required the assent of the Sadar-i-Riyasat to any Bill seeking to amend the J&K Constitution. At the same time, Section 147 barred the Legislative Assembly from making an amendment to Section 147 itself, leading the petitioners to argue that Section 147 demonstrated the perpetual existence of the Sadar-i-Riyasat.[16] However, the Court rejected this contention in light of Section 158 of the J&K Constitution which made the Jammu and Kashmir General Clauses Act, 1977 ("the J&K General Clauses Act") applicable for the purpose of interpretation of the J&K Constitution.

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16 Ibid, at para 26.

In this regard, Section 18 of the J&K General Clauses Act states that the application of any law to a functionary extends to the successors of that functionary as well thereby leaving the Court to decide whether the Governor was the successor to the Sadar-i-Riyasat. The Court held in the affirmative and noted that despite the Governor not being an elected position, unlike the Sadar-i-Riyasat, the same had no bearing on the issue since the executive power of the State vested in both functionaries as heads of the State and further, the overall democratic character of the Government in the State remained unchanged.

Thus, the legal position emerging from *Maqbool Damnoo* is that reference to a particular functionary in the Constitution can be construed to mean its successor in accordance with Section 18 of the General Clauses Act, 1897,[17] which uses language identical to Section 18 of the J&K General Clauses Act, and can be applied to interpret the provisions of the Constitution as per clause (1) of Article 367. Hence, the author opines that the Union Government has carefully traced its steps in accordance with the decision of the Court in *Maqbool Damnoo* and that the substitution of the phrase "Legislative Assembly" for "Constituent Assembly" is in keeping with the change that was upheld by the Court in *Maqbool Damnoo*.

In this context, the primary argument against construing "Legislative Assembly" to mean "Constituent Assembly" flows from Section 147 of the J&K Constitution. Section 147 prevents the Legislative Assembly from introducing or moving any "Bill or amendment" seeking to make any change in the provisions of the Constitution of India as applicable to the State. Given that Article 370 is a provision of the Constitution of India that applies in relation to the State, commentators have argued that the Legislative Assembly does not possess the requisite constituent power to make a recommendation

17 S. 18, The General Clauses Act, 1897.

under clause (3) of Article 370.[18] However, the author refutes this contention as the process to effect a recommendation only requires the passing of a statutory resolution by the Legislative Assembly. As per Assembly rules of procedure and conduct of business, a "resolution" is a mechanism by which the Assembly expresses its opinion on a matter of general public interest[19] and may take the form of a recommendation.[20] Thus, the terms "resolution" or "recommendation" ought to be distinguished from "Bill or amendment". The omission of the words "resolution" or "recommendation" from Section 147 of the J&K Constitution would resultantly suggest that the legislative power to recommend the cessation of Article 370 is vested in the Legislative Assembly. The reliance on Section 147 therefore seems to be misplaced. The wording of Section 147 aside, the Legislative Assembly of the State may be validly regarded as the successor to the Constituent Assembly for the following *three* reasons –

Mandate of the Legislative Assembly

The Legislative Assembly, just like the Constituent Assembly, is an elected body chosen on the basis of adult franchise.[21] Thus, by their very nature, both the Constituent Assembly and the Legislative Assembly represent the wishes of the people of the State of Jammu

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18 K. Nivedhitha, *Guest Post: Article 370: The Constitutional Challenge*, Indian Constitutional Law and Philosophy, available at https://indconlawphil.wordpress.com/2019/08/13/guest-post-article-370-the-constitutional-challenge/, last seen on 17/12/2019.

19 Lok Sabha Secretariat, *Motions and Resolutions in Parliament*, (14th ed., 2014), available at http://164.100.47.194/loksabha/writereaddata/ParliamentProcedure/Motions%20and%20Resolutions.pdf, last seen on 17/12/2019.

20 Lok Sabha Secretariat, *Rules of Procedure and Conduct of Business in Lok Sabha – Rule 171*, (16th ed., 2019) available at http://164.100.47.194/loksabha/rules.aspx, last seen on 17/12/2019.

21 Art. 170(1), the Constitution of India; S. 47(1), the Constitution of Jammu and Kashmir.

and Kashmir. Resultantly, the similarity in the mode of formation and broader mandate would suggest that the two bodies share sufficient characteristics for the Legislative Assembly to be declared as the successor to the Constituent Assembly for the purpose of Section 18 of the General Clauses Act, 1897. Therefore, even if *Maqbool Damnoo* were to be criticized on the ground that the Court failed to provide adequate reasoning as to how the Governor could be construed to be the valid successor of the Sadar-i-Riyasat given the distinction in the mode of appointment of the two functionaries,[22] the said criticism would not be applicable to the instant case.

Harmonious Reading of Clause (1)(d) and Clause (3) of Article 370

Pursuant to sub-clause (d) of clause (1) of Article 370, the President has the power to extend all provisions of the Constitution [except for Article 1 and Article 370 itself which are already applicable to the State as per sub-clause (c)] subject to possible exceptions and modifications to the State of Jammu and Kashmir with the concurrence of the 'Government of the State'. As per the amended Explanation in clause (1), any reference to the 'Government of the State' is to be construed as "including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers".[23] The invocation of this power was first seen in 1950 when the President, with the concurrence of both the Government and the Constituent Assembly of the State, issued the Constitution (Application to Jammu and Kashmir) Order, 1950 which extended the application of several provisions of the Constitution to the State of Jammu and Kashmir. Subsequently, this Order was superseded by the Constitution (Application to Jammu and Kashmir) Order, 1954 ("Order of 1954") which has been amended several times over the

22 Abdul Qayoom Khan v. State of J&K and Ors., 2016 (1) JKJ 506, para 24.

23 The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1965.

years to extend various provisions of the Constitution to the State. A bare reading of the amendments to the parent Order of 1954 shows that various provisions of the Constitution such as the Preamble, Article 14, Article 21, among others have been extended to Jammu and Kashmir verbatim.[24] In *Sampat Prakash* v. *The State of Jammu and Kashmir* ("Sampat Prakash"), the Court sanctioned the working of clause (1)(d) in this fashion by observing that the President was expected to make exceptions or modifications to a provision while applying it to the State only if the situation in the State demanded the same and that the said exceptions and modifications were capable of being rescinded on account of any change in the situation in the State.[25] Therefore, the previous usage of clause (1)(d) coupled with the observations of the Court clearly indicate that the application of provisions of the Constitution to Jammu and Kashmir with exceptions and modifications is contingent on the discretion of the President and the Government of the State. This ability to decide on how provisions of the Constitution are to be extended to the State is also confirmed by the use of the word 'may' in clause (1)(d) with regard to making such exceptions and modifications. In turn, this would effectively mean that all provisions of the Constitution of India, as applicable to other states in the country, can be made applicable to the State of Jammu and Kashmir with the only condition being the concurrence of the Government of the State, which is de-facto the Council of Ministers. Consequently, such an outcome would dismantle the scheme of Article 370 and render it inoperative in practice without the invocation of clause (3) of Article 370. Therefore, if the Council of Ministers has an implied power to virtually de-operationalize Article 370 under clause (1)(d), the same may logically also be extended to the Legislative

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24 The Constitution (Application to Jammu and Kashmir) Order, 1954, available at http://jklaw.nic.in/constitution_jk.pdf, last seen on 20/05/2020.

25 Sampat Prakash v. The State of Jammu and Kashmir, AIR 1970 SC 1118, para 12.

Assembly, a body with widespread representation and law making power, under clause (3) to ensure a harmonious reading of the two clauses. Even if such an interpretation is deemed to clash with Section 147 of the J&K Constitution, precedence ought to be given to Article 370 since the Constitution of Jammu and Kashmir has been held to be subordinate to the Constitution of India[26].

The Constitution as a Living Document

An acceptance of the change in terminology would also be in line with the tendency of the Court to interpret the Constitution as a living document that needs to evolve and keep pace with the needs of changing times.[27] The Court explained the importance of a living Constitution in *Justice K.S. Puttaswamy v Union of India* wherein it stated that while the Constitution is an embodiment of the eternal values of Indian society, it also possesses the ability to ensure its continued relevance. The Court further noted that the ability of the Constitution to stay relevant stems from permitting present and subsequent generations to find unique solutions to pressing issues of their times.[28] In practice, the adoption of this rule of interpretation has resulted in the relaxation of locus standi rules in public interest litigation cases[29] and an expansion of the scope of the right to life under Article 21.[30] Therefore, in the present case, even if the Court were to agree with the notion that the Constituent Assembly of India intended, by way of the proviso in clause (3), for the Constituent Assembly of the State to take a final decision on whether or not Article 370 was to be abrogated, the same would not proscribe it from holding that the words and expressions used in the Constitution have no fixed meaning[31] and can

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26 State Bank of India v. Santosh Gupta and Ors., (2017) 2 SCC 538, para 43.

27 I.R. Coelho (Dead) By Lrs v. State of Tamil Nadu, AIR 2007 SC 861, para 32; Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501, para 140;

28 Justice K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161, para 151.

29 S.P. Gupta v. Union of India, AIR 1982 SC 149.

30 Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545, para 37; Justice K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161, para 392.

31 Aruna Roy v. Union of India, (2002) 7 SCC 368, para 78.

be interpreted to reflect current political realities. In such a scenario, and as a hallmark of representative democracy, the body which comes closest to representing the people presently residing in the State of Jammu and Kashmir is the Legislative Assembly. A textualist interpretation to the contrary may lead to an arguably absurd situation where the Union Government and the State Legislative Assembly would never be permitted to abrogate Article 370 despite reaching an agreement to do so in the near future. This position is further untenable given that the abrogation of Article 370 and consequent repeal of the special status of Jammu and Kashmir is not in contravention of the basic structure of the Constitution, as argued in the next Part.

Application of the Basic Structure Doctrine to Article 370

Based on the above analysis, it becomes imperative to evaluate Article 370 on the yardstick of the basic structure. Introduced by the Court in *Kesavananda Bharti v State of Kerala* ("*Kesavananda Bharati*"),[32] the basic structure doctrine postulates that the Parliament may amend any provision of the Constitution provided the core features and principles of the Constitution remain unchanged. Now, one may hypothetically argue that Article 370 falls outside the ambit of the basic structure doctrine because the basic structure doctrine was propounded in relation to the constituent power of Parliament under Article 368 and Article 370 cannot be amended by the Parliament through Article 368. However, such an argument would be wholly misconceived as it fails to address whether Article 370 is such an inalienable feature of the Constitution that it cannot be amended or abrogated by the President even upon a recommendation of the Legislative Assembly of the State. Therefore, the restriction on the amending power of Parliament, in the form of the basic structure doctrine, would also extend to the President and the Legislative Assembly if Article 370 is deemed to have attained the status of a basic feature of the Constitution. In short, apart from

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[32] Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461.

the argument that the Legislative Assembly cannot replace the Constituent Assembly for satisfying the requirement in the proviso to clause (3), the only other way of contending that Article 370 cannot be amended or abrogated by the Legislative Assembly is by establishing that Article 370 is now a part of the basic structure of the Constitution. Having said that, I will now proceed to explain why I believe that Article 370 is not part of the basic structure of the Constitution.

Article 370 in the Context of Federalism

In *Kesavananda Bharati*, the Court noted that the federal character of the Constitution forms part of the basic structure[33] which has been reiterated in a plethora of subsequent cases.[34] In this context, scholars have argued that since Article 370 governs the relationship of the Union with the State of Jammu and Kashmir, it is an integral aspect of federalism thereby rendering it unamendable.[35] Moreover, one may place reliance on *Sampat Prakash*, wherein the Court held that Article 370 remained operative even after the adoption of the Constitution of Jammu and Kashmir since the Constituent Assembly had only recommended a modification to Article 370 during its existence thereby clearly indicating that it did not intend for the provision to cease to operate.[36] More recently, in *State Bank of India v Santosh* Gupta,[37] the Court noted that in spite of the word 'temporary' in the marginal note of Article 370, it could only be rendered inoperative after following the due procedure laid down in clause (3). However, I contend that these decisions cannot be regarded as determinative of

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33 Ibid, at para 302.

34 Kuldip Nayar v. Union of India and Ors., AIR 2006 SC 3127; Ashoka Kumar Thakur v. Union of India and Ors., (2008) 6 SCC 1.

35 F. Mustafa, *Article 370, Federalism and the Basic Structure of the Constitution*, The India Forum (05/07/2019), available at https://www.theindiaforum.in/sites/default/files/pdf/2019/07/05/article-370-federalism-and-the-basic-structure-of-the-constitution.pdf last seen on 17/12/2019.

36 Sampat Prakash v. The State of Jammu and Kashmir, AIR 1970 SC 1118, para 7.

37 State Bank of India v. Santosh Gupta and Ors., AIR 2017 SC 25.

the question concerning the permanence of Article 370. This is because in neither decision does the Court explicitly hold that Article 370 is beyond amendment pursuant to the dissolution of the Constituent Assembly of the State and is thus a permanent or basic feature of the Constitution. In simpler terms, there exists a distinction between the Court holding that Article 370 continues to be operative post the dissolution of the Constituent Assembly of the State versus the Court holding that Article 370 continues to be operative but is also now permanent and unamendable since the Constituent Assembly of the State has been dissolved. Notably then, the observations of the Court in both decisions fall short of the latter. Therefore, the argument that an amendment to Article 370 would be violative of the basic structure necessitates deeper analysis.

The test for whether an amendment violates the basic structure of the Constitution has been laid down in *M. Nagaraj v UOI* ("M. Nagaraj").[38] Known as the "essences of rights" test or the "over-arching principles" test,[39] the Court held that a constitutional amendment is violative of the basic structure only if it abrogates an over-arching principle of the Constitution so as to change the very identity of the Constitution. For instance, in *R.C. Poudyal v UOI*,[40] the Court observed that a digression from the one-person-one-vote rule was not violative of the basic features of democracy due to the various forms and manifestations of democracy. Therefore, the question that arises is simple – Will an amendment to Article 370 (which may include its repeal) abrogate the principle of federalism so as to render the Constitution almost unrecognizable? An analysis of the true nature of federalism as enshrined in the Constitution provides an answer.

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38 M. Nagaraj v. Union of India, (2006) 8 SCC 212.

39 Indian Medical Association and Ors. v. Union of India and Ors., AIR 2011 SC 2365, para 85.

40 R.C. Poudyal and Ors. v. Union of India (UOI) and Ors., AIR 1993 SC 1804.

In *S.R. Bommai v UOI* ("S.R. Bommai"), the Court held that the essence of federalism is the distribution of powers between the Union and the States.[41] This position was upheld in *Jindal Stainless Limited v State of Harayana*,[42] wherein the Court noted that the key characteristics of the federal system as laid down in the Constitution were supremacy of the Constitution, division of powers between the Union and the States and the existence of an independent judiciary. The said division of powers has been demarcated in the three Lists of the Seventh Schedule to the Constitution. Therefore, it is fairly clear from judicial pronouncements that asymmetric or pluralistic federalism, whereby States are vested with unequal powers and have different legislative and administrative relations with the Centre based on their needs and specificities,[43] has not been considered to be an essential feature of federalism. Thus, Article 370 apart, while certain other provisions of the Constitution such as Article 371A, Article 371B, among others, are admittedly also representative of asymmetric federalism, that in and of itself does not render asymmetric federalism a key facet of federalism as enshrined in the Constitution or alternatively, part of the basic structure of the Constitution. Consequently, to the extent that Article 370 deviated from the demarcation of powers enunciated in the three Lists by limiting Parliament's law making powers and granting greater autonomy to Jammu and Kashmir, it digressed from the essence or the core nature of the larger federal structure embodied in the Constitution. The abrogation of Article 370 would, therefore, align Jammu and Kashmir with the core of the Indian federal structure and thus cannot be regarded as an annulment of the principle of federalism. Consequently, the abrogation of Article 370 would certainly not meet

41 S.R. Bommai v. Union of India, AIR 1994 SC 1918, para 14.

42 Jindal Stainless Limited v. State of Haryana, (2017) 12 SCC 1, para 944.

43 M. Govinda Rao and N. Singh, *Asymmetric Federalism in India*, UC Santa Cruz International Economics Working Paper, 3, Working Paper Number 04-08, University of California, Santa Cruz (2004).

the high judicial threshold for a basic structure contravention as laid down in *M. Nagaraj*.

Article 370 is Subject to the Will of the People of Jammu and Kashmir

There is another reason why Article 370 cannot be considered as a part of the basic structure. Since independence, the bedrock of the relationship between the Union of India and the State of Jammu and Kashmir has been that the will of the people of Jammu and Kashmir would be supreme with respect to their State. This is evinced from the statements of Gopalaswami Ayyangar in the Constituent Assembly Debates, who at the time of moving to introduce Article 370 (then Article 306A) into the Constitution, noted that the "will of the people, through the instrument of a constituent assembly, will determine the Constitution of the State as well as the sphere of Union jurisdiction over the State".[44] However, the Constituent Assembly of the State chose not to make a recommendation to abrogate Article 370 prior to its dissolution. This makes it fair to assume, primarily on account of the wording of clause (1)(d) of Article 370, that it did not intend for the legal relationship between the Union and the State to be set in stone. As a result, this legal relationship has continuously evolved over time with numerous provisions of the Constitution being made applicable to the State through the mechanism of clause (1)(d) (as explained in Part III). Notably, with each extension of constitutional provisions to the State, the sphere of autonomy of the State has correspondingly decreased.[45] In fact, 260 out of 395 Articles of the Constitution, 94 out of 97 entries in the Union List and 26 out of the 47 entries in the Concurrent List have been extended to the State.[46]

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44 K.M. Munshi, *Indian Constitutional Documents: Pilgrimage to Freedom*, 185 (1967); Sampat Prakash v. The State of Jammu and Kashmir, AIR 1970 SC 1118, para 4.

45 Abdul Qayoom Khan v. State of J&K, 2016 (1) JKJ 506, para 17.

46 A.G. Noorani, *Deception on Article 370*, GREATER KASHMIR (04/07/2016), available at https://www.greaterkashmir.com/news/opinion/deception-on-article-370/, last seen on 20/05/2020.

This has led to the dilution of Article 370 to the extent that it has been described as an "empty shell"[47]. Therefore, the framework of Article 370, which allows for constant alteration in the constitutional relationship between the Union and the State, itself makes it clear that the power to decide on the degree of legal autonomy to be enjoyed by the State vests in the elected representatives of the people of Jammu and Kashmir. Consequently, the people of the State through their elected representatives may (in the future) choose to put an end to Article 370 and accept the Constitution in its entirety. As a result, the basic structure doctrine would not stand in the way of the Legislative Assembly and the President coming together to abrogate Article 370. However, the crucial question of whether the President and the Parliament can validly abrogate Article 370 during the operation of President's rule is addressed in the next Part.

Delineating the Contours of the Powers under President's Rule

C.O. 272 states that the "concurrence of the Government of the State of Jammu and Kashmir" has been obtained. As mentioned earlier, the phrase 'Government of the State' ordinarily refers to the Governor acting on the advice of the Council of Ministers. However, as explained in Part II, the concurrence obtained as per C.O. 272 was the concurrence of the Governor, acting on behalf of the President, due to the imposition of President's rule in Jammu and Kashmir. Similarly, the recommendation under clause (3) of Article 370 which formed the basis of C.O. 273 was given by the Parliament on behalf of the Legislative Assembly of Jammu and Kashmir. Therefore, for C.O. 272 and, consequently, C.O. 273 to withstand judicial scrutiny, the concurrence of the President and recommendation of the Parliament must fall within the constitutional purview of the powers that may be

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47 Greater Kashmir, *Article 370 reduced to empty shell: J&K High Court Bar Association*, (07/07/2017), available at https://www.greaterkashmir.com/news/kashmir/article-370-reduced-to-empty-shell-hcba/, last seen on 21/05/2020.

exercised during President's rule. Hence, the issue pertains to the scope of the powers that may be exercised by the President and Parliament during the period of President's rule. Accordingly, in this Part, I will attempt to demystify the full range of powers and decisions that fall within the domain of President's rule. Additionally, I will examine whether such powers have been constitutionally exercised in the instant case.

Assessing the Scope of President's Rule

Article 356 of the Constitution governs the situation of President's rule. As per sub-clause (a) of clause (1) of Article 356, the President may by Proclamation "assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor". Along similar lines, sub-clause (b) states the President may by Proclamation "declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament". Thus, *prima facie*, the actions of the President and the Parliament appear to be within the confines of the bare text of the Constitution.

The said actions however must also be considered in accordance with the spirit of the Constitution.[48] The arguments of the petitioner in the writ petition[49] and rejoinder[50] filed before the Court to declare the legal measures adopted in relation to Jammu and Kashmir as constitutionally invalid assume significance in this regard. The petitioners argue that the purpose of President's rule under Article 356 is only to ensure continued governance in the State until an elected

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48 Supreme Court Advocates-on-Record Association and Another v. Union of India, AIR 1994 SC 268, para 19.

49 *Mohd Akbar Lone & Anr. (Petitioners) v. Union of India & Ors. (Respondents)*, available at https://www.livelaw.in/pdf_upload/pdf_upload-363037.pdf, last seen on 17/12/2019.

50 *Dr. Shah Faesal & Ors v. Union of India & Anr.*, W.P. 1099 of 2019, available at https://www.livelaw.in/top-stories/temporary-presidents-rule-cannot-be-used-permanently-repeal-jk-special-status-petitioners-article-370-cases--149738, last seen on 17/12/2019.

government returns to power thereby placing implied limitations upon the powers that can be exercised by the President in such a situation. Resultantly, the petitioners submit that the President cannot implement decisions of a permanent nature that alter the very structure and status of the State under the framework of the Constitution in the absence of an elected state government. To buttress this argument, the petitioners rely on Article 357(2), which states that any law made on behalf of the Legislature of the State during the pendency of Proclamation shall, after the Proclamation has ceased to operate, continue in force until "altered or amended or repealed" by a competent State Legislature. The petitioners also contend that to confer on the President such wide powers would be in direct contravention of the constitutional principles of federalism and representative democracy.

While the aforementioned arguments are of considerable force, they do not present an accurate legal position on the issue at hand. In *S.R. Bommai*,[51] the Court observed that the object of Article 356 was to enable the Union to take remedial action in order to restore governance of the State in accordance with the provisions of the Constitution. However, the Court did not venture into an analysis of the scope of 'remedial action' or the ambit of powers that may be exercised during President's rule. In the absence of sufficient judicial clarity, weightage must be given to the text of Article 356.

The position adopted by the petitioners is hit by Article 356(1)(c), which vests in the President the power to "make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any

[51] S.R. Bommai and Ors. v. Union of India (UOI) and Ors., AIR 1994 SC 1918.

body or authority in the State"[52]. By implication, the President is empowered to suspend the proviso to Article 3 which requires a reference to the State Legislature of any Bill seeking to alter the boundaries or area of that particular State.[53] Alternatively, the President may decide to suspend the portion of clause (1) of Article 169 requiring the passing of a resolution by the State Legislature in relation to the abolition or creation of a Legislative Council in that State.[54] The power to suspend the aforementioned constitutional provisions would be meaningless unless the benefit of suspending such provisions can be availed in practice. In effect, this indicates that fundamentally permanent decisions, such as altering the boundaries or status of the State or creating a Legislative Council in the State, may be taken even during the imposition of President's rule to the extent that it is necessary for achieving the objects of the Proclamation. Therefore, considering the power to take these decisions, the abrogation of Article 370 for giving effect to the objects of the Proclamation would also presumably lie within the ambit of President's rule.

At this stage, another important point must be clarified. The ability of the President to take the aforesaid permanent decisions during President's rule may appear to be contradictory to the spirit of Article 370 which mandates the "concurrence of the Government of the State" before any constitutional decisions can be implemented in relation to Jammu and Kashmir. However, it must be recognized that the State ceded its autonomy, in the context of President's rule, the moment the provisions of Article 356 were made applicable to the State.[55] Thus, the extension of Article 356 to the State of Jammu and Kashmir meant that the "Government of the State" vested in the President the power to make decisions for the State during President's

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52 Art. 356(1)(c), the Constitution of India.

53 Art. 3, the Constitution of India.

54 Art. 169(1), the Constitution of India.

55 The Constitution (Application to Jammu and Kashmir) Order, 1954, available at http://jklaw.nic.in/constitution_jk.pdf, last seen on 21/05/2020.

rule, provided that they are within the confines of the provisions of Article 356.

Additionally, the interpretation of the petitioners would hamper the functioning of the Parliament. This is because, according to the petitioner's line of argumentation, only the decisions which can be reversed by a subsequent elected government of the State may be taken during President's rule. This would lead to an outcome whereby Parliament would be forestalled from introducing any Bill seeking to amend provisions of the Constitution which require the ratification of one-half of the State Legislatures[56] during the prevalence of President's rule in any State. It is true that the requirement of half the number of States may be met even without the ratification of the State under President's rule. However, there exists the possibility, albeit rather slim, that the ratification of the State under President's rule may prove decisive to meet the said requirement. In such a situation, the Parliament would be precluded from ratifying the amendment in question on behalf of the State Legislature as the same would be incapable of being reversed by the new State government. Consequently, the said amendment to the Constitution would not be capable of being carried out until the completion of President's rule in the State. Thus, given that President's rule could extend to a maximum period of three years[57], the threshold of abstaining from taking permanent or irreversible decisions, as argued by the petitioners, is legally unsustainable.

Therefore, I believe that the correct legal position is that while wide powers may be exercised by the President and the Parliament during President's rule, the use of such powers must have a direct relation to the objects sought to be achieved by the Proclamation or in

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56 Art. 368(2), the Constitution of India.

57 Art. 356(4), the Constitution of India "(…but no such Proclamation shall in any case remain in force for more than three years)".

other words, the imposition of President's rule. I contend that there is an additional reason to support this position. The principle of federalism, as espoused in the Constitution, is not federalism in its strictest sense.[58] A string of judicial decisions has confirmed that the Constitution is 'quasi-federal' since it contains both federal and unitary elements with a bias towards the latter.[59] The Court has in the past cited Article 356 as one of the provisions of the Constitution which is representative of this tilt in favour of the Centre.[60] Therefore, an interpretation of Article 356, which upholds the exercise of wide powers by the Centre during President's rule, that furthers the objects of the Proclamation would also be consistent with the principle of supremacy of the Centre over the States as envisaged by the Constitution.[61] Having established the scope of President's rule, I will now proceed to argue that the exercise of such powers is unconstitutional in the context of the Proclamation in Jammu and Kashmir.

Evaluating C.O. 272 and C.O. 273 in light of the Proclamation in Jammu and Kashmir

In line with the above analysis, it becomes necessary to turn towards the events leading up to the declaration of President's rule in the State of Jammu and Kashmir in order to identify the objects of the Proclamation in the instant case. In June 2018, the Bharatiya Janata Party withdrew its support to the People's Democratic Party led coalition government in Jammu and Kashmir thereby reducing it to a

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58 K. Lakshminarayanan v. Union of India, (2019) 4 SCJ 30, para 52.

59 State of West Bengal v. Union of India, (1964) 1 SCR 371, para 91; State of Karnataka v. Union of India, (1978) 2 SCR 1, para 250; S.R. Bommai v. Union of India, AIR 1994 SC 1918, para 210.

60 Kuldip Nayar v. Union of India, AIR 2006 SC 3127, para 23.5; Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501, para 105.

61 Jindal Stainless Limited v. State of Haryana, (2017) 12 SCC 1, para 32.

minority in the Legislative Assembly.[62] As a result, Governor's rule was imposed on the State in accordance with Section 92 of the J&K Constitution.[63] On November 21, 2018, the Governor dissolved the Legislative Assembly citing political horse-trading and the impossibility of forming a stable government due to the prospect of political parties with opposing ideologies coming together as the reasons for his decision.[64] Thereafter, upon the completion of six months of Governor's rule in the State,[65] a Proclamation for President's rule was issued on 19th December, 2018.[66] Subsequently, in March 2019, the Election Commission declared that Assembly elections in the State would not be held along with the Lok Sabha elections due to recent violent incidents and lack of security forces in the State.[67] Consequently, the Proclamation in question was extended for a further period of six months[68] during which time the above constitutional changes were undertaken.

Based on the abovementioned circumstances, the need for the imposition of President's rule in the State was two-fold. *First*, a political

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62 The Hindu Business Line, *BJP pulls out of alliance with PDP in J&K*, (19/06/2018), available at https://www.thehindubusinessline.com/news/national/bjp-pulls-out-of-pdp-govt-in-jk/article24200617.ece, last seen on 21/05/2020.

63 S. 92, the Constitution of Jammu and Kashmir.

64 The Economic Times, *Jammu and Kashmir Governor dissolves Assembly after rivals stake claim to government formation*, (22/11/2018), available at https://economictimes.indiatimes.com/news/politics-and-nation/jk-assembly-dissolved-amid-claims-for-power/articleshow/66739283.cms, last seen on 21/05/2020.

65 S. 92(3), the Constitution of Jammu and Kashmir.

66 Proclamation No. G.S.R. 1223(E), dated 19th December 2018, available at http://egazette.nic.in/WriteReadData/2018/194042.pdf, last seen on 21/05/2020.

67 A.G. Noorani, *The Case of the missing election in J&K*, THE HINDU (20/03/2019), available at https://www.thehindu.com/opinion/op-ed/the-case-of-the-missing-election-in-jk/article26593728.ece, last seen on 21/05/2020.

68 The Economic Times, *President's rule extended for 6 more months beginning July 3*, (12/06/2019), available at https://economictimes.indiatimes.com/news/politics-and-nation/president-rule-in-jk-to-be-extended-for-6-more-months/articleshow/69759938.cms, last seen on 21/05/2020.

vacuum was created in the State since no party or coalition was able to establish a majority on the floor of the Assembly and thereby form a stable government in the State. *Second,* the deferment of Assembly elections in the State meant that President's rule in the State had to continue until a fresh election was held. Flowing from these reasons, the Proclamation was the consequence of a political crisis in the State which required the Centre (President and Parliament) to step in until a government with a clear mandate was elected to power in the State. Arguably, the object of the Proclamation was only to ensure stable continuity in governance and administration of the State in accordance with the provisions of the Constitution for the limited duration of President's rule.

The question which then arises is whether C.O. 272 and C.O. 273 were in any way necessary to give effect to the abovementioned objective of the Proclamation. To that extent, C.O. 272 as discussed in Part II, extended Article 367 with certain modifications to the State of Jammu and Kashmir thereby paving the way for the abrogation of Article 370. Additionally, C.O. 272 extended all provisions of the Constitution, as amended from time to time, to Jammu and Kashmir thus rendering Article 370 nugatory even without C.O. 273. In summation, C.O. 272 along with C.O. 273 sought to abrogate Article 370 so as to repeal the special status of Jammu and Kashmir under the Constitution. In fact, the Centre's stated rationale for the same is that, *inter alia*, it would help curb terrorism, diminish feelings of separatism and allow for the full integration of Jammu and Kashmir with the rest of India in furtherance of national interest.[69] I argue that these stated outcomes would probably have been necessary to restore governance in the State in accordance with the provisions of the Constitution, as required by Article 356(1)[70], if President's rule had been declared in

[69] Counter Affidavit on behalf of Union of India, Mohd. Akbar Lone v. Union of India, WP(C) 1037 of 2019 (S.C.) (Pending), para 20.

[70] S.R. Bommai v. Union of India, AIR 1994 SC 1918, para 57.

the State on account of a break down in law and order or due to an internal rebellion or some other grave security predicament in the State. However, as explained above, the Proclamation in question was in light of a political crisis in the State due to the majority government losing its support in the Assembly and the incapability to form an alternate government commanding the confidence of the Assembly. Consequently, the Centre was to act as a caretaker government until this political crisis was resolved in the State by the electorate through a process of fresh elections. In such a situation, I do not believe that the abrogation of Article 370 was either "necessary" or "desirable" to give effect to the object of the Proclamation. The object of the Proclamation was to carry on the day-to-day government of the State in accordance with the Constitution, and this had already been achieved without the abrogation of Article 370 for the initial seven months of President's rule in the State. Therefore, in view of the material and information available in the public domain, I believe that the President and the Parliament have acted beyond the scope of their constitutionally-prescribed powers in relation to Article 356 and thus, C.O. 272 and C.O. 273 ought to be struck down as unconstitutional.

In summation, the legal criterion for the Centre to take fundamentally permanent decisions during the operation of President's rule is that they must be necessary to achieve the intended objectives behind the imposition of President's rule in the state. In the instant case, the issuance of C.O. 272 and C.O. 273, which resulted in the abrogation of Article 370, fails to meet this criterion and therefore, should not be upheld by the Court. I will now turn my attention to the second landmark constitutional change being effectuated – the reorganisation of the State of Jammu and Kashmir.

Constitutional Validity of the Jammu and Kashmir Reorganisation Act, 2019

The Jammu and Kashmir Reorganisation Act, 2019 ("the Reorganisation Act") is unprecedented as there is no example of a State

being bifurcated into two separate Union territories[71] since the creation of Union territories in place of Part C States in 1956[72]. In this Part, I will examine the legality of the Reorganisation Act in two prongs. *First*, I will address the question of whether the Parliament possesses the power to create two Union territories by extinguishing a State under Article 3 of the Constitution. *Second*, assuming that such a power exists, I will assess whether it could have been invoked in the instant case while the State of Jammu and Kashmir was under President's rule.

7.1. *Bifurcation of a State into two Union Territories*

The plain language of Article 3 provides a starting point for an analysis on whether the Parliament possesses the requisite power to bifurcate the State of Jammu and Kashmir into the Union territories of Jammu and Kashmir and Ladakh. They key clauses of Article 3 for the purpose of the present analysis are as follows:

Parliament may by law –

(a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;

[Explanation I. – In this article, in clauses (a) to (e), "State" includes a Union territory, but in the proviso, "State" does not include a Union territory.

Explanation II. – The power conferred on Parliament by clause (a) includes the power to form a new State or Union territory by uniting a part of any State or Union territory to any other State or Union territory.]

It is contended that the implication of Explanation I would be to read clause (a) of Article 3 as follows: "form a new State *or Union territory* by separation of territory from any State *or Union territory* or by uniting two or more States *or Union territories* or parts of States *or Union*

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71 India Today, *Jammu and Kashmir bifurcated: India has one less state, gets two new Union Territories in J&K, Ladakh*, (31/10/2019), available at https://www.indiatoday.in/india/story/jammu-and-kashmir-bifurcated-ladakh-union-territory-october-31-1614249-2019-10-31, last seen on 17/12/2019.

72 S. 2(2), The Constitution (Seventh Amendment) Act, 1956.

territories or by uniting any territory to a part of any State *or Union territory*" for three reasons.

First, the ordinary meaning of the word "includes" in Explanation I would imply that the words "Union territory" enlarge the meaning of the word "State" rather than substituting or replacing it.[73] *Second*, such a reading would be consistent with the wording of Explanation II which also uses the word "or" between the words "State" and "Union territory" thereby clarifying how clause (a) ought to be read. Third, the past practice of creating Union territories also lends supports to the above-mentioned reading of clause (a). For instance, the Punjab Reorganisation Act, 1966 reorganised the erstwhile State of Punjab by transferring some territory to the Union territory of Himachal Pradesh, creating a new Union territory known as Chandigarh and bifurcating the remaining territory between the two new States of Punjab and Haryana.[74] In effect, this demonstrates that the new Union territory of Chandigarh was formed by "separation of territory" from the (former) State of Punjab in line with the aforementioned reading of clause (a).

Thus, the above-mentioned reading of clause (a) provides for the formation of a single new Union territory by "uniting two or more States" thereby effectively destroying both the States in question. Logically, clause (a) would therefore also include the power to create two new Union territories by destroying a particular State as done in the instant case. Furthermore, the fact that such a power has not been expressly provided for cannot be reason enough to deny the same given the previous practice of converting various Union territories

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73 P. Kasilingam and Ors. v. P.S.G. College of Technology and Ors., AIR 1995 SC 1395, para 19.

74 Ss. 3, 4, 5 & 6, The Punjab Reorganisation Act, 1966.

such as Himachal Pradesh,[75] Manipur,[76] Tripura[77] into individual States in spite of the absence of express wording in clause (a) to this effect.

The above contentions aside, the wording of Explanation II (in and of itself) gives credence to the idea that the Parliament can extinguish a State for the creation of two Union territories. This is because as per Explanation II, a new Union territory may be formed by "uniting a part of any State or Union territory to *any other State or Union territory*". Therefore, the use of the words "any other State" as opposed to the words "part of any other State" in the latter half of the Explanation would mean that hypothetically, a new Union territory named 'A' may be created by uniting a part of State 'B' with the whole of State 'C'. In turn, the creation of Union territory 'A' would destroy a part of State 'B' and the entirety of State 'C'. Therefore, Explanation II expressly authorizes the destruction of a State for the creation of a Union territory. Given that the same Explanation states that the power conferred on Parliament by clause (a) "includes" the aforesaid power, it is only illustrative of the manner in which new Union territories can be created. Resultantly, along with a reading of clause (a), it would be logical to hold that variations of the method to create Union territories as envisaged in Explanation II would also be permitted so as to allow for two Union territories to be created by destroying a single State.

The above interpretation is further strengthened by the object and purpose of Article 3. Unlike other federations such as the United States, the Indian Union was not the outcome of an agreement or compact between separate States and has aptly been characterised as an "indestructible Union of destructible units"[78]. This proposition is embodied in Article 3 which is reflective of the unique quasi-federal

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75 S. 3, The State of Himachal Pradesh Act, 1970.
76 S. 3, The North-Eastern Areas (Reorganisation) Act, 1971.
77 Ibid, at S. 4.
78 Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha, (2007) 3 SCC 184.

nature of the Constitution[79] which exists even qua the State of Jammu and Kashmir.[80] Resultantly, the Court has held that Article 3 has to be construed in light of the fact that the Constitution does not guarantee the territorial integrity of States and allows for changes in their territorial limits.[81] Thus, the power of Parliament to destroy States should necessarily include the power to decide the manner in which the States are to be destroyed or reorganised for the meaningful exercise of such a power. Hence, if the Parliament and the State Legislature, as required in the case of Jammu and Kashmir, in their collective wisdom believe that the conversion of the State into a Union territory would result in greater stability in administration and governance, they ought to be allowed to act in furtherance of that purpose.

Interestingly, the petitioners have argued against construing Article 3 in a manner that includes the power to convert a State to a Union territory on the ground that India could effectively become a "Union of Union territories" instead of a "Union of States" as envisaged under Article 1.[82] This argument is fallacious on two counts. First, the petitioner's contention is, in truth, an argument that relates to a speculative misuse of power by the Parliament under Article 3. However, it is a settled proposition of law that the mere possibility of a power being abused is not a valid reason to deny its existence.[83] Second, the question of whether the Parliament has legally exercised its powers under Article 3 would need to be examined on a case to case basis. In turn, this would depend on whether the circumstances in

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79 S.R. Bommai v. Union of India, AIR 1994 SC 1918, para 210; Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501, para 127.

80 State Bank of India v. Santosh Gupta, (2017) 2 SCC 538, para 10.

81 In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143(1) of The Constitution of India, AIR 1960 SC 845, para 35.

82 Mohd Akbar Lone v. Union of India, WP(C) 1037 of 2019 (S.C.) (Pending), para BB.

83 State of West Bengal v. Union of India, AIR 1963 SC 1241, para 35.

question warrant the exercise of such a power and more importantly the scope of judicial review in such matters. However, in any case, the Parliament does not possess unlimited power under Article 3[84] since the restrictions on the exercise of such a power presently exist in the form of the basic features of the Constitution.[85] In *Mangal Singh* v. *UOI*, the Court held that the power of the Parliament to admit, establish and form new States has to be in accordance with the democratic pattern envisaged by the Constitution and cannot be used to override the constitutional scheme.[86] Therefore, in the hypothetical and extremely unlikely event that the Parliament attempts to convert all States into Union territories, it would be subverting the entire scheme of the Constitution which envisages a quasi-federal structure of governance with States existing as constituent units with an elected Legislature and Executive alongside the Union Government[87]. Consequently, such an action of Parliament would be visibly unconstitutional and hence liable to be struck down by the Court. In this scenario, it is virtually impossible to specify the number of States that would need to be converted to Union territories for it to be considered as *ultra vires* the power of the Parliament under Article 3 and is a matter best left for the Court to address if and when such a situation arises. Having contended that the power to bifurcate a State into two Union territories is within the bounds of Article 3, it remains to be seen whether the same is legally permissible even during a situation of President's rule.

Bifurcating a State under President's Rule

In contrast to the requirement of ascertainment of views *vis-à-vis* all the other States, Article 3 as extended to the State of Jammu and Kashmir (prior to the issuance of C.O. 272) required the "consent" of

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84 Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461.
85 R.C. Poudyal v. Union of India, AIR 1993 SC 1804, para 116.
86 Mangal Singh v. Union of India, AIR 1967 SC 944, para 7.
87 Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501, para 106.

the Legislature of the State for any change in the area, name or boundaries of the State.[88] This would imply that Article 3 would be violated if the State were to be bifurcated without the consent of the State Legislature. However, as I have contended in Part V, Article 356(1)(c) may be invoked to suspend the proviso to Article 3 if the same is necessary to give effect to the objects of the Proclamation, thereby dispensing with the need to obtain the consent of the State Legislature. Nonetheless, in harmony with the position adopted in Part V, the purpose of the Proclamation was for the Centre to only hold the fort in the State until an elected State government returned to power. This means that, given this standard objective, no drastic constitutional changes, including the territorial bifurcation of the State, were necessary for its success. Therefore, insofar as the Reorganisation Act was enacted by exceeding the powers of the President and the Parliament under Article 356, it should be declared unconstitutional.

Scope of Judicial Review

In response to the various writ petitions assailing the constitutionality of the aforementioned legal measures, the Union of India, in its Counter affidavit filed before the Court, has submitted that the desirability and wisdom of the decisions of the President and the Parliament are not amenable to judicial review.[89] In light of this submission, a deliberation on the scope of judicial review in the instant case becomes necessary.

As mentioned in Part V, the Centre's reasons for abrogating Article 370 and bifurcating the State of Jammu and Kashmir is that it would help curb terrorism and separatism along with ensuring the complete integration of Jammu and Kashmir with the Union. Furthermore, according to the Centre, ending the legal regime under

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[88] The Constitution (Application to Jammu and Kashmir) Order, 1954, available at http://jklaw.nic.in/constitution_jk.pdf, last seen on 21/05/2020.

[89] Counter Affidavit on behalf of Union of India, Mohd. Akbar Lone v. Union of India, WP(C) 1037 of 2019 (S.C.) (Pending), para 10.

Article 370 would result in greater socio-economic development of the State and the extension of various government schemes to the residents of Jammu and Kashmir.[90] The decisions to abrogate Article 370 and reorganise the State therefore fall within the realms of policy-making during a situation of President's rule. Accordingly, the broad practice of the Court in pronouncing on matters of policy generally, and in the context of President's rule particularly, provides an insight into the scope of judicial review in the present case.

In *State of Punjab* v. *Ram Lubhaya Bagga*, the Court observed that questioning the validity of governmental policy is not normally within the domain of the judiciary except where it is arbitrary or violative of any constitutional or statutory provision.[91] Similarly, in *Ugar Sugar Works* v. *Delhi Administration*, the Court noted that courts are not expected to express their opinion as to whether a particular policy should have been adopted at a particular given time or in a particular situation since the same is best left to the discretion of the State. The Court further noted however that this rule would not be applicable if the policy was mala fide, unreasonable or arbitrary.[92] Notably though, in *S.R. Bommai* v. *Union of India*, the Court observed, in the context of Article 356, that an excessive use of power also amounted to an illegal, irrational and *mala fide* exercise of power.[93] The Court elaborated by stating that the removal of the State Government or the dissolution of the Assembly would be a disproportionate and unreasonable exercise of power by the President under Article 356 if what the situation required was only the assumption of some functions or powers of the Government of the State under Article 356(1)(a).[94] Since the situations of the failure of the constitutional machinery in States may vary in

90 Ibid, at para 18.
91 State of Punjab v. Ram Lubhaya Bagga, AIR 1998 SC 1703, para 22.
92 Ugar Sugar Works Ltd. v. Delhi Administration, AIR 2001 SC 1447, para 17.
93 S.R. Bommai v. Union of India, AIR 1994 SC 1918, para 71.
94 Ibid.

nature and extent, the measures to remedy the situation under Article 356 would have to be proportionate and based on the given circumstances.[95]

Drawing from the above judgments, it would be open to the Court in the instant case to satisfy itself on the absence of arbitrariness and unreasonableness of the decisions to abrogate Article 370 and bifurcate Jammu and Kashmir. More importantly, however, the review of the Court ought to entail an assessment of whether the President and the Parliament have exceeded their powers under Article 356 while trying to rectify the failure of constitutional machinery in the State of Jammu and Kashmir pursuant to which President's rule had been imposed on the State. In turn, the Court will have to delve into whether it was necessary or desirable to abrogate Article 370 and bifurcate the State of Jammu and Kashmir to fulfil the objectives of President's rule in Jammu and Kashmir. To sum up, the review of the Court must be directed towards examining whether the actions of the President and the Parliament, in the form of issuing C.O. 272, C.O. 273 and enacting the Reorganisation Act, are within the ambit of the powers assigned to them under Article 356 of the Constitution.

Conclusion

The decision of the Court in the instant matter is undoubtedly one of the most eagerly anticipated decisions of recent times due to the complex legal issues and policy ramifications at play. The perennial debate on the permanence of Article 370 in the absence of the Constituent Assembly of Jammu and Kashmir may finally be put to rest. More specifically, the Court would need to address whether the mechanism laid down in clause (3) of Article 370 can still be utilised and if so, in what manner. Therefore, even in the event that C.O. 272 is struck down in its entirety, the Court's observations on clause (3) would in no way just be academic but rather serve to elucidate the legal method for a possible abrogation of Article 370 in the future. In this

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95 Ibid.

context, owing to the precedent laid down in *Maqbool Damnoo*, the arrangement for the application of constitutional provisions to Jammu and Kashmir under clause (1)(d) of Article 370 and the need for a living Constitution, I believe that the Legislative Assembly of the State can be construed by the Court to be the valid successor to the Constituent Assembly of the State.

The Court would also need to answer questions pertaining to the scope and limitations of President's rule that have previously been unexplored and which would go a long way in dissecting the nature of Centre-State relations within the framework of the federal structure of the Constitution. On this aspect, I believe that the language of Article 356 and the quasi-federal nature of the Constitution confer on the Centre the power to take wide-ranging and even unalterable decisions as long as they are desirable for achieving the objects of the Proclamation at hand. Tested against this legal standard, the actions of the President and the Parliament exceed the constitutionally prescribed limits on the use of their powers during the operation of President's rule and therefore cannot be validated. Therefore, the special status of Jammu and Kashmir enshrined in Article 370 and the State of Jammu and Kashmir in its original form ought to be restored.

It is essential that the Court acts expeditiously to pronounce a judgment on the matter to prevent it from becoming a *fait accompli*. Irrespective of the final outcome, the verdict of the Court is almost certain to have a long lasting impact on the development of constitutional law jurisprudence in the country.

ADOPTING WEAK-FORM REVIEW IN INDIA: AN INVITATION TO A NEW CONSTITUTIONALISM

*Anirudh Belle**

Abstract

In systems of judicial supremacy judicial review implies the displacement of legislative or executive decisions. This results in what is called "the counter-majoritarian difficulty". The counter-majoritarian difficulty highlights the problem of unelected judges exercising exclusive, or near-exclusive, dominion over decisions that ought to be made by democratically elected branches of the State – namely, the legislature. In addressing the counter-majoritarian difficulty, I examine what Mark Tushnet had referred to as the "weak-form" system of judicial review. The focus of this article is on rights review and on a single jurisdiction – India. My effort is to argue for weak-form review in India as a system that breaks away from the traditional contrasts between legislative and judicial supremacy, and which better protects rights by reallocating powers between the legislatures and the courts. This article begins with an introduction to weak-form review. I proceed to the opening section of my analysis where I detail the evolution of judicial review in India and justify its present avatar as "strong"; this justification is in response to a scholarly position which holds that Indian judicial review, though strong in design, is, in practice, a "partial substitute" of weak-form review. In the second section, divided into four subthemes, I explore arguments made for weak-form review; in the same vein, I address

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concerns that are commonly placed against it. In the final section, I summarise and conclude.

Keywords: Judicial Review, Weak-Form Review, Constitutional Law, Comparative Constitutional Law, India.

Introduction

Judicial review implies the displacement of legislative or executive decisions. Those decisions, as Mark Tushnet explains, "can often plausibly be described as reflecting the views of a nation's majority as expressed through voting; and constitutional court judges are typically, at most, indirectly responsible to the electorate".[1] These notions result in what Alexander Bickel had popularly called "the counter-majoritarian difficulty".[2] The counter-majoritarian difficulty arises in countries whose judicial review system gives the judiciary the "final word" on the constitutional validity of legislation. It highlights the problem of unelected judges exercising exclusive, or near-exclusive, dominion over decisions that ought to be made by democratically elected branches of the State – namely, the legislature. The problem is couched on a range of issues which are explored later in this article. The chief among these are (a) the lack of democratic legitimacy backing judicial judgements, (b) the absence of diverse public representation in making these judgements, and (c) the emphasis on legal or judicial devices to resolve issues that are often best solved along with broader approaches, which judges are not necessarily trained to appreciate (e.g. political, policy, ethical, moral and cultural considerations, to name a few).

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1 M. Tushnet, *The structures of constitutional review and some implications for substantive constitutional law,* 40, 56 in *Advanced Introduction to Comparative Constitutional Law* (M. Tushnet, 2nd ed., 2018).

2 A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 16-17 (2nd ed., 1986). ("[J]udicial review is a counter-majoritarian force in our system… [W]hen the Supreme Court declares unconstitutional a legislative act… it thwarts the will of representatives of the actual people of here and now…").

In addressing the counter-majoritarian difficulty, comparative legal scholars have turned their attention in recent years to constitutional developments in the United Kingdom, New Zealand and Canada.[3] These countries embody systems of judicial review which Tushnet had famously described as "weak-form".[4] This phrase is contrasted with "strong-form" review associated with the United States – i.e. wherein the judiciary is granted the "final word" on the constitutionality of legislations. As Stephen Gardbaum describes it, weak-form review (or the "new Commonwealth model", as he calls it) "decouples judicial review from judicial supremacy by empowering the legislature to have the final word".[5] The essential characteristics of weak-form review are three-fold:

> (1) a legalised bill or charter of rights; (2) some form of enhanced judicial power to enforce these rights by assessing legislation (as well as other governmental acts) for consistency with them that goes beyond traditional presumptions and ordinary modes of statutory interpretation; and (3), most distinctively, notwithstanding this judicial role, a formal legislative power to have the final word on what the law of the land is by ordinary vote.[6]

The first two features set weak-form review apart from traditional Westminster-style Parliamentary supremacy, and the third from judicial supremacy.

Taking note of the inter-institutional dialogue present in weak-form review, some commentators have added the "dialogic" quality as

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3 See M. Tushnet, *The Rise of Weak-form Judicial Review,* 321, 327-30 in *Comparative Constitutional Law,* (Tom Ginsburg & Rosalind Dixon, 1st ed., 2011) (for Tushnet's summary of weak-form review provisions in these three jurisdictions).

4 M. Tushnet, *Alternative Forms of Judicial Review*, 101 Michigan Law Review, 2781, 2781-2802 (2003).

5 S. Gardbaum, *Reassessing the new Commonwealth model of constitutionalism*, 8 International Journal of Constitutional Law, 169, 171-5 (2010).

6 Ibid., at 171.

among its distinct features.[7] This attribution is unnecessary and "overinclusive".[8] It does not sufficiently distinguish weak-form review from other forms of judicial review. Even in strong-from review systems, the legislature has the opportunity to respond to judicial pronouncements by passing amendments. As Aileen Kavanagh explains, "… these forms of inter-institutional dialogue occur in both strong-form and weak-form systems. Therefore, 'dialogue' is not a distinctive marker of 'weak-form systems.' Rather, it is something both systems have in common."[9] The dialogue, however, is distinct in weak-form review in that it ultimately culminates in the legislative final word.

The focus of this article is on a single jurisdiction – India. My effort is to present a case for adopting a system of weak-form review in India. In the opening section of my analysis, I detail the evolution of judicial review in India and justify its present avatar as "strong"; this justification is in response to a scholarly position which holds that Indian judicial review, though strong in design, is, in practice, a "partial substitute" of weak-form review. In the second section, divided into four subthemes, I explore arguments made for weak-form review; in the same vein, I address concerns that are commonly placed against it. In the final section, I summarise and conclude.

Two clarifications must be made at the outset. First, by "judicial review", I refer to review of legislation and *not* executive actions. Second, my focus is on rights review and not on broader aspects of constitutional review. My aim is to examine a new model of constitutionalism for India, in this limited context, that breaks away from traditional contrasts between legislative and judicial supremacy, and which better protects rights by reallocating powers between the legislatures and the courts. Moreover, weak-from review, as the

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7 Supra 5, at 179-81 (for an overview of this scholarly position).

8 Ibid., at 181.

9 A. Kavanagh, *What's so weak about "weak-form review"? The case of the UK Human Rights Act*, 13 International Journal of Constitutional Law, 1008, 1035-6 (2015).

examples of the U.K., New Zealand and Canada demonstrate, refers, to the instance of rights review.

The Indian Context

The aftermath of World War II witnessed a host of new constitutions adopt American-style strong-form judicial review.[10] The constitution of India, enacted in January 1950, was one instance designed in this trend.[11] Unlike the United States constitution, the power of rights-based judicial review is expressly stated in Article 13 of the Indian constitution. Clause (1) of the provision states those laws in force immediately before the enactment of the constitution, to the extent that it contravenes the constitutionally guaranteed fundamental rights, shall be void. Clause (2) provides that the state shall not make any law that contravenes the chapter on fundamental rights; to the extent such a law does, it shall be void.

The Supreme Court of India ("SCI") began on a positivist note, inspired by the traditions of British courts.[12] In *A. K. Gopalan v. State of Madras*[13] – the first rights dispute before the SCI – it declined to liberally interpret Article 21, the right to life and personal liberty. This was a matter involving Mr. Gopalan, a communist leader, who had been detained under a preventive detention law. The court deferred to Parliament and refused to grant Mr. Gopalan relief. The SCI continued to display judicial restraint on matters pertaining to personal liberty and economic regulation. This was necessitated, S. P. Sathe argues, by the need to aid a newly formed welfare state in its nation-building efforts.[14]

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10 Supra 4, at 2784.

11 D. D. Basu, *Introduction to the Constitution of India*, 87-9 (22nd ed., 2015).

12 S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 Washington University Journal of Law & Policy, 29, 40 (2001).

13 A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

14 Supra 12, at 40-1.

Judicial deference, however, was not total in this period. The SCI clashed with Parliament, for instance, on the scope of the right to property. Parliament's efforts to introduce radical changes in property relations were met with a court that thwarted this agenda by interpreting property rights expansively.[15] From the 1960s onwards, the SCI began to pronounce its strength in expanded terms. In *Sakal Newspapers (Private) Ltd. India*,[16] it struck down a law, which regulated the number of pages and the space and price for advertisements of a newspaper, as violating the freedom of press embodied in Article 19(1)(a). The SCI became bolder in *Golaknath v. State of Punjab*[17] where it ruled that constitutional amendments could not abridge or take away fundamental rights.

In these early decades, India's Parliament featured majority governments that could easily respond to adverse judicial decisions by enacting constitutional amendments.[18] The property decisions of the first decade-and-a-half since 1950, therefore, were set aside through the First, Fourth and Seventh constitutional amendments, and *Golaknath*'s ruling was reversed by the Twenty-Fourth constitutional amendment which explicitly gave Parliament unfettered amending power.[19]

The nature of Parliamentary response manifest in the initial decades of India's nationhood is arguably what led Mark Tushnet and Rosalind Dixon to conclude that the Indian instance of judicial review

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15 See J. Singh, *(Un)Constituting Property The Deconstruction of the 'Right to Property' in India,* Working Paper Series, Centre for the Study of Law and Governance, 9-13, Working Paper Number CSLG/WP/05, Jawaharlal Nehru University (2012 Reprint) (for an overview of clashes between Parliament and the SCI on the scope of the right to property).

16 Sakal Papers Pvt. Ltd. v. Union of India, AIR 1962 SC 305.

17 Golaknath v. State of Punjab, AIR 1967 SC 1643.

18 Article 368 of the constitution provides that a constitutional amendment can be affected merely by a majority vote of two-thirds of Parliamentarians present and voting.

19 See supra 15 and infra 22, respectively.

is distinct from traditional strong-form review. They claim that the strong-form aspect of Indian-style judicial review is "weakened" by its constitution's relatively easy amendment procedures.[20] The Indian Parliament could respond, and has responded, to judicial invalidations of statutes with relative ease. The 101 amendments that feature in the constitution, to date, support this claim.[21]

Tushnet and Dixon's observation is compelling. However, a closer look at the Indian context today renders their position outdated.[22] The excesses of the political Emergency imposed by Prime Minister Indira Gandhi in 1975, and the SCI's "dismal performance in protecting civil rights" during this period, prompted the judiciary to adopt a more "activist" stance.[23] This was an act of atonement, so to speak, an attempt to set-aside its prior pusillanimity. As Sathe observes, "if the Court had envisioned a more positive role for itself in Indian democracy… it could no longer continue to adopt a positivistic role while interpreting other provisions of the Constitution."[24] Indian

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[20] M. Tushnet & R. Dixon, *Weak-form review and its constitutional relatives: An Asian perspective,* 102, 108-12 in *Comparative Constitutional Law in Asia* (T. Ginsburg and R. Dixon, 2014) (The Indian Constitution's amendment rule, stated in Article 368, is simple: amendments can be adopted by a majority vote in each House of Parliament); also see supra 1, at 61 (Tushnet explains how "easy amendment rules" and weak-form review are "partial substitutes"); D.D. Basu, *Commentary on the Constitution of India*, vol. 14 (T.S. Doabia and M.L. Singhal, 9th ed, 2017), ("Though the Constitution of India is a written one and also federal in character,—in the matter of amendment, it has sought to avoid the difficult processes laid down by the American and Australian Constitutions. As has been pointed out at the outset, our Constitution is partly flexible and partly rigid, and a large number of provisions of the Constitution are open to amendment by the Union Parliament in the ordinary process of legislation outside Article 368.").

[21] Contrast this figure with that of the Constitution of the United States, which features just 27 amendments since the Constitution's enactment in 1787.

[22] See supra 12, at 30-109 (for an overview of case law that shows how the SCI began to assert its "strength" more emphatically from the late 1960s onwards till it achieved its present 21st century strong-form avatar. Sathe, it should be noted, describes judicial strength with the phrase "judicial activism").

[23] A. Chandrachud, *Due Process of Law*, 3 (2012).

[24] Supra 12, at 50.

judicial review which, till this period was a partial substitute to a weak-form system, was metamorphosing into a substantially strong court.

The Strong Character of the Indian Judiciary

The "metric of strength" in a judicial review system, to use Kavanagh's phrase and reasoning, is "multi-dimensional".[25] Beyond formal design, it can be influenced by several factors that include the constitutional and political culture of a society. It appears insufficient that the ease of amendment procedures and the sheer number of constitutional amendments, in themselves, should characterise the Indian instance as a variant of weak-form review. My argument is based on the following reasons:

First, as Pratap Bhanu Mehta notes, where the SCI's judgement – particularly on rights matters – is sufficiently "popular", politicians may "perceive that there will be a political penalty involved in overturning a court intervention."[26] Legislative caution, in this way, disincentivises Parliament from enacting a constitutional amendment to the contrary. This is possibly why the State has not pushed for an amendment to invalidate the SCI's recent verdict which upheld privacy as a fundamental right under the constitution.[27] This is despite the government's vehement opposition against upholding the right to privacy under Article 21.[28] The State's deference to the SCI on similar "sensitive" matters was further evidenced in its leaving the constitutionality of Section 377 of the Indian Penal Code, which

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25 Supra 9, at 1041.

26 P. B. Mehta, *The Indian Supreme Court and the Art of Democratic Positioning,* 233, 244 in *Unstable Constitutionalism: Law and Politics in South Asia*, (2015).

27 K.S. Puttaswamy v. Union of India, (2014) 6 SCC 433.

28 PTI, *As right to privacy is multifaceted, it can't be treated as a fundamental right, Centre tells SC*, The Hindu (27/7/2017), https://www.thehindu.com/news/national/right-to-privacy-not-fundamental-right-centre-tells-sc/article19369385.ece , last seen on 2/08/2018.

criminalises homosexual intercourse, "to the wisdom of the court".[29] The court, in such circumstances, normally enjoys the final word.

Second, the "basic structure doctrine", introduced by the SCI in *Kesavanada Bharti v. State of Kerala*,[30] and developed in subsequent case law,[31] allows the SCI to invalidate constitutional amendments which *it* finds are in conflict with the (judicially determined) basic features of the constitution. On this instance, Indian-style judicial review certainly acquires a "strong" form.

There is arguably more to be said about the SCI's positioning in India's democratic context that renders it *effectively* "strong". Mehta notes that "… in carving out a role for itself, the Indian Supreme Court is looking outward to a concept of public legitimacy – as it were – rather than inward to the text of the law or upward to a self-evident provision of the constitution".[32] Mehta's argument is that the SCI, over the years, has turned more towards notions of "public reason" and public acceptability, than to normative theories of judicial legitimacy, to justify its actions. He clarifies that "this does not suggest that it dispenses with the law or the constitution; rather, it must deploy them in ways that it believes will command democratic legitimacy".[33] Couched on public popularity, as Mehta previously observes,[34] the SCI's decisions are met with legislative circumspection and a reluctance from Parliament to combat the judiciary. In these circumstances, the SCI has acquired a remarkably activist character. The extent of the

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29 K. Rajagopal, *Gay sex: Centre leaves it to wisdom of SC to decide on constitutionality of Section 377 IPC*, The Hindu (11/7/2018), https://www.thehindu.com/news/national/sc-hearing-on-section-377/article24387288.ece , last seen on 2/08/2018.

30 (1973) 4 SCC 225.

31 See M. Khosla, *Constitutional Amendment*, 232, 232-250 in *The Oxford Handbook of the Indian Constitution*, (S. Choudhry, M. Khosla, et al, 2016).

32 Supra 26, at 245.

33 Ibid.

34 Supra 26.

powers it has given unto itself can be seen, most obviously, in its relatively recent "interpretations" of Article 21. The guarantees of "life" and "liberty" have been stretched far beyond the provision's text to include the right to livelihood, shelter, cultural heritage, health and medical aid, privacy, and so on.[35] More significantly, even a concept like the basic structure is an expression of such activism. Though the doctrine was, and remains, widely celebrated in India's public domain, nowhere does the text of the constitution strictly legitimise it. Indeed, as Mehta observes, "it seems that nothing is beyond the scope of its [the SCI's] power and jurisdiction".[36]

To view India's higher judiciary as "strong" only in *design*, or in a limited sense, therefore, is problematic. When a constitutional amendment is made in response to a judicial invalidation, the possibility of interpreting it as violative of the "basic structure" – even when such an effort would involve strained interpretation – does not evade the SCI. After all, the basic structure doctrine is itself abstract and its scope is far from defined. The SCI has periodically demonstrated its willingness to engage in strained or doctrinally unclear interpretations, so long as it believes it enjoys public acceptance.[37]

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35 See A. Surendranath, *Life and Personal Liberty*, 756, 756-776 in *The Oxford Handbook of the Indian Constitution*, 756-776 (S. Choudhry, M. Khosla, et al, 2016) (for an overview of SCI decisions which have read social-welfare entitlements into Article 21).

36 Supra 26, at 233.

37 See M. Khosla, *The Ninth Schedule Decision: Time to Define the Constitution's Basic Structure*, 42 Economic and Political Weekly, 3203, 3203-3204 (2007) (Using I.R. Coelho v. State of Tamil Nadu, (1999) 7 SCC 580, as an example, Khosla observes: "Judges evaluate and determine whether the basic structure is violated on a case-by-case basis. There is no defined category and the list of items that form part of the basic structure has been expanding since the pronouncement of the doctrine. While past cases have meant that an inclusive list of some sort is existent, there is no exhaustive formulation. This places a powerful weapon in the hands of the judiciary that enables it to not only review legislative and

My argument in this paper, therefore, is presented not only against the apparently strong-form *design* of Indian-style judicial review. It is also in response to the "strength", manifest in *judicial practice*, that gives the SCI effective powers in claiming the final word.

The next section of this paper examines arguments for weak-form review; in the same vein, it addresses concerns that are commonly placed against it.

The Case for Weak-Form Review

In systems that feature weak-form review, the counter-majoritarian difficulty is turned into "an institutional version of reasonable disagreement over the proper specification of abstractly defined values".[38] In the ultimate course of rights adjudication, why must the "reasonable" view of the legislature prevail over the judiciary's? In this section, I will explore this question. The various defences for weak-form review are presented here under four thematic subsections.

A "Ground-Up" Discourse on Rights

An apprehension that may come to mind is whether Parliament is indeed capable of mature and serious deliberation on rights. In India, this view is understandable given the dwindling levels of productivity an average Parliamentary session features.[39] In the Budget Session of 2018, the Lok Sabha (i.e. the Lower House) functioned for an average of 21% of its scheduled time and the Rajya

executive actions, but also to do so without criterion."); See generally A. Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India,* (2017).

38 Supra 1, at 58.

39 *Vital Stats: Performance of Parliament during the 15th Lok Sabha*, PRS Legislative Research, available at http://www.prsindia.org/administrator/uploads/general/1393227842~~Vital%20Stats%20-%20Performance%20of%2015th%20Lok%20Sabha.pdf , last seen on 4/08/2018 ("Productivity of the 15th Lok Sabha has been the worst in the last fifty years").

Sabha (the Upper House) for 27%.[40] Within these brackets, only 1% and 6% of time, respectively, in the Lok Sabha and Rajya Sabha, was spent on productive legislative deliberation.[41] In fact, PRS Legislative Research has confirmed that this session witnessed the "lowest number of discussions on matters of public importance since 2014."[42] It follows that the judiciary, which is typically understood to function without disruptions, and within the rigorous idiom of legal reasoning, is better placed to have the ultimate word on rights.[43]

The present judicial review regime in India has created its own political imperatives. These emphasise, and even empower, the judicial role in rights deliberations in a manner that they do not for Parliament. As Gardbaum points out, "where legislatures never have final responsibility for rights, and, even more, where (as often happens) courts do not take legislative considerations seriously in their own deliberations, there is an understandable tendency to leave matters of constitutionality to the judiciary and for the legislatures to spend their time on matters they do decide."[44] The absence of authoritative legislative input into rights discourse arguably *disincentivises* Parliament from approaching it with the rigour it demands.

The benefit of weak-form review systems, continues Gardbaum, is that "it has greater potential to actively involve all three branches of government in rights review and to create a broader rights

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40 *Vital Stats: Parliament functioning in Budget Session 2018*, , PRS Legislative Research, available at http://www.prsindia.org/uploads/media/Budget%202018/Vital%20Stats%20-%20Budget%20Session%202018.pdf , last seen on 4/08/2018.

41 Ibid.

42 Ibid.

43 See J. K. Krishnan, *Scholarly Discourse, Public Perceptions, and the Cementing of Norms: The Case of the Indian Supreme Court and a Plea for Research*, Articles by Maurer Faculty (2007), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1311&context=facpub, last seen on 4/08/2018.

44 Supra 5, at 173.

consciousness among the citizenry".[45] This results in what Grant Huscroft terms as a "ground-up" culture of rights, as opposed to a "top-down" one.[46] When Parliament is empowered with the definitive word on rights, the public eye will necessarily shift towards it. The responsibility this calls for will compel Parliament, and its subcommittees, to devote greater and more sustained attention to rights deliberations.

Jeremy Waldron takes the example of the U.K. to show the quality a Parliamentary debate can acquire under a "ground-up" culture. He cites a debate in the House of Commons on the Medical Termination of Pregnancy Bill from 1966:

> This was a bill proposing to liberalize abortion law. The second reading debate on that bill is as fine an example of a political institution grappling with moral issues as you could hope to find. It is a sustained debate — about one hundred pages in Hansard — and it involved pro-life Labour people and pro-choice Labour people, pro-life Conservatives and pro-choice Conservatives, talking through and focusing on all of the questions that need to be addressed when abortion is being debated. They debated the questions passionately, but also thoroughly and honorably, with attention to the rights, principles, and pragmatic issues on both sides. It was a debate that in the end the supporters of the bill won; the pro-choice faction prevailed. One remarkable thing was that everyone who participated in the debate, even the pro-life MPs (when they saw which way the vote was going to go), paid tribute to the respectfulness with which their positions had been

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45 Ibid., at 175.

46 G. Huscroft, *Constitutionalism from the Top Down*, 45 Osgoode Hall Law Journal, 91 (2007).

> listened to and heard in that discussion. Think about that: How many times have we ever heard anybody on the pro-life side pay tribute to the attention and respectfulness with which her position was discussed, say, by the Supreme Court in Roe v. Wade?[47]

In sharp contrast to the above example is the Indian Parliament's engagement with an equally contentious and morally important rights issue – i.e. affirmative action. The government of Prime Minister V. P. Singh sought to introduce, in 1990, the recommendations of the Report of the Backward Classes Commission (i.e. the Mandal Commission Report).[48] The commission recommended a greater level of caste-based reservations in a wide sphere of activities.[49] This move was met with violent and widespread student protests across India,[50] and those opposing the move believed that it would further entrench casteism in the country.[51] The SCI, in *Indra Sawhney v. Union of India*,[52] had ruled that caste-based reservations for promotional posts in public employment are invalid. In 1995, union Parliament sought to reverse this decision through a constitutional amendment that inserts a new provision – Article 16 (4A) – into the chapter on fundamental rights.

The 1995 amendment was whisked through a single-day session of the Lok Sabha and passed with 319 votes and just one

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47 J. Waldron, *The Core of the Case against Judicial Review*, 115 The Yale Law Journal Company, Inc., 1346, 1384-1385 (2006).

48 Mandal Commission Report, *Report of the Backward Classes Commission*, (Government of India Press) (1981).

49 See D. Kumar, *The Affirmative Action Debate in India*, 32 Asian Survey, 290, 290-302 (1992).

50 See *Mandal report touches a peculiar chord among youth*, India Today (31/10/1990), https://www.indiatoday.in/magazine/special-report/story/19901031-mandal-report-touches-a-peculiar-chord-among-youth-813187-1990-10-31 , last seen on 22/08/2018.

51 Supra 49.

52 Indra Sawhney v. Union of India, AIR 1993 SC 447.

dissenting vote.[53] Matters moved more hastily in the Rajya Sabha, where the Bill was passed with 126 votes (to Nil), on the very same day it was passed in the Lok Sabha, and with absolutely no discussion on its contents or implications.[54] Rajeev Dhavan draws attention to the more disturbing fact that the 1995 instance was only the beginning of a larger trend that characterised Parliamentary debates (or the lack thereof) on reservations right until 2007.[55]

Hastiness or casualness in Parliamentary deliberation is certainly not exceptional in modern day India. Madhav Godbole, cites a host of instances since the 1970s that prove these attributes to be more everyday than otherwise.[56] A ground-up culture – in the limited, but crucial, realm of rights at least – will arguably create a more serious and sustained approach to Parliamentary business, which India presently lacks.

Waldron's example of the U.K. is one instance of the institutional quality a ground-up culture encourages. Canada, another weak-form review system, hints at its effects on the broader citizenry. Under Section 33 of the Canadian Charter of Rights and Freedoms, the judiciary is empowered to strike-down legislation that is incompatible with the Charter rights. The legislature, in response, can declare, by a vote of an ordinary majority, for a renewable duration of five-years, that the statute "shall operate notwithstanding a [rights] provision included in Section 2 or Sections 7 to 15 of this Charter". The five-year renewability provision makes the government's enacted position, on a judicial declaration on rights, a potential electoral question. As Tushnet puts it, "[t]he five-year 'sunset' period ensures that an election intervene between initial enactment and renewal,

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53 See M. Godbole, *India's Parliamentary Democracy on Trial*, 127-9 (2011) (for a general commentary on these proceedings).

54 Ibid.

55 R. Dhavan, *Reserved! – How Parliament Debated Reservations: 1995-2007,* (2008).

56 Supra 53, at 39-141 (see particularly, 101-4).

thereby increasing the likelihood that legislative responsibility will be enforced through political accountability."[57] As the opposition and government battle-out their rights positions in public, the broader citizenry is encouraged to develop a greater rights consciousness. The "ground-up" discourse, in this case, transforms from one which only involves the three branches of government, to include the citizenry as well.

The important outcomes in a "ground-up" culture cannot be emphasised enough. In his classic paper, *The Core Case Against Judicial Review*,[58] Waldron puts forth a comprehensive argument against judicial supremacy. Waldron rightly cautions that a weak-form review system will function optimally only if four pre-conditions are met:

> We are to imagine a society with (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.[59]

Waldron's four conditions rest on the political and constitutional culture of a society. These address not just the three branches of government, but also the citizenry. Understandably, students of Indian public life will be quick, and correct, to conclude

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57 Supra 3, at 325.
58 Supra 47.
59 Ibid, at 1360.

that India, presently, does not satisfy Waldron's lofty conditions. However, the "ground-up" culture, which is a by-product of the weak-form review system, is, interestingly, the very factor than enables its effective operation. By turning to weak-form review, India can work with the ground-up possibilities embedded in it to create the constitutional culture required for the system to operate. Of course, the establishment of such a culture might take several years, and much will also depend on the effectiveness with which institutions and citizens adapt to weak-form review. But this is hardly a reason to discard the argument for weak-form review; like any constitutional experiment of this magnitude, its promise can only be presented in likelihoods, strong likelihoods, and not in guarantees. The mechanics of weak-form review offer a compelling and organic possibility of developing a ground-up constitutional culture, which the present regime simply does not.

This being said, Waldron's third condition does raise some genuine concern in the Indian context. Since democracy is organised on majoritarian terms, will minority rights and concerns be pushed to the margins in a weak-form review system? This question is addressed in the last thematic subtheme of this part.

The Legitimacy and Breadth of Rights Deliberations

Judicial reasoning on rights is centred on a Bill of Rights – Part III of the constitution, in the Indian context. Indeed, the presence of a Bill of Rights comes with its attendant benefits. It offers a "valuable way of rendering rights and their limits more concrete and specific, of mooring potentially abstract or hypothetical issues in reality."[60] Further, compared to common law liberties embedded in the Westminster-style system, a charter of rights is relatively less vague in determining the existence and content of an entitlement.[61] However, judicial reasoning on rights is extremely limited.

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60 Supra 5, at 174.

61 Ibid.

The words in a Bill of Rights may not be constructed keeping in mind the nature of rights disputes. Even if they do, they may feature rights-disagreements that existed at the time of the charter's framing which need not exist in the same form today. The apparent emphasis on "procedural due process" in the text of Article 21 is a case in point. Constitutional Advisor, B. N. Rau, recommended against a substantive due-process clause based on the influences he had received from his travels in the United States – namely from American Supreme Court Justice Felix Frankfurter.[62] His recommendation was debated and eventually accepted by the Constituent Assembly. Less than three decades after the constitution's enactment, the SCI recognised the need for a substantive due-process clause. It then proceeded to "read into" Article 21 a guarantee to that effect which the provision did not explicitly state.[63]

Moreover, reliance on a Bill of Rights in systems of judicial supremacy results in a certain rigid textualism. "Judicial supremacy, with its associated tendency towards exclusivity and monologue in rights reasoning, is especially problematic in the inevitable real-world context of reasonable disagreement – among judges, between courts and legislatures, and among citizens – regarding the meaning, scope, application and permissible limits on the relatively abstract text of a bill of rights."[64] While this fact is problematic, it is understandable. Waldron rightly points out that the legitimacy of the judicial process relies on authoritative texts of law.[65] Judges, therefore, are naturally meant to anchor their positions in a charter of rights, its words, and the precedents that guide the manner in which it must be read.

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62 G. Austin, *The Indian Constitution: Cornerstone of a Nation*, 129-30 (2016).

63 See A. Chandrachud, *Due Process*, 777, 777-93 in *The Oxford Handbook of the Indian Constitution* (S. Choudhry, M. Khosla, et al, 2016).

64 Supra 5, at 173.

65 Supra 47, at 1381-2.

In systems of weak-form review, deliberations on rights are widened. In Parliamentary debates, the judicial or legal interpretations of a court are considered against broader moral, cultural, political and policy questions. As Gardbaum points out, the legitimacy of Parliamentary reasoning does not rest on textual reliance on a Bill of Rights.[66] A weak-form review system "helps to resolve the well-known problems of (a) the over-legalisation or judicialization of principled public discourse, and (b) the legislative and popular deliberation that has long been identified as a major cost of constitutionalisation."[67]

Michael Moore expresses his preference for judicial reasoning in separate terms: "judges are better positioned for… moral insight than are legislatures because judges have moral thought experiments presented to them every day [sic] with the kind of detail and concrete involvement needed for moral insight."[68] Waldron persuasively counters this view on two grounds. First, by the time a case reaches the higher appellate levels of litigation, "almost all trace of the original flesh-and-blood right holders has vanished, and argument, such as it is revolves around the abstract issue of the right in dispute."[69] Second, the legislative process is more open to moral deliberation and broader engagement with interested parties. This is achieved through Parliamentary debates, committee enquiries, lobbying and hearings.[70]

Weak-form review systems, however, acknowledge the advantages of judicial reasoning. As Tushnet notes, where an outdated statute exists in the books, the legislative urgency to update or remove the law may not exist.[71] This is possibly because the outdated law may cause harm to relatively few people.[72] Further, Parliament may

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66 Supra 5, at 173-4.
67 Ibid.
68 M. S. Moore, *Natural Law Theory: Contemporary Essays*, 188, 230 (1992).
69 Supra 47, at 1379-80.
70 Ibid.
71 Supra 1, at 59.
72 Ibid.

inadvertently include in a legislation, provisions that are unconstitutional. The unconstitutionality of such provisions may not be apparent to the law's drafters. A judicial decree has the benefit of drawing the legislature's attention to these matters, thereby "shifting the burden of legislative inertia".[73] Experience in the U.K. shows that quite often Parliament does agree with the judiciary on its decrees regarding outdated or unconstitutional provisions, and proceeds to make necessary amends.[74]

A weak-form review system, as can be seen, attempts to blend the best of judicial and parliamentary reasoning to widen discourses on rights. This "widening" is achieved by removing the final word on rights from the judiciary and allowing Parliament to respond within its broader, extra-legal idiom of deliberation.

The greater legitimacy of legislative decision-making procedures is another reason to empower Parliament with the final word. In both legislative and judicial decision-making processes, conclusions are arrived at through majority decision (MD) – i.e. in cases involving a bench of over one judge. Legislators are elected to Parliament through popular elections (one form of MD) and their decisions are enacted by an MD among their number. "The theory is that together these provide a reasonable approximation of the use of MD as a decision-procedure among the citizenry as a whole (and so a reasonable approximation of the application of the values underlying MD to the citizenry as a whole)."[75] Contrast this with the judicial use of MD. Judges, needless to say, are not democratically appointed. There is no reason, in terms of procedural and democratic legitimacy, for judicial decisions to prevail over its legislative counterpart.

Securing Judicial Independence

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73 Ibid.

74 Ibid.

75 Supra 47, at 1388.

In an excellent study of six jurisdictions – Hungary, South Africa, Romania, Egypt, Sri Lanka and Turkey – Gardbaum shows that "strong courts" can be detrimental for the independence of judiciaries in new and transitional democracies.[76] Judicial independence can be thought of in two terms. First, is in the freedom from government control or influence in judicial decision-making. Second, is in the absence of prejudice, partisanship and partiality in judicial decisions. Both aspects of judicial independence, Gardbaum argues, are under threat when courts exercise strong-form review in new or transitional democracies.[77]

In the inaugural or transitional years of a nation, each branch of government will be vying for dominion over power. A judiciary that exercises strong-form review in such scenarios runs the risk of placing itself against the State as an "adversary". This confrontation inevitably leads to interference by the executive or legislature with the judiciary. Attempts are likely to be made by politicians to control judicial appointments, for instance, or to make these appointments for political purposes. This ultimately was the case in the six countries Gardbaum studies,[78] and it is a sorry eventuality in which the judiciary must necessarily share blame. As Gardbaum explains:

> …just as judicial independence is not equivalent to and does not require full autonomy from the other branches of government, so too it is not equivalent to and does not require judicial supremacy over them. In other words, although there is no single model for ensuring judicial independence, there may be a single model for endangering

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76 S. Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 *Columbia Journal of Transnational Law*, 285, 285-320 (2015).

77 Ibid, at 305-6.

78 Ibid, at 294-303.

> it in the particular context of new and transitional democracies.[79]

The SCI was alive to the dangers of strong-form review during the early years of the Indian republic. B. Sen recalls that "[t]he Supreme Court's inclination towards upholding the constitutional validity of legislations… ensured a harmonious relationship between the three organs of State – the Executive, the Legislature and the Judiciary – which was so vital for the survival of an independent judiciary in the formative years."[80]

The view that India remains a young country might be debatable. However, India arguably is a "transitional" democracy – i.e. from the perspective of its judiciary's current strong-form avatar. Of the jurisdictions Gardbaum studies, each featured sufficient legislative majorities that could effectively weaken their activist courts.[81] His study of Hungary is particularly instructive.[82] The Hungarian Constitutional Court was activist right since its creation in 1990.[83] However, for more than a decade, the Hungarian government only held a plurality in Parliament, and not a majority of seats.[84] Only in 2012, on being elected with a sufficient majority, could Prime Minister Viktor Orban finally and weaken judicial power through a series of constitutional amendments.[85] In India, the post-Emergency character of judicial activism – starting with the SCI's watershed ruling in *Menaka Gandhi v. Union of India*[86] – coincided with the formation of the

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79 Ibid, at 306.

80 B. Sen, *Six Decades of Law, Politics and Diplomacy: Some Reminiscences and Reflections*, 92 (2016).

81 Supra 76, at 294-303.

82 Ibid, at 295-7.

83 Ibid.

84 Ibid.

85 Ibid.

86 Menaka Gandhi v. Union of India, AIR 1978 SC 597.

country's first coalition government – i.e. the Janata government.[87] The emergence of Public Interest Litigation in the early 1980s – which rendered the courts even more "strong" – was followed by a more entrenched spell of coalition governments from the late 1980s onwards.[88] It is a well-studied fact that coalition governments find it relatively difficult to muster legislative majorities to overturn adverse judicial verdicts.[89] The waning-away of single party dominance in Parliament from the late 1970s onwards arguably weakened the legislative power required to "correct" an activist judiciary. The "transition" to a stronger, more activist, SCI was accompanied by a Parliament whose powers of response were steadily being "diffused" by coalition alliances.[90]

Therefore, like in Hungary's example above, it is no coincidence that the very first act of a government with full-majority in Parliament in twenty years was to enact a Judicial Appointment's Bill to heighten executive input into judicial appointments.[91] In the period of the same government, it is also no coincidence that four of the senior most judges of the SCI – i.e. after the Chief Justice – chose to come out in public, in an unprecedented fashion, to allege executive meddling with the higher judiciary.[92]

The link seen between strong-form review and judicial independence in this section is useful. The threats faced by judicial independence in India today can arguably be related to the confrontational posturing of the SCI contra the legislature and executive. A turn towards weak-form review, therefore, will, possibly,

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87 See supra 12, at 43-51, 63-86.
88 Ibid., at 63-86.
89 Supra 1, at 58-60.
90 Supra 14, at 102.
91 Supra 26, at 240.
92 '*Democracy is in danger,*' Scroll.in (13/01/2018), https://scroll.in/video/864863/democracy-is-in-danger-watch-the-historic-press-conference-held-by-four-supreme-court-judges , last seen on 5/08/2018.

secure the health of the Indian judiciary, as much as it will the quality of rights discourse among the legislature, and citizenry at large.

The Tyranny of the Majority

Since democracy is organised on majoritarian terms, will minority rights and concerns be pushed to the margins in a weak-form review system? This concern is typically expressed under the phrase "the *tyranny of the majority*".

Waldron approaches this question with two useful terminologies. He describes decision-makers in the legislative process as "decisional" minority and majority and "topical" minority and majority.[93] The former refers to those members of the legislature whose decision *determines* the rights matter in question. The latter refers to those whose rights are *at stake* in the decision. Membership of the decisional majority may coincide with those of the topical majority, and vice-versa, in the case of topical majorities and minorities.

Injustice, or tyranny, explains Waldron, can be established if two facts exist: "(1) that the decision really was wrong and tyrannical in its implications for rights of those affected; and (2) that I was a member of the topical minority whose rights were adversely affected by this wrong decision."[94] This categorisation is useful as it places the word "tyranny" in its correct context. Merely because a minority point of view is rejected, it does not become tyrannical.

Tyranny, as classified above, exists as real possibilities, particularly in India whose population is fractured on lines of religion, language, class and caste. Waldron, however, in his "core case", refers to a society which fulfils the four criteria necessary for a system of weak-form review.[95] Tyranny is unlikely to take place where his third criterion is found to exist – i.e. a society which embodies a

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93 Supra 47, at 1397.

94 Ibid.

95 Supra 59.

commitment to rights, particularly towards those of minorities.[96] India, as we have acknowledged, is yet to fully show that it satisfies Waldron's four criteria. However, it is important to recall our previous discussion on the "ground-up" discourses weak-form review instils. The majoritarian tyranny such a system may embolden is accompanied by the strong likelihood that the Indian citizenry will be more alive to questions of rights. Rights, here, will play a definitive role in whom the electorate returns to political office. Political parties will be compelled to argue their positions on rights in the public domain and eschew – to a relative degree at least – reliance on vague promises like those of "development". In a multi-party system like India's – where multiple constituencies and ideas vie for influence in the public domain – the discourse on rights promises to be vibrant and complex. And in such a scenario, there is no evidence to the claim that majorities will frequently attempt to subordinate the interests of minorities. Indeed, under the present regime itself, there are those in the majority that may support affirmative action, as there are those in the minority who may not. Similarly, some members of religious or tribal minorities might endorse a Uniform Civil Code, as there may be those in the majority who wish to retain official recognition of personal laws.

The weak-form review procedures in the U.K. and New Zealand require the minister concerned (i.e. whose ministry introduces a Bill in Parliament) or the Attorney General, respectively, to make a statement in the House as to a Bill's compatibility with rights statutes. Further, in the U.K., the Parliamentary Joint Committee on Human Rights is tasked with the responsibility of scrutinising every Bill against the Human Rights Act, 1998 ("HRA"). The government, even a majoritarian one, bears the burden of establishing that a law it wishes to pass is compatible with rights. The legislative caution applied on rights matters is evident in the U.K., especially when Parliament

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96 Supra 47, at 1398-1400.

responds to a judicial Declaration of Incompatibility (DOI).[97] Out of 21 DOIs, Parliament or the government have almost always responded by remedying the rights violations mentioned in them.[98] In fact, scholars like Kavanagh view such legislative deference as characterising the U.K. system as more "strong" than "weak":[99]

> …there is multiple sources of political pressure on the U.K. Government to comply with declarations of incompatibility. Not only is there the problem of adverse publicity attracted by a judicial ruling declaring that legislation violates rights, these rulings are often seized upon by Opposition MPs to galvanize opposition to the Government's policy within Parliament.[100]

Governments, therefore, are likely to be very cautious in promoting tyrannical laws; the act of justifying a manifestly tyrannical law in public arguably comes with its political costs. The theoretical possibility of majoritarian tyranny, therefore, can be countered with alternate possibilities. The proof of the pudding is in the eating. Only by implementing a system of weak-form review and giving it time to adjust to the country's political context, can one confirm its true implications.

On a final note, it is problematic to characterise decisions by legislative or popular majorities as particularly tyrannical. Courts can also be tyrannical in their decisions and they too express their verdicts

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97 Note that the first effort of the judiciary in the U.K., vide Section 3 of the HRA, is to interpret the rights-incompatible statute so as to render it compatible with Convention rights – i.e. of the European Convention on Human Rights as manifest in the HRA. Should such a rights-consistent interpretation not be possible, Section 6 of the HRA requires the judiciary to issue what is called a "Declaration of Incompatibility" (DOI). A DOI, unlike the parallel provision on this subject in Canada, does *not* affect the validity of the contested legislation.

98 Supra 9, at 1025.

99 See supra 9.

100 Ibid, at 1024-5.

in the language of majorities. As Waldron puts it, "tyranny is tyranny irrespective of how (and among whom) the tyrannical decision is made".[101] Also, the majoritarian quality of a legislative decision is relatively mitigated by the fact that "there was at least one non-tyrannical thing about the decision: It was not made in a way that tyrannically excluded certain people from participation as equals."[102]

Conclusion

There exists a broad consensus in Canada, New Zealand and the U.K. over the success of weak-form review.[103] The view in the U.K. is that "there is now greater rights consciousness than before – among citizens, courts, Parliament and the government – and the rights that exist are generally better and more widely known and understood than under the pre-HRA regime of common law rights as supplemented by various specific statutory provisions."[104]

The constitutional cultures in these countries vary significantly from that of India's. However, there is no compelling reason I can think of that denies India the possibility of successfully implementing, and reaping the benefits of, a weak-form review system (i.e. in the limited context of fundamental rights compliance review of legislation).

I began this article by introducing the concept of weak-form review. Before delving into my main argument – i.e. developing a case for weak-form review in India – I had to justify the Indian instance as one that was "strong". The need for this arises as there is a scholarly position which holds that Indian judicial review, though strong in design, is, in practice, a variant of weak-form review. In the second section of this article, I divided the defence for weak-form review into four subthemes. The first subtheme explored the "ground-up" culture

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101 Ibid, at 1396.
102 Ibid.
103 Supra 5, at178-198.
104 Ibid, at 198.

a weak-form review system creates in a democratic society. This culture, I argued, will heighten legislative activity and render Parliament more careful and serious in deciding on rights matters. It was also found that the "ground-up" culture, a by-product of the weak-form review system, is also the very factor than enables its effective existence. The second sub-theme looked at the superiority of rights reasoning in a weak-form review system. The possibility of legal as well as extra-legal deliberations on rights, the absence of rigid textualism in considering rights questions, greater representation of various interested parties in rights discussions and the superior democratic legitimacy of legislative decision-making were among the benefits that were found to attend weak-form review. The third subtheme examined the relationship between judicial independence and weak-form review – particularly in fledgling and transitional democracies. This logic was found to resonate with the Indian context. An argument was therefore made that judicial independence is better secured in systems of weak-form review than it is in those where the judiciary takes a more confrontational posture towards the other branches of government. The final subtheme examined the very real possibility of a weak-form review system in India descending into majoritarian tyranny. The word "tyranny" was defined and placed in context. While the theoretical possibility of majoritarian tyranny was acknowledged, it was also countered with alternate possibilities. It became clear, thereafter, that only by implementing a system of weak-form review and giving it time to adjust to the country's political context, can one confirm its true implications.

To discuss the possibility of weak-form review in India is a mammoth task. Not only does it involve building a case for the system – which this article has modestly attempted to do – but it also requires careful consideration of the *form* weak-from review will take in India, and the manner in which it will be implemented. For instance, what will the language of judicial review reform be? What must be done to ensure that the system functions as it must both in design and practice?

Must courts be given an "interpretive" mandate like they are in New Zealand and the U.K., or an "overriding" mandate as in the case of Canada. In other words, must the decoupling of judicial review from judicial supremacy, take the form of the courts "interpreting" statutes, to the extent possible, in a way compatible with rights, or should the courts have the power to invalidate a rights-inconsistent statute (subject, of course, to a legislative "override" as is the case in Canada). Also, what will be the precise nature of Parliamentary scrutiny over rights? Will there be a special Parliamentary committee appointed to aid Parliament in this process? What will the role of the Attorney General be? More broadly, what will be the fate of existing rights jurisprudence in India? What will become of the Basic Structure Doctrine? Should weak-form review be implemented, can such structural change take place through the regular constitutional amendment procedure or does a new constituent body need to be convened? Finally, will a possible turn to weak-form review be temporary (i.e. experimental)? If so, how much time to test the waters must the system receive? Five years? Ten years? These questions are crucial and considering them, in turn, can result in a series of new articles.

Of course, it is entirely possible that weak-form review may never succeed in this country. One can never be certain of this, however, without giving the system a chance.

The proof of the pudding, one repeats, is in the eating. This paper, therefore, serves as an invitation to an experiment – one that is arguably as promising as it is risky.

DEVELOPING A NEW ANALYSIS FRAMEWORK FOR EXAMINING CONSTITUTIONALISM IN MAINLAND CHINA

*Wenjuan Zhang**

Abstract

The purpose of this paper is to develop an analysis framework beyond political philosophy orientation for examining the development of constitutionalism. The parameters of the new analysis framework are summarized on the basis of convergency and divergency of constitutionalism theories. After reviewing the struggles of constitutional transformation from the revolution-oriented social order to the rule of law order, the paper has also analyzed the constituted form in the Constitution (1982) from the perspective of popular sovereignty. Finally, the author conducts a detailed discussion of Chinese constitutionalism in the three parameters and makes her argument that China has a thin version of constitutionalism despite the challenges ahead.

Key words: Thin Version of Constitutionalism, China, Popular Sovereignty, Constituted Form, Constitutional Enforcement, Constituent Power.

1. Introduction

It is still debatable if China has constitutionalism or not. Some scholars including Chinese scholars doubt China has constitutionalism. For example, Prof. Qianfan Zhang of Peking University Law School has published several articles to argue that China has a constitution but without constitutionalism which is directly caused by lack of judicial review.[1] Some other scholars, such as Larry Cata Backer, have

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1 Q. Zhang, *A Constitution Without Constitutionalism? The Paths of Constitutional Development in China*, 8 International Journal of Constitutional Law (2010); Q. Zhang, *Common Knowledge of Constitutionalism*, CITYU HK Press, Hong Kong, pp. 170-174 (2016).

distinguished between western constitutional notions and constitutional notions, and argue that Chinese constitutionalism after 1989 meets the notions of constitutionalism .[2] Others in the middle like Tom Kellogg[3] and Keith Hand[4] believe that China is progressing toward constitutionalism. However, there are also some doubts about whether China is making continuous progress toward constitutionalism especially since 2013., What causes this concern is that "constitutionalism" itself has become a politically sensitive term in China since 2013.[5]

While scholars believing in liberal democracy do not accept China as a country with constitutionalism, some Chinese scholars do not even want to use the concept of "Constitutionalism" in Chinese context at all. The most controversial argument is made by Xiaoqing Yang, a faculty from Renmin University Law School. In her article titled '*Comparative Studies of Constitutionalism and Chinese Democratic Dictatorship*',[6] she has argued that the term "constitutionalism" or even the term "constitutionalism with Chinese Characteristics" should not be used. This is because the Democratic Dictatorship System, which is the foundation of the Chinese Constitution, is completely different from the political logic and constitutional jurisprudence of constitutionalism commonly used in the west. [7]

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2 L.C. Backer, *Party, People, Government and State: on Constitutional Values and the Legitimacy of the Chinese Party-State Rule of Law System*, 30 Boston University International Law Journal, 342 (2012 Summer).

3 T.E. Kellogg, *Constitutionalism with Chinese characteristics - Constitutional Development and Civil Litigation in China*, Volume 7, Issue 2, International Journal of Constitutional Law, 215–246, (April 2009).

4 K. Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 East Asia Law Review, 51-159 (2011).

5 J. Cohen, China's New National Constitution Day: Is It Worth Celebrating? Volume XIV Issue 22, China Brief, Special Issue on China's Fourth Plenum s 4. (November 20, 2014) And also see from R. Creemers, China's Constitutionalism Debate: Content, Context, and Implications, 74(1) The China Journal (1 2015).

6 X. Yang, *Comparative Studies of Constitutionalism and Chinese Democratic Dictatorship*, No. 10, Red Flag Write-up, 4-10 (2013).

7 Ibid.

The concept of constitutionalism is capacious. Whether China is a country with constitutionalism depends on how to define constitutionalism. This paper is going to develop a new analysis framework based on theoretical review of constitutionalism. In Part I, the paper highlights the theoretical development of Constitutionalism in English Literature. In Part II the paper reviews the evolution of constitutional design to show the struggling journey of the constitutional transition from revolution oriented to the rule of law direction. Part III focuses on the introduction and analysis of the constituted form in the Chinese constitution especially from the perspective of popular sovereignty. In the final part of the paper, the author puts the Chinese constitution designing and practice in the new analysis framework and argues that China has a thin version of constitutionalism.

2. Theoretical Development of Constitutionalism in English Literature

Constitutionalism originated from the west. Looking at its theoretical development, it is evident that the constitutionalism in the west has fueled the process of shifting from monarchy to popular sovereignty. Western constitutionalism has also furthered the debates on perfecting the constituted form and, improving the balance between constituted form and constituent power in driving constitutional development.

2.1.1. Constitutionalism and the Understanding of Power Shift from Monarchy to People

The *Oxford English Dictionary* first used the term "Constitutionalism in 1832".[8] It can be said that the modern concept of constitutionalism is developed in tandem with the "transition from the irrational imposition of authority in feudal societies to the capitalist

[8] S. Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today*, Harvard University press, footnote 3, (1999).

state and the rule of law."[9] The discussion of nature and history of constitutionalism can be traced back to philosophers and political scientists such as Thomas Hobbes and John Locke "who are thought to have defended, respectively, the notion of constitutionally unlimited sovereignty versus that of sovereignty limited by the terms of a social contract containing substantive limitations".[10] The French and American revolutions helped the human societies launch into the constitutionalism of modernity.[11]

Early focus of constitutionalism, such as in Britain and France, was to control the monarchy for popular sovereignty. The American constitution has taken a step further and believed that governmental power, which is derived from the people, should also be constrained.[12] From then on, it is almost agreed upon that state power shall be constrained. For example, Scott Gordon takes 'constitutionalism' to "denote that the coercive power of the state is constrained".[13] He believes the "central issue of constitutionalism" is "the problem of controlling the power to coerce".[14] Maria Tzanakopoulou also emphasized that "[a] quintessential characteristic of constitutionalism has ever since been the establishment of domestic limitations to sovereign power".[15] Martin Loughlin and Neil Walker further listed "two fundamental but antagonistic imperatives" of modern constitutionalism-that "government power is ultimately generated from the 'consent of the people' and that, to be sustained and effective,

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9 M. Tzanakopoulou, *Reclaiming Constitutionalism: Democracy*, Power and the State, Hart Publishing, xi (2018).

10 Constitutionalism, *Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/constitutionalism/index.html#ConMinRicSen, last seen on 01/08/2020.

11 Supra 9, at 23-27.

12 Supra 8, at 6-8.

13 Supra 8, at 5.

14 Supra 8, at 7.

15 Supra 9, at. xi.

such power must be divided, constrained, and exercised through distinctive institutional forms".[16] The containment of individual rights on state power has also been emphasized. As Ruti Teitel summarized, the "modeled constitutionalism as a form of pre-commitment and constraint on government or state action" is usually "in the name of individual rights".[17]

2.2. Debates on Best Constituted Forms for Power Check

However, what has not been agreed upon is how the state power shall be constrained in the constituted form such as in the debate of legislative supremacy or judicial supremacy. Historically, the debate on who has the final authority in constitutionalism has been largely influenced by theoretical development and historical events.[18] After the French Revolution in 1789, many countries followed Rousseau's theory. This theory postulated that "only general will can direct the state according to the object what it was situated" which is also called parliamentary sovereignty.[19] In the United States of America, there have been many debates, such as the Lincoln-Douglas debate in 1840, on who should control the constitutional development- the people or the court.[20] However, the emergence of Nazism and Fascism of the Second World War taught a lesson that the legislative supremacy might produce abusive constitutionalism such as pervasive violation of fundamental rights and deprivation of

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16 M. Loughlin & N. Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford University Press, 1 (2007).

17 R. Teitel, *Transnational Justice and the Transformation of Constitutionalism* (in Tom Ginsburg and Rosalind Dixon Ed.), Comparative Constitutional law, Edward Elgar, Cheltenham, UK and Northampton US, 57 (2011).

18 H. Learner, *The Indian Founding: A Comparative Perspective*, The Oxford Handbook of the Indian Constitution, Oxford University Press, New Delhi, 56 (2016).

19 F. Fabbrini, *Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation*, 9 German Law Journal, .1301 (2008).

20 M.A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates,* 81 Chicago-Kent Law Review, 924, Issue 3 (2006).

minorities. [21] For example, the Indian Constitution abandoned parliamentary sovereignty and has borrowed judicial review from United States of America.[22]

Alexander Bickel's "counter-majoritarian difficulty" is one of the most widely used theoretical frameworks for the debates about judicial review both for proponents and critics.[23] He argues that "the root difficulty is that judicial review is a counter-majoritarian force in our system."[24] Other proponents of theory, like Watkins and Lemieux, promote the defense of judicial review using various forms of "bulwark theory". These forms include protecting unpopular minorities, protecting democratic procedural rights and balancing democratic procedural rights and democratic outcomes.[25] For instance, Ronald Dworkin argued that judicial review is necessary for the constitutional conception of democracy which is different from the majoritarian conception of democracy. [26] He pointed out that majoritarian premise is not absolute, as evident in many constitutions which set limits on what a majority can enact.[27] Watkins and Lemieux believe that judicial review should not be exaggerated as the "deviant institution" of democracy.[28] Their recent research proposes an

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21 M. Hailbronner, *Rethinking the rise of the German Constitutional Court: From anti-Nazism to value formalism*, 12 I•CON, No. 3, 626–649 (2014).

22 K. Keshav, *Constitutional Law-I*, Singhal Law Publication, Delhi, pp. 4-5 (7th ed., 2016).

23 D. Watkins & S. Lemieux, *Compared to What? Judicial Review and Other Veto Points in Contemporary Democratic Theory*, 13:2 Perspectives on Politics, 313 (2015); Alexander Bickel, *The Least Dangerous Branch?,* The Supreme Court at the Bar of Politcis, Bobbs-Merill, Binghamton, (1962).

24 A.M. Bickel, *The Least Dangerous Branch*, Yale University Press, New Haven and London, p. 16 (1st ed, 1962).

25 Watkins & Lemieux, pp. 315-316.

26 R. Dworkin, *The Majoritarian Premise and Constitutionalism,* Philosophy and Democracy: An Anthology, Oxford University Press, 242-244 (2003); Jeremy Waldron, *Law and Disagreement*, Oxford University Press, New York, (1999).

27 Ibid, at244-247.

28 Supra 23, at 316.

"acquittal theory" that "courts do sometimes exercise counter-majoritarian influence but they can only reliably use this influence to acquit individuals from criminal or civil penalties".[29] Thus, it can be interpreted that courts can free people from government domination with minimal threat to democratic values.[30]

Jeremy Waldron and Richard Bellamy are strong critics of judicial review. Waldron's critique is based on "equal respect to persons under conditions of persistent disagreement".[31] From a different angle, Bellamy categorizes decision-making procedure into two types: democratic and legal. He insists that collective decision-making should give each individual equal weight in the procedure.[32] Some scholars, like Ran Hirschl, have tried to explain the phenomenon of voluntary and self-imposed judicial empowerment and argued that "political, economic, and legal power-holders who either initiate or refrain from blocking such reforms estimate that it serves their interest to abide by the limits imposed by increased judicial intervention in political sphere".[33] Eoin Daly has questioned judicial supremacy by pointing out the lack of transparency resulting from the fact that using the adjudicative form for legislative function which causes obfuscation and esotericism.[34]

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29 M.E.K. Hall, *Judicial Review as A Limit on Government Domination: Reframing, Resolving and Replacing the (Counter) Majority Difficulty*, 14:2 Perspectives on Politics, 404 (2016).

30 Ibid.

31 Supra 23, at 13-14; Jeremy Waldron, *Law and Disagreement*, Oxford University Press, New York, (1999).

32 Supra 23, at 15-16; Richard Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy*, Cambridge University Press, London (2007).

33 R. Hirschl, *Towards Juristocracy: The Origins and Consequence of the New Constitutionalism*, Harvard University Press, 11 (2007).

34 E. Daly, Transparency as A Justification for Legislative Supremacy, *Critical Review of International Social and Political Philosophy*, Routledge, https://doi.org/10.1080/13698230.2018.1497247, 1-25 (2018), last accessed on 01/08/2020.

Mark Tushnet has tried to balance between "political constitutionalism" and "judicial constitutionalism" as offering "weak form of judicial review" with "iterative nature" as a solution.[35] In his analysis, "weak form" means that the judicial review can step in circumstances such as "legislative inertia" or political parties' competition for constitutional issues.[36] It also means that legislatures can change the judicial review decision through the general law or constitutional amendments depending on the context.[37] He believes the weak-form of judicial review is good for the enforcement of economic and social rights, and even for civil and political rights.[38]

The debate is not only with legislative supremacy or judicial supremacy in the constituted form but also with the balance between the "constituent power" and "the constituted form" in the constitutional transformation and adaption. The "tension linking" and also "the question of priority" between "constituent power" and "constituted form" has been defined as the centrality of all forms of the paradox of constitutionalism.[39] This is involved with the balance of what can be changed and what cannot be changed in the constitution (the people in the constitution drafting era as contrasted with the people today) and with "how the attribution of legislation by constituent power to a collective can take on the form of collective self-attribution" (how to define "we" as collective political identity).[40]

Scholars of popular constitutionalism prioritize the constituent power over constituted power including the judiciary. Larry Kramer is the leading scholar on popular constitutionalism. In 2002, he had the Jorde lecture which was later written into a paper on popular

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35 M. Tushnet, *The Relationship between Political Constitutionalism and Weak-Form Judicial Review*, 14:12 German Law Journal, 2249-2255 (2013).
36 Ibid, at 2251-2256.
37 Ibid, at 2250.
38 Ibid, at 2258-2261.
39 Supra 16, at1
40 Ibid, at 17-19.

constitutionalism to contest the judicial supremacy.[41] He summarized the critics about judicial usurpation of people's role in constitutional interpretation and believed that some form of popular constitutionalism is inevitable.[42] In 2004, he published his book on the same topic with rich historical analysis and continue the argument that it is not legislature or judiciary to have the final say about constitution but the people themselves.[43]

2.3. Summary and Analysis

From this review of literature, it is clear that the early discussion on constitutionalism mainly focused on achieving popular sovereignty and the supremacy of constitutional law. The goal has almost been achieved in most countries of the world today. Now, the discussion is mainly around what could be the best constituted form to reflect popular sovereignty and how to balance the constituted form and constituent power in constitutional development.

While there are various constituted forms for the popular sovereignty little agreement has reached on what is the best form. Each has the weakness from the functional perspective. Yale Law School Professor Bruce Ackerman argued that American style of separation of powers should not be a model for other countries whereas the "constrained parliamentarianism" model practiced in several countries including India "offers a more promising path for constitutional development".[44] However, Indian scholars such as Upendra Baxi have raised the concern about the big shift from jurisprudence to *demoprudence* through judicial activism "in the absence of judicial self-discipline and in the full absence of a degree of judicial

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41 L.D. Kramer, *Popular Constitutionalism*, 92:4 California Law Review, 959-1012 (July 2004).

42 Ibid, at. 960.

43 L.D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, Oxford University Press, 2004.

44 B. Ackerman, The New Separation of Powers, Harvard Law Review Vol. 113 No. 3, 2000, pp. 633-725.

consistency" in India. [45] While comparing the constitutional review through centralized constitutional courts vis-à-vis the constitutional review through ordinary courts, European scholars such as Victor Ferreres Comella have observed that specialized constitutional courts are institutionally fragile for not being indispensable like ordinary courts, for lacking buffer zone or strategy of avoidance in selecting cases and in making decisions through reconstructive constitutional interpretation.[46]

Furthermore, scholars are upset to see the demise of liberal constitutionalism marked by "the June 2016 Brexit referendum in the United Kingdom and the November 2016 presidential election in the United States".[47] The recent World Value Survey even shows a more problematic trend that citizens in North America and West Europe especially among young generation and wealthier persons are more cynical about the liberal values.[48] More and more countries have been "seen partial or full-blown moves toward authoritarianism".[49] Given the above-mentioned scenario, it is very hard to define what is the best constituted form for popular sovereignty from the practical purpose.

Beyond the debate of the best constituted form under the modern constitutionalism, the debate around whether people's sovereignty just means the constituted form is also worthy of attention. However, for scholarship on popular constitutionalism, their weakness

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45 U. Baxi, Law, Politics, and Constitutional Hegemony: the Supreme Court, Jurisprudence and Demoprudence, in Sujit Choudhry and et al (Ed.) The Oxford Handbook of the Indian Constitution, Oxford University Press, 2016, New Delhi, p.109.

46 V.F. Comella, The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism, Texas Law Review, Vol. 82(2004), pp. 1705-1736.

47 T. Ginsburg, Aziz Z. Huq and Mila Versteeg, The Coming Demise of Liberal Constitutionalism?, The University of Chicago Law Review, Vol. 85, No. 2 (March 2018), pp. 240-241.

48 Ibid, at 243.

49 Ibid, at. 241.

is trying to separate constituted form from constituent power in terms of constitutional development. The author believes they cannot be separated easily. On one hand, public interest litigation and street mass movement still rely on the constituted form. On the other hand, the magnitude of the scale and degree of destruction of constitutional movement depends on how much confidence citizens still have in the constituted form to respond to them. For example, in the case of racial discrimination, the civil rights movements and the judicial response of Brown v. Board of Education[50] supplemented each other well. Similarly, the scale and degree of street movement sparked by the death of George Floyd, is different from the movements that were undertaken sixty years ago. This difference arises from the difference in the people's perception regarding how they are governed today.[51]

Based on the above analysis, even though we could comb the line of theoretical development on constitutionalism it is still very hard to define the concept of constitutionalism which is very capacious like the concept of "rule of law". In order to better define the concept of rule of law, scholars have used the technique such as "thin" version versus "thick" version; or "minimum" version versus "aspirational" version. [52] By referring to this technique of defining concepts with ambiguity and elasticity, the author would like to define the thin version of constitutionalism with the following parameters:(1) Pursuing rule of law with the Public Recognition of Constitution as the Supreme Law; (2) Reflecting popular sovereignty in the constituted form; and (3) Creating an institution to look after the constitution

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50 Brown v Board of Education of Topeka, 347 U.S. 483.

51 K.G. Bates, *Similarities And Differences Of George Floyd Protests And The Civil Rights Movement*, NPR, June 4, 2020, https://www.npr.org/2020/06/04/869952367/similarities-and-differences-of-george-floyd-protests-and-the-civil-rights-movem, last accessed on 02/08/2020.

52 P. Rijpkema, *The Rule of law beyond Thick and Thin,* 32:6 Law and Philosophy, 793-816 (November 2013).

enforcement but also leaving space for constituent power to drive constitutional development.

The paper will rely on this framework to examine the constitutionalism in mainland China.

3. The Constitutional Evolvement in the PRC

From the founding of the PRC, there has been one transitional constitutional document, four constitutions and five constitutional amendments. This shows how the CPC has gone through the turbulent transitions from a revolutionary party to a ruling party with the responsibility of providing state welfare, respecting and protecting human rights, and maintaining law and order of the society with the respect of Constitution as the Supreme Law.

3.1. Struggles of Establishing the Constitutional Order during 1949-1978

After the civil war, Kuomintang (KMT Party) fled to Taiwan and the PRC was established under the leadership of CPC on October 1, 1949. The CPC abolished all the laws enacted in the Republic of China under the leadership of KMT. Before the first Constitution was enacted, the Chinese People's Political Consultative Conference (CPPCC) served as the Supreme Power of the PRC.[53] CPPCC[54] convened on Sep. 21st 1949 and passed the *Common Program of CPPCC* as the guiding constitutional document for the transitional period. As to the length of the transitional period, the original plan was to remain indefinite.[55] At the transitional period, CPC shared powers with other

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53 Xinhua, *Backgrounder: Chinese People's Political Consultative Conference*, 03/03/2014, http://www.chinadaily.com.cn/china/2014npcandcppcc/2014-03/03/content_17317558.htm, last accessed on 02/08/2020.

54 The CPPCC is a patriotic united front organization of the Chinese people, serving as a key mechanism for multi-party cooperation and political consultation under the leadership of the Communist Party of China (CPC). After 1954, its role is to "conduct political consultation, exercise democratic supervision and participate in the discussion and the handling of state affairs. See Xinhua News, 2014.

55 G. Tiffert, *Epistrophy: Chinese Constitutionalism and the 1950s*, UC Berkeley Previously Published Works, 12-13, https://escholarship.org/content/qt0rm248nk/qt0rm248nk.pdf, last accessed

democratic parties and non-party personages such as two thirds of ministers in cabinet being held by the democratic.[56]

However, Stalin tried to persuade the CPC three times in 1949, 1950 and 1952 to hold the elections and to pass the constitution following the model of the Soviet Union as early as possible.[57] The key arguments from Stalin was two folds. First, he argued that the CPC lacked legitimacy without national election and a formal constitution.[58] Second, he argued that the multi-party government posed risks to the CPC's future ruling. These were persuasive to Mao Zedong. The CPC took the suggestion of Stalin and put constitutional making as one of the three main tasks in 1953.[59]

The 1954 constitution was passed on June 14, 1954. This laid the foundation for the key institutional framework of PRC even for today. However, the 1954 Constitution played a very limited role in checking power abuse and avoiding political turbulence. For example, it was helpless in checking the anti-rightist movements in 1958 which substantially curtailed the freedom of expression. [60] It could not stop the Culture Revolution which dragged China into the political tragedy for the next 10 years.[61] Sadly, the constitution itself was discarded in 1975 and was replaced by the 1975 Constitution which was the

on 02/08/2020. See C. Liu, *The Development of Chinese Constitutionalism*, 48:2 St. Mary's Law Journal p. 204 (2016). (The argument for not making the constitution within a short period is for the two considerations: Capitalist and small property owners still dominated the economy which would make the socialist constitution not fit; the Constitution dominated by the CPC could alienate the democratic who are important for the recovery of the civil war.)

56 C. Liu, The Development of Chinese Constitutionalism, 48:2 St. Mary's Law Journal 204 (2016). p. 203.

57 D. Han, *The Making Process of 1954 Constitution of PRC*, Law Press China, 63-64 (2014); Also see Supra 55, at 12-13.

58 Supra 55, at13.

59 Supa 57, at 69.

60 Supra 56, at 217-222

61 Supra 56, at 222-226.

endorsement of Mao's ideology for the Culture Revolution.[62] The 1975 constitutional was treated as "a radical instrument" by comparing to the 1954 constitution and even to the ones of other Communist States.[63] Among the many reflections, one of the key weakness of the Constitution is lack of enforcement mechanism.[64] After the Culture Revolution, the CPC proposed another constitution in 1978. However, it was soon realized that the 1978 constitution was still based on revolution mindset which made few changes to the 1975 constitution.[65] The few changes made were for ensuring institutional check but not for protecting fundamental rights such as property rights.[66]

3.2. The 1982 Constitution and the Transition from Revolution to Ordinary Constitutional Order

Then in 1982, another constitution was made which is still in use today. The 1982 constitution admitted that socialism could not be easily achieved within a short period and that the whole country needs to shift from the mindset of revolution to economic development and society building which helps restore the law and order after the Culture Revolution. Freedom of strike and freedom of migration which were in 1975 Constitution and 1978 Constitution was removed. [67] Due to the serious abuse of fundamental rights in the Culture revolution, the 1982 Constitution placed fundamental rights and duties before the State Structure and right after the Preamble and General Principles to show the priority of protecting fundamental rights.[68]

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62 Supra 56, at 226.
63 J. Cohen, China's Changing Constitution, China Quarterly, 803 (1978).
64 Supra 57, at476.
65 Supra 63, at 805.
66 Supra 63, at 805-810.
67 Y. Shu & J. Yu, *Thirty Years of Chinese Legal Studies*, Sun Yat-sen University Press, 80-90 (2008).
68 D, Han, *Sixty Years of Chinese Constitution Evolvement*, Guangdong People's Press 207-208 (2009).

This constitution added to Preamble that, "it is the fundamental law of the State and has supreme legal authority". Furthermore, in the main body of the Constitution, Article 5 further emphasizes the Supremacy of the Constitution. The provision is clear: "[n]o laws or administrative or local regulations may contravene the Constitution." It also adds "[a]ll State organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and other laws. All acts in violation of the Constitution or other laws must be investigated." It further emphasizes that, "[n]o organization or individual is privileged to be beyond the Constitution or other laws." This is also drawn from the lesion from the Culture Revolution which ignore the Constitution 1954 at all. Later we will also introduce that Article 5 was amended with adding one more section of commitment to the rule of law building in the Amendments 1999.

Another significant part learned from the Culture Revolution is to strengthen institutional building for constitutional enforcement. In the Constitution (1954), NPC was the only body granted with the power to supervise the constitution enforcement. However, NPC is composed part-time deputies who only meet once a year for ten days or two weeks. In order to make it function, a permanent acting body of NPC named Standing Committee of NPC (NPCSC) was established which had relatively minor power.[69] But it didn't prevent the Culture Revolution. Learned from the profound lesson of the Culture Revolution, the Constitution (1982) gives exclusive power of constitutional interpretation and the joint power of supervising constitutional enforcement to NPCSC which was interpreted as institutional building for constitutional enforcement.[70]

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[69] D. Cai, *Constitutional Supervision and Interpretation in the People's Republic of China*, Journal of Chinese Law No. 9, 220 (2005).

[70] Supra 69, at 222.

Since the constitution (1982) was drafted at the early stage of "opening up and reform", it is inevitable that "certain parts unavoidably exhibit certain political overtones".[71] However, the follow-up constitutional developments were not through the rewriting of the constitution but through constitutional amendments. From 1982, the constitution has been amended five times (in 1988, 1993, 1999, 2004 and 2018) to match the evolving development of market economy and social transformation.

The main purpose of 1988 amendments was to further legitimize the private economy and the transfer of land rights. For example, the fourth paragraph of Article 10 of the Constitution, which provides that "no organization or individual may appropriate, buy, sell or lease land or otherwise engage in the transfer of land by unlawful means," has been amended to: "[n]o organization or individual may appropriate, buy, sell or otherwise engage in the transfer of land by unlawful means. The right to the use of land may be transferred according to law."[72]

The 1993 amendment formally institutionalized "market economy" over "planned economy" and changed structures and terms for business entity and rural units, such as replacing "planed economy" with "socialist market economy", replacing "state-run economy" with "state-owned economy" and replacing "rural people's communes and agricultural producers' cooperatives" with "responsibility system in rural areas, mainly the household contract responsibility system with remuneration linked to production". [73] It also adds in the preamble that "[t]he system of the multi-party cooperation and political consultation led by the Communist Party of China will exist and

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71 Q. Zhang, *On the Selective Application of the Chinese Constitution*, 2:1 Peking University Law Journal, 2 (2014).

72 M. Jihong, *The Constitutional Law of the People's Republic of China and Its Development*, 23 Columbia Journal of Asian Law,144 (2009-2010).

73 Ibid, at145.

develop for a long time to come", which is important for creating long-term space of multi-party cooperation. [74]

"All of the 1999 amendments arose out of the demand for meaningful reform in the economy, politics, and social welfare."[75] For example, in the Preamble, Deng Xiaoping Theory was added to the guiding principles which is to institutionalize the market economy efforts.[76] But it also opens the door for all the following leaders to add their guiding theories to the Preamble of the Constitution. [77] In addition, the concept of rule of law is strengthened. A new paragraph is added to Article 5 of the Constitution that "[t]he People's Republic of China governs the country according to law and makes it a socialist country under rule of law". It also clearly mentioned that private economy is a healthy supplement to state-owned economy and that the state protects the rights and interest of private economy.[78]

The constitutional amendment of 2004 focused on rights, such as bettering the land acquisition system, clearly proposing to encourage, support and guide the development of private economy, to improve the system or private property protection, to expand social security system. More importantly, it adds one section to Art. 33 in the chapter of fundamental rights and duties, that "[t]he State respects and protects human rights."[79]

The most recent amendment efforts were made in 2018 which was slightly different from the early four amendments. The earlier amendments focused on universalism such as market economy, rule of law and human rights. The 2018 amendments are a mix of universalism such as strengthening constitutionality review, and culture

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74 Supra 68, at 227.
75 Supra 72, at 145.
76 Supra 68, at 235-237.
77 Such as Jiang Zemin's Theory of Three Represents, Hu Jintao's Scientific Outlook of Development and Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era.
78 Supra 68, at 241-243.
79 Supra 68, at 247-249.

particularism such as strengthening Chinese political identities of party-state. The main content of the reforms include: (1) Updating the guiding principles of the CPC into the Preamble; (2) Further strengthening the party leadership which were mentioned both in the Preamble and also in the Article 1 of the Constitution; (3) Creating a new institution named National Supervision Commission which reports to the National People's Congress together with the State Council, Supreme People's Court and Supreme People's Procuratorate; (4) Changing Law Commission into Constitution and Law Commission (CLC) which is expected to take the role of constitutional review in China.[80] In fact, there is another important amendment in 2018 which is to remove term limit for President and Vice-president of the Country. However, almost all Chinese scholars writing on the 2018 Amendments avoided commenting on it in their open publications.

By reviewing the constitutional development history, it is evident that that after the PRC's founding, at the initial stage (1949-1978), the struggles were between the institutional building and the ideology of utopian society with the complex of factional fighting and divergent understanding for the path to achieve socialism and communism. During the Cultural Revolution, it seemed that the state gave enough liberty and freedom to street movements which were easily manipulated by demagogue and finally turned the society into widespread mob lynching and social disorder for 10 years.

After the Culture Revolution, in the process of transition from political fever to market economy (1978-2018), CPC paid good attention to the role of constitution in a pragmatic and evolving way which help slowly create law and order in China. The main thread of

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80 Q. Qin, *2018 Constitutional Amendments and the Rule of Law Development in the New Era in China*, China Parliament, No. 11, 4-6 (2018); See *Annotated Translation: 2018 Amendment to the P.R.C. Constitution (Version 2.0)*, NPC Observer, https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/, last accessed on 02/08/2020.

constitutional development reflected by the four amendments is toward market economy and some form of constitutional democracy. As to the most updated constitutional amendments in 2018, it sent mixed signals about the Chinese constitutional trend. While it emphasizes the role of constitution in governance such as strengthening constitutionality review it also changes some content which may not be in line with the political democracy envisioned by Deng Xiaoping as the Chinese Reform Designer. This might be one of the reasons that some scholars argued that even today's constitutional order is still revolution based, not completely shifted to the standard constitutional order. [81]

4. The Constituted Form in the 1982 Constitution and the Analysis from the Perspective of Popular Sovereignty

While there are explicit words in the constitution (1982) to embrace popular sovereignty the constituted form to implement it is different from the theories of liberal constitutionalism. In this part, the author shall introduce the constituted form for popular sovereignty and shall also provide the analysis through scholarly theoretical frameworks.

4.1. Texts About the Nature of the State and Constituted Power Structure

The nature of the State and the general principles of the power arrangement are mainly written in the Preamble and Chapter I of the General Principles. As to the specific arrangement of the state organs, it is in Chapter III.

The Chinese constitution has the longest Preamble in the world. As Prof. Quanxi Gao emphasized, "without first interpreting the constitution's preamble, no real conclusions about the current constitution of China can be drawn". [82] He views the preamble as the

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[81] Q. Gao, *Revolution, Reform & Constitutionalism: The Evolution of China's 1982 Constitution*, 2:1 Peking University Law Journal, 27-57 (2014).

[82] Ibid, at 31.

"core of the constitution which forms an organic constitutional structure together with other parts of the constitution".[83]

The Preamble, after combing the long struggle of political modernization after the Opium War also highlights what had been achieved through the socialist revolutions. It is then clarified that, "The basic task of the nation [after the Culture Revolution] is to concentrate its effort on socialist modernization along the road of Chinese-style socialism." After that it emphasizes the leadership of CPC, the guiding theories (ideology) and the goal of the nation building.

Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents and the Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era , the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and the socialist road, persevere in reform and opening to the outside world, steadily improve socialist institutions, develop the socialist market economy, develop socialist democracy, improve the socialist legal system and work hard and self-reliantly to modernize the country's industry, agriculture, national defence and science and technology step by step and promote the coordinated development of the material, political and spiritual civilizations, to turn China into a socialist country that is prosperous, powerful, democratic and culturally advanced.[84]

Then the Preamble states s that even though CPC plays the leadership in the nation building it is necessary to build the United Front to support CPC's ruling:

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[83] Ibid.

[84] Constitution of the People's Republic of China, http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content_1372962.htm, last accessed on 02/08/2020.

> In building socialism it is essential to rely on workers, peasants and intellectuals and to unite all forces that can be united. In the long years of revolution and construction, there has been formed under the leadership of the Communist Party of China a broad patriotic united front which is composed of the democratic parties and people's organizations and which embraces all socialist working people, all builders of socialism, all patriots who support socialism, and all patriots who stand for the reunification of the motherland.[85]

In order to make the United Front function in an institutionalized way is stated that the role of Chinese People's Political Consultative Conference is that of a broad-based representative organization. As mentioned in Part II the amendment of 1993 makes it a system for long.

> The Chinese People's Political Consultative Conference, a broadly based representative organization of the united front which has played a significant historical role, will play a still more important role in the country's political and social life, in promoting friendship with other countries and in the struggle for socialist modernization and for the reunification and unity of the country.[86]

Chapter I General Principles the nature of the state and the guiding principles of power arrangement is re-emphasized. Article 1 Section 1 says:

> The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants."

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[85] Ibid.

[86] Constitution of the People's Republic of China, http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content_1372962.htm, last accessed on 02/08/2020.

> [87] Section 2 says, "The socialist system is the basic system of the People's Republic of China. *The defining feature of socialism with Chinese characteristics is the leadership of the Communist Party of China*.[88] (Emphasis supplied)

Article 2 Section 1 says: "All power in the People's Republic of China belongs to the people." Article 2 Section 2 says: "The National People's Congress and the local people's congresses at various levels are the organs through which the people exercise state power." Article 57 says that: "The National People's Congress of the People s Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People's Congress." Article 2 Section 3 says "The people administer State affairs and manage economic and cultural undertakings and social affairs through various channels and in various ways in accordance with the provisions of law"[89] which focuses on the importance of the law.

Article 3 has four sections. Section 1 says: "The State organs of the People's Republic of China apply the principle of democratic centralism." Section 2 says: "The National People's Congress and the

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87 Ibid.

88 The second part of the section was added in the 2018 Amendment. See *Annotated Translation: 2018 Amendment to the P.R.C. Constitution (Version 2.0)*, NPC Observer, https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/, last accessed on 02/08/2020. The bracketed part was added in March 2018 Amendments. This matches the opening paragraph of CPC's Constitution which says "The Communist Party of China is the vanguard of the Chinese working class, the Chinese people, and the Chinese nation. It is the leadership core for the cause of socialism with Chinese characteristics and represents the developmental demands of China's advanced productive forces, the orientation for China's advanced culture, and the fundamental interests of the greatest possible majority of the Chinese people;" See *Constitution of the Communist Party of China*, 10:1 Qiushi Journal (January-March 2018), available at http://english.qstheory.cn/2018-02/11/c_1122395578.htm, last accessed on 02/08/2020.

89 The Constitution of the People's Republic of China, available at http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987458.htm, last accessed on 02/08/2020.

local people's congresses at various levels are constituted through democratic elections. They are responsible to the people and subject to their supervision." Section 3 says: "All administrative, *supervisory*[90], adjudicatory, and procuratorial organs of the State are created by the people's congresses, to which they are responsible and by which they are overseen."[91] And Section 4 says: "The division of functions and powers between the central and local State organs is guided by the principle of giving full scope to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities."

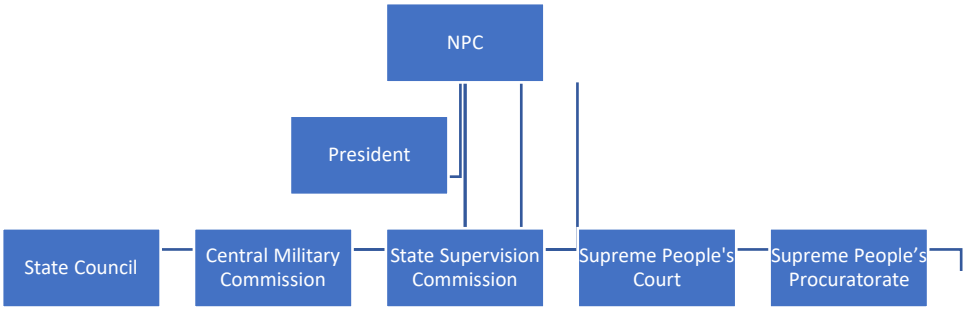
The power structure reflecting the Chinese version of Popular Sovereignty in the constituted form can be depicted as follows:

Figure 1: Popular Sovereignty and Its Forms of Representation (Political Power)

90 Added in 2018 constitutional amendments.

91 The highlighted part was added in March 2018. See *Annotated Translation: 2018 Amendment to the P.R.C. Constitution (Version 2.0)*, NPC Observer, available at https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/, last accessed on 02/08/2020.

Figure 2: PRC Constitution and Parliamentary Sovereignty (Administrative Power)



4.2. Conceptual Frameworks for Analyzing the Power Structure in Chinese Constitution 1982

The Chinese power structure and its reflection of popular sovereign is very different from the liberal constitutionalism. There have been some academic efforts to develop a conceptual framework to understand it. The paper delves into two such conceptions. The first is the political power/ administrative power structure constructed by an American scholar named Lary Cata Backer. Backer tries to consolidate the CPC and the PRC Constitution into the framework that places political power with the CPC and the administrative power with the State. He believes that the Chinese constitution "exists as a combination of polity and governing ideology on the one hand and state apparatus on the other"[92] in which "the repository of political power" is with the "the party" and "the repository of administrative power" is with "the government".[93] .

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92 L.C. Backer, *Party, People, Government and State: on Constitutional Values and the Legitimacy of the Chinese Party-State Rule of Law System*, 30 Boston University International Law Journal, 343 (2012).

93 Ibid.

This means that the discussion of PRC constitutionalism shall not only be based on PRC Constitution but also includes the CPC Constitution. As Creemers pointed out, legal scholars on Chinese constitutionalism usually ignore the CPC about its ideology, organization and theory.[94] It is easy to understand why it is so essential to understand the CPC's ideology, organization and theory. The CPC leads the efforts to design, interpret and implement the constitution on behalf of the people. For example, "the National People's Congress amended the constitution every time after the Party's National Congress adopted a crucial resolution".[95] Meanwhile, CPC is an organization which has her own functional logic bound by her own constitution. This is why Creemers has emphasized that "It is in the Party Constitution that we find many of the substantive norms and epistemological claims that give meaning to the terminology in which law is conceived and discussed."[96]

From this design, some clues from Backer's framework of dividing political power and administrative power can be found. First, it uses two different articles to talk about the different powers based on its nature. Political power belongs to the working class led by the CPC as the Vanguard of the working class. Administrative power is exercised through the NPC and people's congresses at different levels as well as the bodies responsible to them. Second, it also uses different principles for the power exercise. For political power it is applied through the principle of "people's democratic dictatorship". For the administrative power, the principle is "democratic centralism". Third, we can find that the term following the "administrative, supervisory, adjudicatory, and procuratorial" is "organs of the State" not "power".

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94 R. Creemers, China's Constitutionalism Debate: Content, Context, and Implications, 74(1) The China Journal (1 2015), at 108-109.

95 Supra 81, at 36.

96 Supra 94, at 109.

This is another evidence to show the difference between political power and administrative function.

It is also worthy of notice that the PRC constitution puts "All power in the People's Republic of China belongs to the people" into the second article. This article alludes to administrative power and not the first article, which talks about political power. One explanation for this framing might be that 1982 Constitution is still a transitional one which keeps some flavor of revolution mindset. Beginning with the CPPCC Common Program, the Chinese Constitution differentiates people from citizens to grant them different scope of constitutional rights especially for civil and political rights.[97] In the early days, big landlords, big bourgeois, people who are against socialism were not treated as part of the people whose political rights were abridged.[98] This can also partly explain the logic of "people's democratic dictatorship".[99]

The second conception of the Chinese power structure is the "Three Types of Representations" which was constructed by Chinese scholars such as Gao Quanxi and Tian Feilong. They categorize the people's sovereignty of PRC into three types of representations: "the Representation of Leadership by the Communist Party of China in the sense of truth, plus the People's Representative Congress in the sense of procedure, plus Participatory Democracy in the non-representative sense".[100]

The "Three Types of Representation" helps to understand the mixed arrangement of constituted form and constituent power in the Chinese Constitutional designing. However, among the three

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97 Z. Xianyi & Z. Jinfan, *Brief Introduction to Chinese Constitutional History*, Beijing Press, 243 (1979).

98 Ibid.

99 Z. Anping, L. Xudong & Z. Yunfen, *The Constitutional Journey of PRC: Problems, Response and Texts, People's Publisher*, 85, 189 (2017).

100 Supra 81, at 43; See T. Feilong, *Chinese Version of Political Constitutionalism*, CITYU HK Press, 49 (2017).

representations, NPC is the only one which has been clearly constituted by the PRC Constitution. CPC is half constituted through the PRC Constitution. And CPPCC is only constituted in the Preamble.

The PRC Constitution formally grants the following powers to the NPC: (1) prescribe NPC as the highest organ of the state; (2) establish NPCSC as the permanent body of NPC; (3) prescribe NPC to supervise all administrative, supervisory, adjudicatory, and procuratorial organs of the State; (4) develop a long list of functions in Art. 62 for NPC and Art. 67 for NPCSC; (5) gives NPCSC the function of constitution interpretation and give NPC and NPCSC to supervise the enforcement of the Constitution; (6) set terms and elections for the NPC and People's Congress at lower levels. It is worthy of notice here is that people's congress is not just a legislative body but as the entry body for people to exercise their power at five levels from national level to township level.

It is evident that the form and function of NPC are very well structured in the constitution which is supposed to function well. However, from the three types of representations we can see that NPC is just one type of popular sovereignty representation. Since the other two types of representation were not constituted clearly in the main body of the PRC Constitution and their relationship with the NPC was not clearly defined, their relationship is ambiguous which will cause confusion how they really function to better the quality of popular sovereignty.

Before the 2018 Constitutional Amendments, CPC was mentioned only in the Preamble.[101] The Preamble mentioned CPC in three places: first, in the leadership for " the victory in the New-Democratic Revolution and founding the People's Republic of China". Second, in the leadership in the "victory in China's New-Democratic Revolution and the successes in its socialist cause". Third, in leadership

[101] Ibid.

role in the "broad patriotic united front. The third reference is composed of the democratic parties and people's organizations and which embraces all socialist working people, all builders of socialism, all patriots who support socialism, and all patriots who stand for the reunification of the motherland". The 1993 constitutional amendments added the fourth reference that "The system of the multi-party cooperation and political consultation led by the Communist Party of China will exist and develop for a long time to come". But this is still in the Preamble.[102] Only in the amendments of 2018 was "the leadership of the Communist Party of China" added in the main body of the constitution which is in Art.1 Sect. 2.

In contrast to the role of CPC, the role of CPPCC in Chinese Constitutionalism has been little explored in scholarship, especially after 1982. As mentioned in Part 1, CPPCC used to be the Supreme Power of PRC before the 1954 Constitution. Later, the reference of CPPCC was only mentioned in the preamble of 1954 and 1982 Constitution.

For CPPCC, the Preamble has a clear description of it. [103] Through the press releases of the state we can understand the nature of CPPCC in a more detailed way: (1) as "an organization in the patriotic united front of the Chinese people"; (2) as "an important organ for multi-party cooperation and political consultation under the leadership of the Communist Party of China "; and (3) as "an

[102] Tracking Constitutional Amendments in People's Republic of China, Law Press China, 63 (2004).

[103] "The Chinese People's Political Consultative Conference, a broadly based representative organization of the united front which has played a significant historical role, will play a still more important role in the country's political and social life, in promoting friendship with other countries and in the struggle for socialist modernization and for the reunification and unity of the country." See The Constitution of the People's Republic of China, available at http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987458.htm, last accessed on 02/08/2020.

important means of promoting socialist democracy in China's political activities".[104] In summary, it is "an important platform on which various political parties, people's organizations, and people of all ethnic groups and from all sectors of society work together in democratically participating in state affairs."[105] However, the state press release also emphasized that CPPCC is "neither a body of state power nor a policymaking organ".[106]

The main functions of the CPPCC are as follows: first is to conduct political consultation which "covers major principles and policies proposed by the central and local governments and matters of importance concerning political, economic, cultural and social affairs"; second is to "exercise democratic supervision" and; third is to "participate in the discussion and the handling of state affairs."[107]

Even though CPPCC has been only referred in the preamble, in practice it has been institutionalized with structured organization, with regular budgets from the state and routine functional forms. CPPCC has four levels: at national, provincial, prefecture and county. All have their official websites ending with "gov.", such as the national one http://www.cppcc.gov.cn/. All conduct elections of representatives[108] every five years. Every year they conduct the political consultation conference with all representatives from the country. CPPCC representatives have similar rights and duties as NPC

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[104] Roles and functions of Chinese People's Political Consultative Conference, China Daily, March 2017, available at http://www.chinadaily.com.cn/china/2017twosession/2017-03/03/content_28422856.htm, last accessed on 02/08/2020.

[105] Ibid.

[106] Ibid.

[107] Ibid.

[108] There are 2151 representatives of CPPCC (national level) currently. The quota distribution of the representatives is proportional among 36 groups based on political parties, political organizations, professional fields and oversea Chinese. See **中国人民政治**协商会议第十三届全国委员会委员名单, available at http://www.cppcc.gov.cn/zxww/2020/05/11/ARTI1589179608333237.shtml, last accessed on 02/08/2020.

deputies in the annual sessions. CPPCC conducted their session every year two or three days before the NPC session which enables them to deliver the suggestions to the NPC for discussion. As mentioned above, the preamble of the 1982 Constitution clearly points that the system of the multi-party cooperation and political consultation led by the CPC will exist and develop for a long time. It means that the research of CPPCC's role in the Chinese constitutionalism should be paid more attention.

However, to make the analysis framework of Tian and Gao meaningful, we need to further explore the membership composition of CPC, NPC and CPPCC. A further conceptual framework should be developed to assess how the degree of membership overlapping of the three would influence the quality of popular sovereignty.

5. Assessing Constitutionalism of PRC in the New Analysis Framework

In this part, the paper is going to refer to the parameters of a thin version of constitutionalism to discuss whether China has constitutionalism after the introduction to the constitutional evolvement and the constituted form for popular sovereignty in the current Constitution 1982.

5.1. Pursue Rule of Law with the Public Recognition of Constitution as the Supreme Law

This parameter can be further divided into two important parts-.from one side, the state has public recognition of the constitution as the supreme law; from the other side, the state shall pursue the rule of law with genuine efforts. The supremacy of the constitution, as introduced in Part II, is mentioned in two parts: the Preamble and Chapter 1 of the General Principle.

In the Preamble, it is stated that: "*it is the fundamental law of the State and has supreme legal authority*"[109] In the main body of the constitution, Art. 5 has five sections to emphasize: (1) the state's commitment to building socialist rule of law, (2) to uphold uniformity of legal system; (3) no law or regulations contravening the Constitution; (4) to investigate acts violating constitution; (5) no organization or individual above the constitution. [110]

The words of the Preamble and the General Principle provide good evidence that the Constitution (1982) embraces the Constitution as the supreme law in a public way. What is debatable is whether China has taken serious efforts for upholding the rule of law.

Rule of law itself is a very capacious concept. The definition varies a lot, depending on the purpose of using it. Some academic efforts have been made for defining it from difference perspectives. For example, based on the scholarship on the rule of law such as Joseph Raz and Robert Summers, Peerenboom develops the defining model of "thin" and "think" version.[111] There are scholars who are more ambitious to establish normative and prescriptive framework particular for the rule of law as a principle of law and as a principle of governance, such as Peter Tijpkema.[112] Reflected on the international program designing, Gordon summarizes the definition into minimalist

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[109] For more details of the Preamble of the Constitution (1982), please refer to the link: http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content_1372962.htm.

[110] Art.1, Chapter 1, General Principle of Constitution (1982), available at http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content_1372963.htm, last accessed on 03/08/2020.

[111] R. Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in twelve Asian Countries, France and the U.S*., Routledge, London and New York, 1-55 (Randall Peerenboom, 2004).

[112] P. Tijpkema, *The Rule of Law Beyond Thick and Thin, Law and Philosophy*, 32:6, 793-816 (November 2013).

version, a market-oriented version and a human rights-oriented version.[113]

In terms of assessing the Chinese rule of law, Peerenboom's thin and thick version is widely used. Peerenboom's thin conception stresses on "formal or instrumental aspects of rule of law—those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of democratic or non-democratic society, capitalist, liberal or theocratic."[114] The thick version is to add elements of political morality to the thin version which includes "particular economic arrangements (free-market capitalism, central planning, 'Asian developmental state', or other varieties of capitalism), forms of government (democratic, socialist, soft authoritarian) or conceptions of human rights (libertarian, classical liberal, social welfare liberal, communitarian, 'Asian values' etc.)".[115]

The stakeholders' perspective of the definition has also been incorporated into several rankings such as the rule of law index ranking by the World Justice Project and the Ease of Doing Business Ranking by the World Bank. For example, multilateral lending institutions tend to interpret the rule of law in terms of its function: "well functioning markets require the support of a framework of clearly defined and effectively and predictably enforced legal rules and rights". [116]Human

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113 R.W. Gordon, *The role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, Faculty Scholarship Series Paper 1397, 441-443, available at http://digitalcommons.law.yale.edu/fss_papers/1397, last accessed on 03/08/2020.

114 R. Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, *Randall Peerenboom,* Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in twelve Asian Countries, France and the U.S., Routledge, London and New York, 2 (2004).

115 Supra 114, at 4.

116 R.W. Gordon, *The role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, Faculty Scholarship Series, Paper 1397, 442, available at

rights activists view the rule of law "as legal constraints on a state's authority to search, arrest, imprisonment, torture or kill persons in its jurisdiction".[117]

Based on scholarly assessment, China does have a thin version of the rule of law. In terms of the market-oriented rule of law, Chinese performance is better than many developing countries. For example, Peerenboom observes that, "China is now following the path of other East Asian countries that have achieved sustained economic growth, established the rule of law, and developed constitutional or rights based democracies, albeit not necessarily liberal rights-based democracies."[118] Some research in comparing the FDI policy in India and China also reveals that:

> a country's (in this case, China's) disregard of the 'rule of law' in political governance may, ironically, allow it more effectively (1) to grant rule of law protections to investors and (2) to implement more efficient approval processes than a country such as India, which preserves rule of law at the highest levels of governance, yet at the expense of streamlined FDI statutory governance and approval procedures.[119]

A look at the Rule of Law Index Ranking and the Ease of Business Ranking in the last several years especially the most updated version in 2020, makes it evident that China is performing better as compared to many developing countries, including India, in terms of

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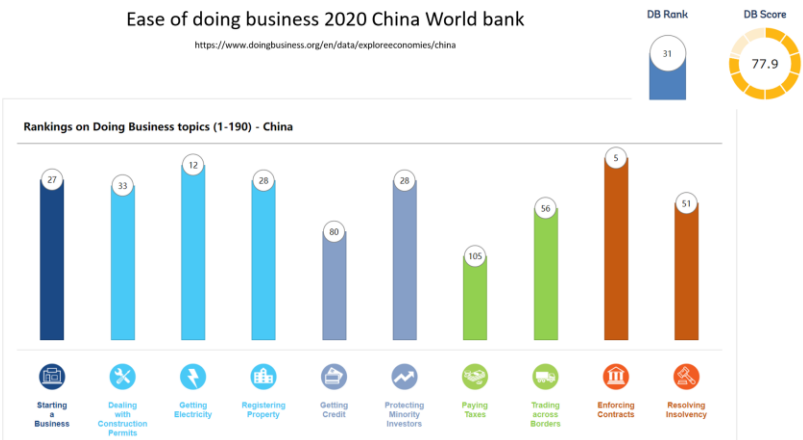
http://digitalcommons.law.yale.edu/fss_papers/1397 last accessed on 03/08/2020.

117 Ibid.

118 R. Peerenboom, *Law and Development of Constitutional Democracy: Is China a Problem Case?,* The Annals of the American Academy of Political and Social Science, series 603 Law, Society, and Democracy: Comparative Perspectives 193 (Jan., 2006).

119 R. Sachdev, *Comparing the Legal Foundations of Foreign Direct Investment in India and China: Law and the Rule of Law in the Indian Foreign Direct Investment Context*, Columbia Business Law Review, 169 (2006).

market oriented rule of law but poorer from human rights oriented version. Compared to India, we can see that China performs better in regulatory enforcement, contract enforcement, civil justice, criminal justice and regulatory enforcement while India has strength in government constraints, protection of fundamental rights and government transparency. [120]



[120] See Rule of Law Index Ranking 2020 in China by the World Justice Project, available at https://worldjusticeproject.org/sites/default/files/documents/China%20-%202020%20WJP%20Rule%20of%20Law%20Index%20Country%20Press%20Release.pdf; for India part, see https://worldjusticeproject.org/sites/default/files/documents/India%20-%202020%20WJP%20Rule%20of%20Law%20Index%20Country%20Press%20Release.pdf. For Doing Business Ranking 2020, for China's profile, see https://www.doingbusiness.org/content/dam/doingBusiness/country/c/china/CHN.pdf; for India's profile see https://www.doingbusiness.org/content/dam/doingBusiness/country/i/india/IND.pdf.

2020 Rule of law index in China and India

China

The scores range from 0 to 1, where 1 signifies the highest possible score and 0 sig

Overall Score	Regional Rank	Income Rank	Global Rank
0.48	12/15	33/42	88/128

Score Change	Rank Change
-0.01 ▾	-4 ▾

	Factor Score	Score Change	Regional Rank	Income Rank	Global Rank
Constraints on Government Powers	0.32	0.00	14/15	40/42	123/128
Absence of Corruption	0.53	-0.02	8/15	15/42	51/128
Open Government	0.43	0.01	12/15	33/42	92/128
Fundamental Rights	0.29	-0.03	15/15	41/42	126/128
Order and Security	0.78	-0.01	8/15	9/42	40/128
Regulatory Enforcement	0.49	0.01	9/15	21/42	67/128
Civil Justice	0.53	-0.01	8/15	22/42	64/128
Criminal Justice	0.45	-0.02	10/15	21/42	62/128

* Indicates statistically significant change at the 10 percent level Low Medium High

India

The scores range from 0 to 1, where 1 signifies the highest possible score and 0 sign

Overall Score	Regional Rank	Income Rank	Global Rank
0.51	3/6	6/30	69/128

Score Change	Rank Change
0.00	—

	Factor Score	Score Change	Regional Rank	Income Rank	Global Rank
Constraints on Government Powers	0.61	0.00	1/6	3/30	41/128
Absence of Corruption	0.42	-0.01	2/6	9/30	85/128
Open Government	0.61	0.00	1/6	1/30	32/128
Fundamental Rights	0.51	-0.02	3/6	10/30	84/128
Order and Security	0.59	0.00	4/6	24/30	114/128
Regulatory Enforcement	0.49	0.00	2/6	8/30	74/128
Civil Justice	0.45	0.00	2/6	18/30	98/128
Criminal Justice	0.40	0.00	3/6	9/30	78/128

* Indicates statistically significant change at the 10 percent level Low Medium High

From the above analysis, we can conclude that China openly announces that the constitution is the supreme law of the land. It has made a commitment and taken serious efforts for the rule of law building. In theory, scholars believe China has developed a thin version of the rule of law which, even if present in substance or in governance is not in line with the model of liberal democracy. In practice, the rule of law in China is more market oriented.

5.2. Reflecting Popular Sovereignty in Constituted Form

Part III, of the paper introduces how popular sovereignty has been reflected in the constituted form and also referred to the theoretical framework to understand it. However, the confusion or debate arises when one seeks to understand the combination of entrenching CPC's only leadership and popular sovereignty in the Constitution.

For interpreting the role of CPC and NPC in reflecting popular sovereignty, the two conceptual frameworks were introduced in Part III. These frameworks share the similar understanding. However, compared to Backer's one, Tian and Gao emphasise the CPPCC as a very important political form into the analysis. This difference in attitude toward CPPCC is largely caused by the difference of whether to treat CPPCC as a constituted form. For Gao and Tian, Chinese Preamble is an integrated part of the Chinese Constitution. Thus, CPPCC is a constituted form. However, Backer, recognizes that the CPC leadership in the Preamble but not gives attention to the role of CPPCC in participatory democracy.

The common challenge of both the conceptual frameworks is that they have not argued or debated on how to explain the logic of entrenching CPC's only leadership in the Constitution while openly embracing popular sovereignty. For understanding this, some academic efforts especially by scholars with deep knowledge of Chinese culture have been made.

One critical academic effort is to differentiate between the political legitimacy in Confucianism and liberal democracy. Chinese Confucianism scholar Mr. Jiang Qing has published a book to elaborate his theory about Confucian Constitutional Order.[121] In his theory, he has outlined the differences in the concept of political

[121] Q. Jiang, D.A. Bell, R. Fan, & E. Ryden, A Confucian Constitutional Order: How China's Ancient Past Can Shape Its Political Future, Princeton University Press, 2012.

legitimacy in Confucianism (Human Authority) and in the liberal democratic model. In his comparison, he has listed three features of liberal democracy for political legitimacy- (the will of the people as the sole source of legitimacy; rule by a formal majority and; only aim is to meet the secular desires of the people.

In the human authority based on Confucianism, political legitimacy focuses on two key points. First, humane authority states that the legitimacy of political power (Zhengdao) comes from recognition and representation of the Way of heaven (higher values), history, and the popular will".[122] This means people's will is the source of the legitimacy but not the sole one. Second, the legitimacy of power exercising (Zhidao) is also important which requires practical ruling of achieving the harmony of heaven, earth and people.[123] Jiang argues that:

> The political problem of the present time is not simply a matter of how to implement democracy. Indeed, as I see it, the problem is precisely the opposite. The political problem of today's world is that democracy itself presents a serious problem. So long as the will of the people is seen as the sole source of legitimacy, politics can never aim at implementing the good. Hence, the problem is not to implement democracy, as Fukuyama reckons, but how to change the basic principles of democracy and re-establish the principles of legitimacy. This is the most fundamental political issue facing humanity. In practice this means demoting popular legitimacy from its status as sole source of legitimacy and founding a new model of politics in which several kinds of legitimacy work together in

[122] Ibid, at 28.
[123] Ibid.

> equilibrium. This new form is precisely what the Way of the Humane Authority is about.[124]

Even though Jiang Qing's theory sounds ideal it does offer us some cultural insights to read the Chinese perception of the relationship between political legitimacy and popular sovereignty. The long Preamble, tracing the political modernization from Opium War of the Constitution, is the evidence to show how China values the legitimacy of culture and tradition. While incorporating the concept of the rule of law into the Constitution the CPC also proposes the rule of virtue as a ruling guideline. It was introduced by President Jiang Zemin and is still emphasized by President Xi Jinping.[125] This is another evidence to show how the exercise of power is legitimatized to achieve the equilibrium between higher values and practical rules.

Some other scholars explore the coordination of party state and popular sovereignty from the practical perspective. Zheng Yongnian, a Chinese political scientist based in Singapore has argued that even if the CPC has not tolerated the emergency of a counter-hegemony "it has been able to absorb all political forces which might be a counter-hegemony".[126] To some extent, this perspective of absorbing capacity is similar to the debate among India scholars regarding the expansion of Hinduism.

Daniel Bell, a Canadian political scientist based in China frames Chinese political system from the functional angle as grassroot democracy with vertical meritocracy and tries to argue that it could

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[124] Ibid, at 41-42.

[125] X. Jinping, *Ruing in the Coupling of Rule of Law and Rule of Virtue*, People's Daily, 09/12/2016, available at http://theory.people.com.cn/n1/2018/0103/c416126-29742944.html, last accessed on 03/08/2020.

[126] Y. Zheng, *The Chinese Communist Party as Organizational Emperor—Culture, Reproduction and Transformation*, Routledge 119 (2010).

avoid some challenges faced by electoral democracy. [127] It provides some insights to Jiang Qing's theory that people's will should not be the sole source for political legitimacy. Yunhan Chu, a distinguished scholar of Taiwan also used rigorous data analysis to argue that the political legitimacy of CPC in China is not mainly based on economic performance but more with "culturalist argument on the prevailing influence of the traditional concepts of political legitimacy" as well as "institutionalist argument about the importance of perceived characteristics of the political system".[128]

Thus, it can be concluded that the perception of political legitimacy in Chinese culture is not solely based on people's will but with other legitimacy factors valued by Chinese culture. The current constituted form in Constitution (1982) is not in line with the theory of popular sovereignty in liberal democracy but acceptable from the Chinese cultural perspective. From universalism perspective, Chinese constituted form has not fully embraced popular sovereignty. But from culture particularism, this can be accepted as genuine efforts of constituted form to reflect their understanding of popular sovereignty. Hence, the assessment of this parameter for constitutionalism will depend on how to define popular sovereignty.

5.3. Create An Institution to Look After Constitution Enforcement While Leaving Space for Constituent Power to Drive Constitutional Development

As discussed in Part II and Part III, the vulnerability of Chinese constitution is the lack of strong enforcement mechanisms. The constitution is sitting at the juncture of being both political and legal. For the political part, it would be hard to be directly enforced in a way

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[127] D. Bell, Three Models of Democratic Meritocracy (Chapter 4), *The China Model: Political Meritocracy and the Limits of Democracy*, Princeton University Press, 151-178 (2010).

[128] Y. Chu, *Sources of Regime Legitimacy and the Debate over the Chinese Model*, 13:1 The China Review, 1-42 (Spring 2013).

citizens can feel in daily life. However, the weakness of the Chinese constitution is more than that. In the daily life, it is hard for people to feel the legal nature of it.[129]

One critical deficiency is that there is a lack of a well-designed mechanism to enforce the constitution. In the Constitution (1954), NPC was the only body granted with power to supervise the constitution enforcement. But NPC is composed part-time deputies who only meet once a year for ten days or two weeks. In the drafting process of the constitution (1982), it has been debated on how to strengthen it. Judicial review was introduced but not adopted. The adopted solution is to strengthen the power of permanent acting body of NPC that is NPCSC for constitution enforcement. As presented above, Constitution (1982) gives exclusive power of constitutional interpretation and the joint power of supervising constitutional enforcement to NPCSC.

However, before 2000, there was no formal mechanism developed by the NPCSC on how to supervise the constitution enforcement. This means that 'NPCSC's role on constitution enforcement was almost inactive before 2000s.

From 2000, constitutional movements become active in both ways of top to down and bottom up in China. In 2000, NPC passed the Law on Legislations which prescribes law-making process and hierarchy of laws and regulations in China. More importantly, it codified the procedure for local acts, administrative regulations and binding rules to file the record with the NPCSC.[130] This lays a good foundation for constitutionality review and legality review.

Meanwhile, the Supreme People's Court (SPC) started experimenting with judicial activism on enforcing the constitution.

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129 Supra 71, at 3.

130 Q. Qin & D. Goayang, *Forty Years of Constitutionality Review in China*, Pushi Institute for Social Science, 23/05/2019, available at http://www.pacilution.com/ShowArticle.asp?ArticleID=9609, last accessed on 03/08/2020.

Under the Constitution (1982), judiciary is law-applying courts which have no constitutional power to check legislative but limited power to check administrative power through the administrative litigation. From the early 2000s, liberal professionals of SPC and liberal scholars have tried to experiment the formal role of the judiciary in enforcing the constitution, such as judicializing the constitution by applying it in specific cases such as *Qi Yuling* case (2001)[131] and announcing the local legislation unconstitutional through case-based constitutional review in *Luoyang Seed Case* (2003)[132]. From the late 2000s, the efforts by the judiciary stepped out due to lack of constitutional basis and other factors. However, according to the Law on Legislation, the SPC still has the power to move the NPCSC for legal interpretation and constitutional review of regulations made by central or local governments. This could be another window for judiciary to promote the constitutional review.

The lack of formal constitution enforcement mechanism also creates some space for constituent power to drive constitutional development which is also summarized as "grand mediation" model for constitutional disputes by American scholar Keith Hand.[133] The first most noticeable constitutional development driven by constituent power is to strengthen the constitutional review promoted by the *Sun Zhigang* case (2003) which became a civil society based constitutional movement fueled by open letters to the NPCSC for requesting constitutional review by liberal scholars and professionals.[134]

This case is significant in the constitutional development in China after 1982.First, the State Council (the central government) repealed the administrative regulation 1982 Measures on Custody and

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131 Z. Tong, *A Comment on the Rise and Fall of the Supreme People's Court's Reply to Qi Yuling Case*, 43 Suffolk U. L. Review, 669-680 (2010).
132 Supra 4, at109-112.
133 Supra 4, at 51-159.
134 Supra 4, at 112-115.

Repatriation of Vagrants and Beggars (C&R Measures 1982) soon after the case was reported by Media. Second, in 2004, the Commission of Legislative Affaires of NPCSC established a new office for reviewing and processing legislative conflicts.[135] Third, in 2004 NPC adopted a constitutional amendment confirming that the state respects and safeguards human rights which are believed partly contributed by wide discussion about human rights violations in this case.[136] Fourth, the revision of Law on Legislation in 2015 took a multiple steps forward to strengthen constitutional review., These steps include the expansion of the scope of regulations to be reviewed and the grant of automatic review powers to the NPCSC even if there is no request from the public or designated authorities.[137]

However, the high-profile political attention to the necessity of constitutionality review has not been evident until 2017. At the 19th national congress of the Communist Party of China held between October 19 and October 24t 2017, the CPC, for the first time, formally proposed to strengthen constitutional review in China. [138] Being inspired by the 19th CPC report, on December 24 2017, the Commission of Legislative Affaires released the constitutionality review report first time which shows from 2004 to 2017 it has received 1527 constitutional review requests from citizens, organization and

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135 K. Hand, p. 114; See Liao Weihua, Zhongguo Shouci Chengli Zhuanmen Jigou Jinxing Weixian Shencha *China for the First Time Establishes a Special Body to Engage in Constitutional Review*,
Xinjing Bao [Beijing News], 19/06/2004, available at
http://www.boxun.com/news/gb/china/2004/06/200406191347.shtml, last accessed on 03/08/2020.

136 Ibid.

137 See http://www.npc.gov.cn/zgrdw/npc/xinwen/2015-03/18/content_1930129.htm, last accessed on 03/08/2020.

138 W. Zhang, *China is Now Grappling With What It Means to Review Its Constitution*, Wire, 24/10/2017, available at https://thewire.in/external-affairs/china-now-grappling-means-review-constitution, last accessed on 03/08/2020.

agencies.[139] Through the demonstration cases listed in the Report, we can find that the review is mainly for legality review that is to review the compliance of government regulations, local acts and judicial reviews with laws enacted by the NPC or NPCSC.[140] In addition, the publicity of information is still limited, lack of information about who sent the request, status or outcome of the review.[141] It is interesting to notice that 92.5% of the requests for legality or constitutionality review is against judicial interpretations. [142] It is also worthy of attention that almost within ten years after the establishment of review office there was no record of review requests and that 71% of the requests happened in 2017.[143] This can also be an evidence to show how CPC's attitude towards constitution influences the attention of NPC and NPCSC.

In response to the CPC's proposal for strengthening constitutionality review, on March 11, 2018, NPC passed the constitutional amendments. One of it is to change the "Law Committee" in Art. 70 into "Constitution and Law Committee" (CLC) which is supposed to take the responsibility of constitutional review. [144] On March 13th 2018, the list of committee members were released which includes one Director, Seven Vice Directors and ten members.[145] Among the 18 members, all are NPC deputies. In terms

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139 J. Mo, *Building the Workable Mechanism of Constitutional Review in China in Last 40 Years*, 16:3 Journal of Beijing Union University (Humanities and Social Sciences), 21 (July 2018).

140 T. Wei, *Procedural Studies for the Constitutional Review by the Constitution and Law Committee*, 4 Journal of East China University of Political Science and Law, 32 (2018).

141 J. Hu, *The Filtering Mechanism of Constitutional Review*, No.1, FN 7, China Law Review, 66 (2018).

142 Supra 2, at 65.

143 The analysis is based on the data provided by Ibid.

144 Constitutional Amendment 2018, available at http://www.npc.gov.cn/npc/xinwen/2018-03/12/content_2046540.htm, last accessed on 03/08/2020.

145 See http://www.npc.gov.cn/npc/c34375/xffl.shtml, last accessed on 11 August 2020.

of expertise background, while 13 are from law background five are from non-law backgrounds, such as medical, engineering, higher education and military reform or disciplining. So far, no formal mechanism for constitutionality review has been announced by the CLC. For example, what can be reviewed? Would review request be abstract or case based? Will the review request sent by specified authority such as the Supreme People's Court, State Council (Central Government) be dealt with in a similar way as the request sent by organizations or individuals? Will the review process and review result be open to the public?

However, there is an acceleration in the institutional building of constitutional review even though its mode of functioning is not clear yet. It is also a good example to show how constituted form interacts with constituent power to drive constitutional development.

In addition to this case, there are also several other cases which drive the substantive part of the constitutional law, such as bring the protection of private property in Constitutional Amendment through dealing with the open challenge from leftist scholar Prof. Gong Xiantian in a sophisticated way and also responding to the tragic cases of causing the death of citizens in coercive grabbing of private property such as Tang Fuzhen case and several other cases).[146] The movements for the implementing Art. 33 of the Constitution of equality before the law through several anti-discrimination cases were also very active.[147] But there are also failed cases, such as the trial and sentencing of Xu Zhiyong in 2014. [148] Since there is a lack of a formalized mechanism to

[146] Detailed analysis about the cases, please refer to Supra 4, at115-125. You can also get the details from M. Jia, China's Constitutional Entrepreneurs, American Journal of Comparative Law, Vol. 64 648-659 (2016).

[147] Supra 4, at 130-131.

[148] *China jails 'New Citizens' Movement' activists*, BBC News, 19/06/2014, https://www.bbc.com/news/world-asia-china-27917234, last accessed on 03/08/2020.

deal with citizens' concern about constitutional enforcement the space and outcomes of constitutional movements are not very predictable.[149]

Most worried that "whether another wave of constitutional entrepreneurship could happen again in the age of Xi Jinping" since he has tightened the CPC's grip of officials and the civil society.[150] Even though constitutional movements have slowed down however the accessional movements could also be more resilient and creative. The most recent movement was demanding the recognition of the freedom of expression during the coronavirus early this year. When Dr. Li Wenliang, the whistle blower died on Feb. 7th 2020 China almost reached the "Chernobyl moment" or started the" beginning of a version of the Arab Spring".[151] It reached the peak for Chinese social media users to defy censors by reposting an interview with Dr. Ai Fen, a whistleblowing Wuhan doctor, in dozens of coded versions of the text in scripts ranging from emoji to Klingon.[152] The pressure is so significant that the government has made concessions in various ways, such as honoring Dr. Li Wenliang as martyrs[153] and showing some concessions in propaganda after witnessing the relentless efforts of citizens for freedom of expression[154]. These social media movements

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149 R.E. Stern, Kevin, J. O'Brien, *Politics at the Boundary: Mixed Signals and The Chinese State*, 38:2 Modern China, 174-198 (March 2012).

150 M. Jia, *China's Constitutional Entrepreneurs*, 64 American Journal of Comparative Law, 671 (2016).

151 E. Li, *Xi Jinping Is a 'Good Emperor',* Foreign Policy, 14/05/2020, available at https://foreignpolicy.com/2020/05/14/xi-jinping-good-emperor-coronavirus/, last accessed on 03/08/2020.

152 *In China, demands for more free speech outlast coronavirus lockdowns*, Japan Times, 17/04/2020, available at https://www.japantimes.co.jp/news/2020/04/17/asia-pacific/china-demands-free-speech-outlast-coronavirus-lockdowns/#.XuyzWmgzbic, last accessed on 03/08/2020.

153 Ibid.

154 L. Kuo, *'Gratitude education': Wuhan boss faces backlash over calls to thank leaders*, Guardian, 09/03/2020, available at https://www.theguardian.com/world/2020/mar/09/gratitude-education-wuhan-boss-faces-backlash-over-calls-to-thank-leaders, last accessed on 03/08/2020.

happened in such an unprecedented way that they could change policymakers' understanding of people's bottom line of speech censorship.

Thus, it is evident that China is trying to take serious efforts to enforce its constitution. In this process, bottom up efforts supplemented but also pushed the top to down efforts which could be interpreted as being in line with the thin version of constitutionalism.

6. Conclusion

From the theoretical development of constitutionalism in a liberal democracy we can see that at its early stages, constitutionalism was meant to facilitate the power transition from monarchy to people. Later, with majority of states adopting a popular sovereignty model, the focus of constitutionalism has been to design the constituted form and to balance between constituted form and constituent power.

In terms of the constituted form, there are different ways to safeguard the constitution– judicial supremacy, legislative supremacy and political constitutionalism with a weak form of judicial review. Each has its own advantages and disadvantages. The debate has never stopped. The emergence of popular constitutionalism reminds scholars of the remaining power of people for driving constitutional development.

The analysis of the theoretical development of constitutionalism helps us understand that constitutionalism could be a capacious term. We may argue that even though most constituted forms for popular sovereignty are followed in liberal democracies popular sovereignty can also be reflected under other political theories such as Marxism and Confucianism. The debates among scholars help us develop the new analysis framework of constitutionalism based on their convergence and divergence. This paper tries to develop a value-free analysis framework which includes the following three parameters:(1) Pursuing rule of law with the Public Recognition of Constitution as the Supreme Law; (2) Reflecting popular sovereignty in the constituted form; and (3) Creating an institution to look after

the constitution enforcement but also leaving space for constituent power to drive constitutional development.

In the Chinese case, it is evident that China has taken serious efforts to transition from revolution-oriented order to the rule of law order. Many of its rule of law index indicators have steady better than many developing countries. It embraces the constitution as the supremacy in a public way. The constitution also unequivocally announces that "All the power belongs to the people". In terms of the constituted form to reflect the popular sovereignty, it has not taken the people's will as the only political legitimacy which is not in line with the liberal democracy but reasonable in her own culture. What remains to be explored further is the method to develop a new framework to assess the quality of the different constituted form for popular sovereignty. Among the three parameters, the weaker part is the lack of formalized constitutional enforcement mechanism in the constituted form. As a result, constitutional development has been largely driven by "grand meditation" through the popular movements with unpredictable outcomes. However, the positive side is that the CPC has shifted attention to the institutional building of constitutionality review which is worthy of close observation for further research.

The purpose of this new analysis framework is to help understand how constitutionalism has been developed in China by providing some parameters of enabling a functional constitutional order despite political philosophy orientation. However, this is just the minimum version for constitutionalism. In China, the pursuit of thick constitutionalism still has a long way to go. For example, the quality of constituted form to uphold popular sovereignty has not been well-researched and assessed. In addition, it is also necessary for China to define the basic structure of the constitution. By defining what can be changed and what cannot be changed, then stability of constitution can be maintained while leaving space for constituted form and constituent power to drive the constitution in line with social development. One

more important task is to develop a transparent constitutional enforcement mechanism to strengthen the legally-binding nature of the constitution for reviewing the constitutionality of laws and regulations and also for people to enforce their fundamental rights.

ARTICLE 22 — CALLING TIME ON PREVENTIVE DETENTION

Abhinav Sekhri[*]

Abstract

Part III of the Indian Constitution guarantees various fundamental rights to persons, and also details various regulations for the deployment of preventive detention laws by the Union and States. The alacrity with which preventive detention has thus been deployed as a law enforcement tool has alarmed some, and the politically motivated use of these powers is what has often attracted the most criticism. But amidst this clash of arms, surprisingly little problem has been found with the constitutional scheme that regulates preventive detention law. This essay takes aim at Article 22 of the Constitution and argues that the minimum threshold it sets for legislatures is painfully inadequate. Rather than safeguard individual liberty against legislative tyranny, I argue that Article 22 is suborning these ideals instead. Is it time, then, to rid the Constitution of Article 22? And, dare I say, time to finally question as Indians our glibness at the detention of thousands without trial every year?

Keywords: Preventive Detention, Article 22, minimum threshold, judicial abnegation, rule of law, detention without trial.

1. Introduction

As I write this essay, countless persons in the (erstwhile) State of Jammu & Kashmir have been arrested and detained without being produced before a magistrate, or being informed of the reasons for their arrest. We will probably never learn how many persons were deprived of their liberty in this fashion, and they will, in all likelihood, never be prosecuted in court.

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I would like to thank the School of Law, Governance and Citizenship at Ambedkar University Delhi, for having invited me to speak on the subject in September 2019, and the participants in the discussion, who helped me discuss and develop these themes. All errors are mine.

In the past few years, I have had some opportunities to discuss how such deprivations of personal liberty are not only legal, but part of the chapter on fundamental rights in the Constitution. When my audience was legally trained, the reaction was a mixture of resignation, and even acceptance: *because* if the Constitution itself talks about preventive detention, then it must be necessary. When the same conversation happened with laypersons, who had not read the Constitution, the reaction was far more visceral: rather than revere the constitutional text, they pushed for changing *status quo*.

This short essay is an effort to nudge the legal community into questioning the perceived necessity of preventive detention; more importantly, questioning our lazy acceptance that regulation of preventive detention by the Constitution is sufficient. I will demonstrate that at present, this regulation is singularly *insufficient*, for it adopts a position that is least protective of personal liberty and permits the executive to enjoy untrammelled powers of arrest and detention without trial.

Before we proceed, a few caveats. This is not a legal article offering a fully formed argument, but an essay intending to spur debate and discussion, by sharing thoughts that are at best a work in progress. Thus, having identified the infirmities in the *status quo*, I do not have an answer for any clear course of action. What I am certain about, though, is that serious questioning of preventive detention will help provide better answers on how to restore personal liberty from its presently precarious position in the hands of the State.

2. Legal Basis

The Indian Constitution specifically empowers both the Central and the State Legislatures to pass laws for "Preventive Detention". Entry 9 in List I of the Seventh Schedule to the Constitution empowers the Central Legislature to legislate for matters relating to "preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India" and persons subjected to such

detention.[1] Similarly, Entry 3 in List III of the same Schedule confers powers on Central and State Legislatures *concurrently* to legislate for matters relating to "preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community" and persons subjected to such detention.[2]

This legislative power stands limited by the Chapter III of the Constitution which guarantees various fundamental rights to persons and / or citizens.[3] Unlike other kinds of legislative power, the power to pass preventive detention laws attracts the *specific* attention of Article 22 of the Constitution, which details the do's and don'ts for any legislature enacting a preventive detention statute. These are: [4]

a) Don't provide a right to counsel to persons subjected to such arrest and detention, nor inform them about the reasons for arrest, nor produce them before a magistrate within 24 hours or arrest [Article 22(3)];
b) Don't allow purely executive detention to continue for more than three months, and have an inquiry by an Advisory Board to sanction detentions longer than three months [Article 22(4)];
c) The Central Legislature may prescribe the procedure to be followed by the Advisory Board in an inquiry [Article 22(7)];
d) The Central Legislature can also pass a law which allows for persons to be detained for longer than three months without an Advisory Board hearing [Article 22(7)];

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1 Entry 9, List I, Seventh Schedule, the Constitution of India.
2 Entry 3, List III, Seventh Schedule, the Constitution of India.
3 Article 13, the Constitution of India (Declaring that every law contrary to Chapter III shall be void).
4 Note, though, that while this list of do's and don'ts for preventive detention laws contained in Article 22 was amended by the 44th Amendment to the Constitution of India passed in 1978, it has not been brought into force by any government yet.

e) The Central Legislature may prescribe the maximum period for which any person may be detained under preventive detention laws [Article 22(7)].
f) Do communicate the grounds of detention "as soon as may be" to the person [Article 22(5)];
g) Do afford the detained person the "earliest opportunity of making a representation" against the detention [Article 22(5)];
h) Don't provide any facts to the person, the disclosure of which is against "public interest" [Article 22(6)].

This constitutional regime governing preventive detention forms the backdrop to what is today a vast network of Central and State legislation that provides for such detention without trial. Currently, there are four Central statutes that provide for preventive detention: The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974, the National Security Act 1980, the Prevention of Black-Marketing and Maintenance of Supplies of Essential Commodities Act 1980, and the Prevention of Illicit Traffic in Narcotics Drugs and Psychotropic Substances Act 1988. Four such laws have been passed and repealed over time.[5] At the same time, different preventive detention laws have been passed by almost all State Legislatures over time,[6] which means that in most states there are actually, *at least* five different statutes operating at any point of time that allow for preventive detention.

In terms of pure numbers, it is difficult to estimate just how many persons are arrested and detained under these laws, for there is no source except government data. But even these supposedly

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[5] These statutes are: (i) Preventive Detention Act, 1950; (ii) Defence of India Act, 1962 [read with the Defence of India Rules]; (iii) Maintenance of Internal Security Act, 1971; (iv) Defence of India Act, 1971 [read with the Defence of India Rules].

[6] See *Lawless Laws,* Amnesty International (India), available at http://lawlesslaws.amnesty.org.in/ (2016), last seen on 30/06/2020; (Offering an interactive, state-by-state map, of active preventive detention laws as of 2016).

conservative estimates put the number of persons who suffered preventive detention through 2016 (the last available year) at around 8,000.[7]

3. Exposing the Rule of Law Myth

In his remarkable book, Nasser Hussain interrogated the colonial emphasis on installing the "rule of law" for the despotic South Asian society: The idea that government would no longer be the fiefdom of an oriental despot but be run under a system of laws, as legislated by Parliament and the breach of which was subject to judicial review.[8] As Hussain convincingly demonstrated, in practice, the colonial experiment relied heavily on the *myth* of a rule of law to create a system where executive discretion of a sovereign remained writ-large, only being coated by a veneer of legality and procedure.[9]

One example of this tendency is traced by Radhika Singha in the evolution of the Criminal Procedure Code provisions on taking bonds to prevent breaches of the peace.[10] This history shows an executive that was loathe to surrender its power to *any* judicial review, and only assented to a law where judicial review was curtailed to leave vast streams of executive discretion unfettered.[11] This logic of conferring the executive with wide powers to secure public order transposed itself onto the first *Goonda* laws in provinces of colonial

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7 I arrive at this figure by adding the figures for persons in detention *at the end* of 2016, with the figures for persons detained and released *during* 2016. *See*, Table 3.4., *Prison Statistics India: 2016*, National Crime Records Bureau, available at http://ncrb.gov.in/StatPublications/PSI/Prison2016/TABLE-3.4.pdf, last seen on 30/06/2020. (Note: The data does not include foreigners who are detained.); Table 7.5, *Prison Statistics India: 2016*, National Crime Records Bureau, *available at*: http://ncrb.gov.in/StatPublications/PSI/Prison2016/TABLE-7.5.pdf, last seen on 30/06/2020.

8 Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law*, University of Michigan Press 3—6, 41—56 (2003).

9 Ibid, at 6, 22—29, 58, 65—66.

10 Radhika Singha, *Punished by Surveillance: Policing "Dangerousness" in Colonial India*, 49(2) Modern Asian Studies 241 (2015).

11 Ibid at 246—48, 255—64.

India, permitting preventive detention and expulsion of local rowdies.[12]

In almost seventy years of India's life as a constitutional republic, a moment designed to secure liberty and transform the individual-state relationship in independent India,[13] the Criminal Procedure scheme on preventing breaches of the peace remains almost entirely as it was under colonial rule. Similarly, *Goonda* laws have proliferated across states beyond Bengal, and have been expanded to also arrest, detain, castigate, and expel *Bootleggers*, *Slumlords*, *Video Pirates*, *Slumlords*, and *Dangerous Persons*.[14]

This gradual expansion of executive powers and erosion of personal liberty in India demands a level of historical scrutiny that is beyond my scope.[15] In this section, I focus on the perversions perpetrated by the rule of law myth in independent India in context of preventive detention. This critique looks at two aspects: Problems at the Constitution's birth, and the judicial approach to fossilize the text.

The fact that Article 22, a clause that in effect offers a guide to legislatures on how to pass laws that can allow for preventive detention, finds a place in *the* Chapter on Fundamental Rights in the Indian Constitution is perplexing at first. Until, of course, we turn to the Founding-Era history and read the Constituent Assembly Debates.

7.2. *3.1. The Conventional Story of a Complex Founding History*

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[12] Ibid at 266, 258: Singha perceptively suggests how one reason for preventive legislation during colonial times was the support from propertied classes, who thought wide executive powers are needed to deal with the problems posed by the lower classes.

[13] See Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins India, 2019).

[14] See, e.g., the Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Gamblers, Goondas, Immoral Traffic offenders, Slum-grabbers and Video or Audio Pirates Act, 1985.

[15] Hailie Ludsin, *Preventive Detention and the Democratic State*, Cambridge University Press 84-153 (2016).

The standard story upon reading the Debates is, broadly, as follows. The set of clauses guaranteeing civil liberties had witnessed serious excision in the initial drafting exercises.[16] But the unkindest cut for many was the exclusion of the words "Due Process of Law" from the Draft Constitution of India, which instead provided that life and personal liberty could be taken away by "procedure established by law"

[16] Initial drafts of the Fundamental Rights clauses prepared by the Fundamental Rights Sub–Committee and the Constitutional Adviser, Sir B.N. Rau contained provisions borrowed chiefly from the Irish and American systems that guaranteed individuals various civil and political rights. Procedural guarantees relevant to the criminal process adapted clauses modelled on the Fourth, Fifth and Eighth Amendments to the U.S. Constitution. Within the space of April 1947, though, the wide-ranging set of protections for privacy and individual liberty had been reduced to a handful of clauses. At the time, this included a Due Process clause, inspired from the Fifth Amendment to the U.S. Constitution, which protected persons against deprivations of life, liberty and property without due process of law. See Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, 61–63 (1966) (nature of committees in the Drafting Process); See, B. Shiva Rao (ed.), *The Framing of India's Constitution*, Vol. II 147–50 (2010 reprint). (note on foreign sources for fundamental rights chapter).
In the Sub-Committee's Report dated April 16, 1947, the Fourth Amendment was mirrored by Clause 11; the Fifth Amendment was split up across Clauses 5–7, 12 and 27; the Eighth Amendment was adopted in Clause 28. See, *The Framing of India's Constitution,* Vol. II, 171–175. In the Adviser's Draft there was no provision for the Fourth Amendment, the Due Process Clause was mirrored by Article 16, and the other criminal procedure clauses were placed together as Article 26. See, *The Framing of India's Constitution,* Vol. III, 7–12. On the point of similarities between the American and Indian models, see Speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates,* Vol. VII, 40 (04/11/1948) ("The difference between the position under the American Constitution and the Draft Constitution is one of form and not of substance. That the Fundamental Rights in America are not absolute rights is beyond dispute. In support of every exception to the Fundamental Rights set out in the Draft Constitution one can refer to at least one judgment of the U.S. Supreme Court. …").

instead.[17] This was ultimately accepted to form part of the Constitution.[18]

Now, the exclusion of Due Process was largely due to a fear of this clause enabling the future Supreme Court to act like a "third chamber" and stall critical reform legislation that Parliament hoped to push.[19] But this focus on the welfarist agenda was accompanied by striking inattention to what the absence of a Due Process clause meant for state-based violations of the traditional civil-political rights to life and liberty — a prominent feature of the British regime.[20] Thus, citing

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[17] The Drafting Committee had been appointed by a Resolution dated August 29, 1947, to settle a Draft of the new Constitution. This was submitted to the Assembly on February 21, 1948 and the comments in the Draft suggest the words "procedure established by law" were adopted from the Japanese Constitution of 1946, and were preferable on account of being more specific. See, *The Framing of India's Constitution,* Vol. III, 523.
The trigger behind this "revolutionary" change is considered to have been a meeting between Sir B.N. Rau, Constitutional Adviser to the Constituent Assembly, and Justice Felix Frankfurter, during the former's tour of the United States in late 1948. Sir B.N. Rau had been dispatched for a tour of the United States, Canada, Eire, and Great Britain and met Justice Frankfurter during this trip. See *Framing,* Vol. III, 217–34. Gadbois and Austin both argue this was only one aspect of the reasons why Due Process was dropped, and point to further evidence gleaned from the positions adopted by members of the Drafting Committee. Gadbois, *Supreme Court of India: The Beginnings*, 151–152 (Vikram Raghavan & Vasujith Ram (eds.), Oxford University Press 2018); Austin, *Cornerstone*, at 103–105.

[18] See Constituent Assembly Debates*,* Vol. VII 797–98 (03/12/1948), 842–857 (06/12/1948), 859 (07/12/1948), 999–1001 (13/12/1948). Debate scheduled for December 3, was pushed to December 6, and came to an abrupt halt on December 7, 1948 when Dr. Ambedkar conveyed the wish of the Assembly for further deliberations to be kept pending. Perhaps to try and arrive at a compromise, as the debates had shown clear fault-lines ran through the Assembly on the issue. The trick seems to have worked, as when the clause was taken up on December 13, it was accepted after a speech by Dr. Ambedkar without any debate.

[19] See Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 Berkeley Journal of International Law 216, 221–22 (2010).

[20] See M.C. Setalvad, *War and Civil Liberties*, Oxford University Press, 45—69 (1945).

public criticism and personal dissatisfaction over the excision of Due Process,[21] Ambedkar introduced Draft Article 15-A to "[save] a great deal which had been lost by the non-introduction of the words 'due process of law'".[22]

This Draft Article went through minor modifications and ultimately became Article 22.[23] Why include clauses regulating preventive detention here? Ambedkar's speech introducing Draft Article 15-A provides answers. He explicitly recognized that this measure may be necessary "in the present circumstances of the country" and argued that the "exigency of liberty of the individual should [not] be placed above the interests of the State."[24] Ambedkar then argued that the proposed clauses controlled use of preventive detention, by installing measures such as a three-month limit on any executive detention, conferring a right to know grounds of detention and to make a representation for release, and ensure mandatory referrals to Advisory Boards for detention beyond this period.[25]

That Ambedkar asked those "fighting for protection of individual freedom" in the Assembly to congratulate themselves on having secured this Article[26] might seem jarring at first. But, a closer inspection of the political context of late 1940s India lends substance to his comments. Preventive detention laws were in force in almost all

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21 Speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates,* Vol. IX, 1497 (15/09/1949).

22 Speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates,* Vol. IX, 1497–98 (15/09/1949).

23 *Constituent Assembly Debates,* Vol. XI, 575—77, 600 (15/11/1949), 531—36 (16/11/1949). These debates focused on further tweaks to Clause 7 of Article 22 to confer more leeway to the Executive by allowing cases where detention could proceed longer than three months *without* requiring Advisory Board approval.

24 Speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates,* Vol. IX, 1500 (15/09/1949).

25 Speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates,* Vol. IX, 1500 (15/09/1949).

26 Speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates,* Vol. IX, 1500 (15/09/1949).

provinces for the three years during which the Constituent Assembly went about its work in Delhi.[27] The need for a detailed procedure in Article 22 arose because Due Process was no longer there to check legislative powers to pass preventive detention laws, that had already been conferred.[28] This meant that nothing stopped legislatures from creating laws where persons could be detained for lengthy periods without having any right to know the grounds of arrest and detention or a *right* to challenge this process, or having wide discrepancies on these lines.[29] Thus, this constitutional regime was meant to be an *incremental* improvement on prevailing legislative practices on preventive detention.

To say that these proposals received flak from members of the Assembly would be an understatement. In a fiery speech, Thakur Das Bhargava called Draft Articles 15 and 15-A "a blot upon the Constitution."[30] Bakshi Tek Chand called Draft Article 15-A "a cloak for denying the liberty of the individual" and a "Charter to the Provincial Legislature to go on enacting legislation under which persons can be arrested without trial and detained for such period as they think fit".[31] H.V. Kamath criticized the Drafting Committee, for

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27 See *e.g.*, Bengal Criminal Law Amendment Act, 1930; CP and Berar Public Safety Act 1947; Punjab Public Safety Act, 1947; Madras Maintenance of Public Order Act, 1947; Bihar Maintenance of Public Order Act, 1947; U.P. Maintenance of Public Order (Temporary) Act, 1947; Marwar Public Security Act, 1947; Bombay Public Security Measures Act, 1947.

28 *Power of Preventive Detention Given to Centre: Constituent Assembly Adopts Provision*, The Times of India 8 (23/08/1947). The relevant clause for List III was approved during Debates on August 22. See *Constituent Assembly Debates,* Vol. V, 112—18 (22/08/1947).

29 See Speech of H.V. Pataskar, *Constituent Assembly Debates,* Vol. IX, 1523—24 (15/09/1949); Bakshi Tek Chand, *Constituent Assembly Debates,* Vol. IX, 1529—30 (15/091949).

30 Speech of Pandit Thakur Das Bhargava, *Constituent Assembly Debates,* Vol. IX, 1506 (15/09/1949).

31 Speech of Bakshi Tek Chand, *Constituent Assembly Debates,* Vol. IX, 1506 (15/09/1949).

working as if to frame "a short-term Constitution … which will last perhaps just as long as some of us hope to be in power", and he worried if the Members had imagined "how some other persons, possibly totally opposed to our ideals, to our conceptions of democracy, coming into power, might use this very Constitution against, and suppress our rights and liberties?"[32]

3.2. Reading against the Grain

The Constituent Assembly Debates, thus, paint a picture of its Members being struck with a crisis of conscience. It suggests their commitment to liberty was beyond question, but circumstances had forced the Members' hand and propelled the constitutional regime legalizing preventive detention that is present in India today. This view lends Article 22 a Founding-Era intention of serving to protect personal liberty and expiates our collective shame at having the Constitution's Fundamental Rights Chapter aggressively detail a legal regime to safeguard preventive detention laws.

Until recently, I was happy to subscribe to this viewpoint.[33] What propelled doubts in my mind was some prodding by a friend[34] to consider this question: If Article 22 sought to restrict use of preventive detention, then why has it failed so miserably in achieving this result? Rather than witness a gradual limitation or erosion of preventive detention, independent India has witnessed a remarkable expansion of this power, normalizing it to an extent unparalleled in other liberal democracies.[35]

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32 Speech of H.V. Kamath, *Constituent Assembly Debates,* Vol. IX, 1521 (15/09/1949).

33 See Abhinav Sekhri, *Preventive Justice Part 1: The History Behind Article 22*, The Proof of Guilt (02/12/2016), available at https://theproofofguilt.blogspot.com/2016/12/preventive-justice-part-1-history., last seen on 30/06/2020.

34 My thanks to Arudra Burra for this conversation and prodding me to be less kind to the Constituent Assembly.

35 Hallie Ludsin, *Preventive Detention and the Democratic State*, 196, 400—405 (2016).

With this perspective, consider a remark made by Ambedkar during the debates over Draft Article 15-A. Reacting to the harsh criticism from his compatriots over including clauses on preventive detention, he retorted that *they* had "done worse".[36] What was this all about? Ambedkar was referring to how the Assembly had agreed, almost without debate, to invest future Legislatures with powers of preventive detention in 1947.[37]

Thus, if the Members were actually unhappy about preventive detention, why allow for such laws in the first place? It's a reasonable criticism, and one that only becomes louder if we read the Constituent Assembly Debates together with the work done by the same Members while acting as the Provisional Parliament, which served as a Central Legislature for independent India between 1950 and 1951.[38]

On the eve of Independence Day, 1950, the Provisional Parliament passed restrictive bail provisions to double-down on the crisis regarding provisions of essential supplies and commodities, reversing the presumption of innocence itself.[39] Such restrictions had only been seen once in the history of the *Raj*—during the Second

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[36] Speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates,* Vol. IX, 1561 (16/09/1949) ("We have given power to the Legislatures of the State and Parliament to make laws regarding preventive detention. What I am trying to do is to curtail that power and put a limitation upon it. I am not doing worse. You have done worse.").

[37] *Power of Preventive Detention Given to Centre: Constituent Assembly Adopts Provision*, The Times of India, 8 (23/08/1947). The relevant clause for List III was approved during the Debate on September 3, 1949. See *Constituent Assembly Debates,* Vol. IX, 929—931 (03/09/1949).

[38] See Nandini Upreti, *Provisional Parliament of India* (Lakshmi Narain Agarwal, 1971).

[39] Government of India, *Parliamentary Debates*, Vol. VI, 1013—1112 (14/08/1950). The amendment required that rather than presume the person innocent, the court presume that a person seeking bail was *guilty* of the alleged crime. For a discussion, see Abhinav Sekhri, *Restrictive Bail Conditions in Indian Criminal Procedure: Lessons from History*, The Proof of Guilt, available at https://theproofofguilt.blogspot.com/2019/06/restrictive-bail-conditions-in-indian.html, last seen on 30/06/2020.

World War—[40] but have since become standard-fare in repressive laws that have been passed by successive governments after independence.[41]

But perhaps the legislative activity that strikes the loudest dissonant chords is that which led to the Preventive Detention Act of 1950.[42] This statute, passed exactly a month after the Constitution came into force, was again accompanied by public statements of anguish on part of the Home Minister.[43] But it becomes difficult to accept these statements at face value considering the statute.

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[40] Government of India, *Parliamentary Debates*, Vol. VI, 1103—04 (14/08/1950); Abhinav Sekhri, 'Restrictive Bail Conditions in Indian Criminal Procedure: Lessons from History'.

[41] See Rule 184, Defence of India Rules supplementing the Defence of India Act, 1971 (since repealed); Section 12AA (inserted in 1981), Essential Commodities Act, 1955 (since repealed); Section 20(8), Terrorist and Disruptive Activities (Prevention) Act, 1987 (since repealed); Section 37 (amended in 1989), Narcotic Drugs and Psychotropic Substances Act, 1985; Section 7A (inserted in 1994) of the Anti-Hijacking Act, 1982; Section 6A (inserted in 1994), Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982. Section 21(4), Maharashtra Control of Organised Crime Act, 1999; Section 8, Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002; Section 45, Prevention of Money Laundering Act, 2002; Section 51A (inserted in 2002), Wildlife Protection Act, 1972; Section 49(7), Prevention of Terrorism Act, 2002 (nearly identical; since repealed); Section 43D (inserted in 2008), Unlawful Activities Prevention Act, 1967 (nearly identical);Section 36AC (inserted in 2008) of the Drugs and Cosmetics Act, 1940; Section 212(6), Companies Act, 2013.

[42] The Preventive Detention Act, 1950, was preceded by the Preventive Detention (Extension of Duration) Order, 1950, passed on January 26, 1950, which declared that any detention order passed prior the commencement of the Constitution, even if void under the Constitution, will continue to remain in force for a period of three months.

[43] See Government of India, *Parliament Debates*, Vol. II, 909—10 (Feb. 25, 1950) (Patel reportedly said: "Now, perhaps Members are aware that I know more than anybody else what the mental attitude of a detenu would be when he is arrested in the middle of the night in his sick bed and again when he is in detention when many of his dear relations die in this country or outside this country and when their dead bodies are brought back and he is not released even for cremation by the imposition of such conditions that the detenu declines for the honour of his country to go out. So, when this legislation is brought in, it is not done with a

Four issues stand out. *First*, rather than even attempt at trying to demarcate specific kinds of conduct that could empower executive officials to use preventive detention powers, the PDA simply copied the entire Entry from the Legislative lists and retained the broadest possible scope of power.[44] *Second*, the PDA did not restrict the use of this power to only senior officials, and continued with the colonial policy of allowing even commissioners of police to detain first and seek approval later.[45] *Third*, the PDA *reduced* the level of scrutiny to regulate executive officers using this power from the prevailing colonial standards, by excluding the word "reasonable" as a test for executive satisfaction, and further limited scope for independent judicial review.[46] *Fourth*, the PDA crafted a procedure for deciding representations against detention that gave *fewer* rights to detained persons than practices from wartime Britain or existing provincial laws

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light heart. It is done with a heavy heart. When responsibility is placed on one to keep law and order and safeguard the liberties of millions of people, for the protection of that liberty and for the fulfilment of that duty one has to take actions which are most detestable. But to call this measure as a black Bill is I consider a very light-hearted comment to make. There are occasions on which there may be room for humour, jokes and laughter. But I assure this House that I have passed two sleepless nights when I was asked to take up this measure. …").

44 Section 3(1), Preventive Detention Act, 1950.

45 Sections 3(2), 3(3), Preventive Detention Act, 1950.

46 Section 3(1)(a), Preventive Detention Act, 1950. This permitted detentions if the officer was "satisfied" that a person was engaging in prohibited conduct.

The relevant standard for the colonial legislation was found in Rules 26 and 129 of the Defence of India Rules, passed under the Defence of India Act, 1939. Rule 129 authorised detentions of persons whom an officer "reasonably suspects" of engaging in prohibited conduct. The non-compliance of statutes with this standard was at the heart of the Federal Court decision in *Keshav Talpade* v. *King Emperor*, AIR 1943 FC 1.

The British law of most recent vintage, i.e. Defence Regulation 18-B passed at the start of the Second World War, allowed the Secretary of State to pass detention orders only if he considered there was "reasonable cause to suspect" a person of engaging in prohibited conduct. On the experience under Regulation 18-B, *see*, A.W. Brian Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford University Press, 1994).

in colonial India: There was no right to legal representation for Advisory Board proceedings, which were rendered confidential, and to an extent which not only foreclosed the right to a public hearing, but went so far as to *proscribe* any court from allowing any discussion of either the grounds of detention or the hearings before the Advisory Board.[47]

Surely, then, if the anguish was real, why craft a statute that treated persons in independent India *worse* than what the colonial regime had done? Such legislative strategies suggested that, in some regards, the Constitution was only furthering the rule of law *myth* that the colonial regime had so successfully engaged. On paper, there could be no stronger basis than the Constitution to regulate preventive detention. But, if the regulation itself only serves to *legitimize*, rather than curb, the use of such power, then the rule of law quickly descends back to the rule of man which it sought to improve upon.

3.3. Judicial Abnegation

In the powerful documentary *13th*,[48] an interviewee argued that the text of the 13th Amendment to the U.S. Constitution was not self-enforcing. It had to be read *by people* in a way that has helped to deny freedom to communities of colour through mass incarceration.[49]

The same can be said about the colonial rule of law myth: Without courts accepting their role of supplying limited judicial review over executive acts, it would not be possible to effectively perpetuate this myth.[50] And history confirms that the Indian Supreme Court has, repeatedly, accepted the logic of limited judicial review to foster the myth that preventive detention is regulated by a rule of law.

This history of judicial abnegation began within a month of the PDA 1950 being passed, when A.K. Gopalan brought a writ petition

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47 Sections 10 & 14, Preventive Detention Act, 1950.
48 Ava Duvernay *et. al.*, *13th* (Dir.: Ava Duvernay) (2016).
49 Ibid. (Interview with Kevin Gannon).
50 Hussain, *Jurisprudence of Emergency*, 69—97.

challenging the validity of the Act before the Supreme Court.[51] It is often forgotten that because the PDA prohibited Gopalan from sharing the grounds of his detention or other papers with the Supreme Court, the arguments remained in the realm of the hypothetical. This was critical, for it meant that arguments inviting the Court to strike down the law could only turn to the *hypothetical* abuse that it made possible, rather than try and argue that the abuse was manifest in Gopalan's detention itself.[52] The arguments still convinced two Justices on the Bench to declare the law unconstitutional, but four Justices upheld the law and affirmed the idea that wide powers for the executive were necessary for preventive detention.[53] Pertinently though, all Justices agreed that the provision which prevented a Court from looking at the detention papers, was unconstitutional.[54]

The abstract nature of hearings in *Gopalan* makes the decision particularly bad precedent. And yet, for at least twenty years, the Court's conclusions about the limited scope of judicial review in preventive detention controlled the field. Subsequent decisions used

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51 A.K. Gopalan v. State of Madras & Anr., 1950 SCR 88. The litigation attracted significant media attention at the time: see *Communist Prisoners' Case against Madras State: "Rules Nisi" Issued by India's Supreme Court*, Times of India 10 (23/03/1950); *"Preventive Detention Act Not Valid": Counsel's Plea in Supreme Court,* Times of India 3 (01/04/1950); *Arguments in Detenu's Case: Resumed Hearing in Supreme Court*, Times of India 5 (06/04/1950); *Detention Act Validity: Arguments Before Supreme Court,* Times of India 10 (07/04/1950) (The newspaper reports the Attorney General M.C. Setalvad as having argued that "There is no question of feeling here … for I am myself arguing much against my feelings; but there can be no doubt as to what the intention of the framers of the Constitution was.");'*Detenus' Safeguards under Constitution,* Times of India 3 (19/04/1950) (Noting an exchange between Fazl Ali, J. and M.C. Setalvad where the Justice raised concerns about the Indian law providing a truncated right to be heard, even when compared with wartime Britain); *Fundamental Rights & Constitution,* Times of India 3 (20/04/1950); *Preventive Detention Act Held Valid,* Times of India 1 (20/05/1950), *Divided Supreme Court Decision on Preventive Detention,* Times of India 3 (20/05/1950).

52 This was because of Section 14, Preventive Detention Act, 1950.

53 The Bench was comprised of all six sitting Justices of the Court. Only Mahajan, J. and Fazl Ali, J. declared the statute unconstitutional.

54 A.K. Gopalan v. State of Madras & Anr., 1950 SCR 88.

Gopalan's conclusions to not only expand the scope of executive power, but also constrain judicial review further, for instance by approving the use of preventive detention in cases executive detention orders were passed *in spite of* a court having granted the same person bail on largely the same set of allegations.[55]

It did not help that subsequent decisions misapplied *Gopalan* in a way that constrained judicial review further, by reading *Gopalan* as authority for the proposition that laws on preventive detention were *only* subject to the tests of Article 22 and not the other fundamental rights. Thus, the Supreme Court refused to review arrest and detention without trial, even if the underlying conduct behind the arrest was an exercise of *constitutionally protected fundamental rights*.[56]

A year before the suspension of civil liberties took place by a declaration of Emergency, the Supreme Court reversed this view in *Haradhan Saha* and unequivocally held that preventive detention law would not be tested within the silo of Article 22, but also upon the anvil of other fundamental rights.[57] This meant that you could not be subjected to executive detention for, say, exercising your constitutional right to free speech. But, in the same breath, the Court somehow concluded that that "*even if Article 19 be examined in regard to preventive detention, it does not increase the content of reasonableness required to be observed in respect of orders of preventive detention*" beyond what was existing in Article 22.[58] When a year later the Court held judicial review itself could

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55 See Kartic Chandra Guha v. State of W.B. & Ors, (1975) 3 SCC 490; Rekha v. State of Tamil Nadu, (2011) 5 SCC 244; Union of India v. Dimple Happy Dhakkad & Ors., Crl. Appeal 1064 of 2019 (Decided on 18.07.2019). See Ludsin, *Preventive Detention and the Democratic State*, 205 (Showing how the *fact* that preventive detention can be used to circumvent bail has become a consideration for legislators to support / pass preventive detention statutes).

56 Bhatia, *Transformative Constitution*, Chap. 8.

57 Haradhan Saha v. State of West Bengal & Ors., (1975) 3 SCC 198.

58 Haradhan Saha, ¶ 31.

be taken away by the Executive during the Emergency in *A.D.M. Jabalpur*, we know that the rule of law myth has reached its apogee.[59]

The story of a judicial renaissance after the Emergency is the subject of much critical literature, but while this literature focuses on the many judicial innovations of the era surprisingly little attention is paid to what happened in the field of preventive detention itself, the focus of the decision in *A.D.M. Jabalpur* which was critiqued as the judiciary's *nadir* during the Emergency.

In *Maneka Gandhi*,[60] the Supreme Court reiterated that the Chapter on Fundamental Rights offered a composite test for legislation, rather than examining it in silos. It also *notably expanded* on the meaning of the words "procedure established by law" in Article 21, holding that this phrase effectively carried the *same* scope as "Due Process" despite the extensive Debates in the Constituent Assembly pointing to the contrary.[61] But what would this expansive notion of judicial review mean for preventive detention law? Would this change the pre-Emergency position adopted in *Haradhan Saha*? Only one opinion from *Maneka Gandhi* touched upon this, and Chief Justice Beg squarely held that the notion of "Due Process" in the preventive detention context meant nothing more than what Article 22 guaranteed.[62] Thus, he actually turned the clock back from what had been held in *Haradhan Saha*!

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59 A.D.M. Jabalpur v. Shiva Kant Shukla & Ors., (1976) 2 SCC 551.

60 Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

61 Supra 21-26. (CAD on excision of due process and insertion of Draft Article 15-A.)

62 Maneka Gandhi, ¶ 200 (Beg, C.J.) ("I have already referred to the passages I cited in A.D.M., Jabalpur case to show that, even in Gopalan case the majority of Judges of this Court took the view that the ambit of personal liberty protected by Article 21 is wide and comprehensive. It embraces both substantive rights to personal liberty and the procedure provided for their deprivation. One can, however, say that no question of "due process of law" can really arise, apart from procedural requirements of preventive detention laid down by Article 22, in a case such as the one this Court considered in Gopalan case. The clear meaning

That nothing much had changed in how the judiciary perceived its role in context of preventive detention was evident by 1980, when the Court unanimously upheld the National Security Act, 1980,[63] reiterating the same logic of necessity for (almost) unbridled executive power that the Constituent Assembly had pitched to justify the harshness of the PDA, 1950.[64] The only, and critical, difference was that while the PDA 1950 contained a sunset clause to reinforce claims of the *temporariness* of the need for such powers, the National Security Act of 1980 contained no such clauses, suggesting a *permanent need* for executive superpowers.[65]

3.4. Post Script

The combination of judicial abnegation and unabashed claims to power by the executive has created a system where courts are happy to adopt a hands-off policy on the *substance* of preventive detention, but at the same time maintain a critical eye on its *procedural* components. Thus, we find ourselves in the strange space where courts can exhort about the importance of personal liberty and chastise the executive for failing to dot the i's and cross the t's when passing detention orders, and even expand the scope of this procedural regulation, but keep turning a blind eye to the reasons *why* a person might be arrested and detained in the first place, on mere *allegations* and not proof of guilt.

And this perplexing reality exists in a constitutional scheme where, somehow, the legislative primer of Article 22 remains the mainstay of regulation over preventive detention *in spite of* the fact that

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of Article 22 is that the requirements of "due process of law", in cases of preventive detention, are satisfied by what is provided by Article 22 of the Constitution itself. This article indicates the pattern of "the procedure established by law" for cases of preventive detention.").

63 A.K. Roy & Ors. v. Union of India, (1982) 1 SCC 271.

64 A.K. Roy, ¶¶58—68; *See also*, Ludsin *Preventive Detention and the Democratic State*, 136—151 (also considers the legislative process and offers critique).

65 Section 1(3), Preventive Detention Act, 1950.

the *raison d'être* of this clause has ceased to exist. And, where the constitutional text *itself* is living on a strange half-life, simply because the executive has refused to notify amendments that have been passed in the 44th Amendment to the Constitution. The minimum thresholds of Article 22 were adopted by the Constituent Assembly because the words "Due Process" had been taken out of Article 21. Today, the Supreme Court has, in no uncertain terms,[66] confirmed that due process is part of the Constitution.

If the constitutional landscape has travelled a long distance from where the journey began in 1950, to the extent that certain words no longer mean what they did back then, and new horizons for existing rights have been unequivocally affirmed, why must the standards for preventive detention remain frozen in time? This open-ended question is what I turn to in the final section of this Essay.

4. Conclusion — Where do we go from here?

In this essay, I sought to demonstrate that India's constitutional regulation of preventive detention is deficient on several counts, considering the premise that protecting and safeguarding personal liberty was a core interest of the Constitution. Moreover, I argued that the persistence to continue with the *same legal standards* as 1950 in 2019 is particularly problematic, for which all branches of State are to be held responsible.

Having identified the problem, the next step is to consider what can be done to redress this. It is a question to which I do not have any convincing answer at this point. A suggestion that I have floated in public forums, is to delete Article 22 altogether from the Constitution with a clear message of it being unsatisfactory. This would then leave Articles 14, 19, and 21 as bulwarks to protect personal liberty against abuse of preventive detention by the executive, together with a judiciary that is free to enforce stricter norms, for it will no longer be shackled by the text of Article 22.

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66 Mohd. Arif v. Registrar, SCI, (2014) 9 SCC 737.

The problem in this scenario is the need to pin hopes on the Judiciary. For all the lyrical waxing about personal liberty and individual freedom, the Supreme Court has time and again failed to stand up to the other branches of the state and protect these virtues from an onslaught. What, then, prevents the Supreme Court from reverting to type in this scenario? Is it not likely, as was pointed out to me,[67] that the Court ends up using the same old tests of Article 22 to regulate preventive detention, but now through Article 21? While I wholeheartedly embrace this concern, the marginal gains from a stronger judicial review are bound to weed out the egregious cases of using preventive detention, and also lead to more frequent and robust reviews, with counsel, than the cycles currently incorporated through the Constitution.

Arguably, the best legal solution would be to delete the relevant Entries from the Legislative Lists that permit the Central and State Legislatures to pass preventive detention statutes altogether. This would possibly allow such legislation to only be considered during an Emergency, constitutionally declared, rather than for ordinary law and order purposes. Whilst being the most desirable, this course of action is likely to meet the greatest resistance by a government that has so long been under the influence of this heady power.

The history of preventive detention law in India shows that all three branches of State have, at different times, made apparent their contentment with upholding a regime where personal liberty can be thrown into the dustbin. Since 1950, Legislatures have repeatedly failed to even try and lift themselves beyond the constitutional minimums; the Executive has actively frustrated the coming into force of a set of a higher constitutional baseline; and a Judiciary that has been famous for innovation and reinterpretation of text has remained docile as

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[67] Many thanks to Lawrence Liang for flagging this concern.

persons are arrested and detained without trial on *allegations* of video piracy, leaking exam papers, cricket-ground spats, and the like.[68]

Considering this inglorious institutional past, perhaps it is time to look elsewhere. At the end of the day, the only satisfactory answer for this is the People to which the Constitution is promised. After all, "laws and constitutions are but the paper safeguards of liberty. A people must have the will to be free."[69] Safeguards for individual liberties have always been reduced to paper when the individuals themselves forget the value of this liberty, and are no longer resistant to its deprivation. The same can be said about the practice of preventive detention in India. The fact that this most odious deprivation of personal liberty is normalized today is because the People have not challenged this process. Even when persons have opposed preventive detention, either as opposition party members in Parliament, or as civil rights activists, they have surprisingly always had no qualms about using preventive detention against *some* category of persons. Why not question the necessity of preventive detention itself wholesale? Do we really need a legal tool that allows persons to be locked away for months on the basis of mere *suspicion*? Is there no such thing as a presumption of innocence? Until we start calling time on Article 22, I do not think we can fully begin to tackle these difficult questions. What are we waiting for?

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[68] See Aasavri Rai, *Guest Post: Arrests under the Infamous "No Vakil, No Appeal, No Daleel" Law*, The Proof of Guilt (25/12/2018), available at https://theproofofguilt.blogspot.com/2018/12/guest-post-arrests-under-infamous-no.html, last seen on 30/06/2020.

[69] Cecil T. Carr, Concerning English Administrative Law, 92 (Columbia University Press, 1941).

'REFORM THAT YOU MAY PRESERVE': RETHINKING THE JUDICIAL APPOINTMENTS CONUNDRUM

*Prannv Dhawan**

Abstract

Appointment of judges to the constitutional courts in India has been a subject of inter-institutional discord, constitutional jurisprudence as well as public debate. This issue underlines the concern about safeguarding the institutional independence of the judiciary from the creeping march of executive power while addressing the genuine concerns about the inadequacies of the Collegium system.

While weighing in on the debates around judicial primacy as the sole route for securing independence, this paper argues that the judicial appointment process needs to be radically rethought. The paper underlines the need of rigorous public scrutiny and debate about judicial appointments process to increase objectivity and transparency thus creating accountability for the judiciary. More importantly, what is needed is the initiation of meaningful dialogue and discussion between the judiciary and other branches of government, to strike at the roots of inefficiency and the judicial-political discord.

Keywords: judicial appointments, collegium, National Judicial Appointments Commission Act, Supreme Court Advocate-on-Record Association and others v. Union of India and Others

1. Introduction

In 2015, the Supreme Court of India reviewed the constitutionality of the Constitution (Ninety-ninth Amendment) Act, 2014, that established the National Judicial Appointments

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Commission (NJAC) through NJAC Act.[1] The key *formal-legal* outcome of the crucial Constitution Bench judgement has been the restoration of ultimate authority in the judiciary in matters pertaining to its selection and appointment.[2] This has given rise to impassioned debates about judicial independence being an inherent part of the basic structure,[3] democratic mandates of the elected executive,[4] and striking a fine balance between independence and accountability.[5] However, in the aftermath of the judgement, a series of controversies relating to the executive's recalcitrance and delay with respect to certain judicial appointments, and the transfer of independent judges have raised a cause of concern.[6] This issue is particularly relevant in light of the recent controversial elevations to the Supreme Court, wherein concerns were raised about the change in collegium's decisions and the supersession of numerous judges.[7]

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1 Supreme Court Advocate-on-Record Association and others v. Union of India and Others, (2016) 5 SCC 1.

2 G. Bhatia, *The Sole Route to an Independent Judiciary?: The Primacy of Judges in Appointment*, 138, 145 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018).

3 A.Sengupta, *Justice Chelameswar's Dissent*, 159, 167 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018).

4 A. Jaitley, *The Judicial Collegium: Issues, Controversies and the Road Ahead*, 45, 55 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018); *Arun Jaitley on NJAC verdict: Democracy cannot be 'tyranny of the unelected'*, The Indian Express (19/10/2015), available at https://indianexpress.com/article/india/india-news-india/njac-sc-verdict-democracy-cannot-be-tyranny-of-the-unelected-says-arun-jaitley/ last seen on 23/12/2018.

5 P. B. Mehta, *A Plague on Both Your Houses: NJAC and the Crisis of Trust*, 57, 70 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018); Mukul Rohatgi, *Checks and Balances Revisited: The Role of the Executive in Judicial Appointments*, 84, 95 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018).

6 Prannv Dhawan and Anmol Jain, *Strong Executive, Weak Courts: Collapsing Edifice of Judicial Independence* 57(45) The Mainstream Weekly (2019).

7 Justice Madan B Lokur, *Collegium's actions show that the NJAC which was struck down four years ago is back, with a vengeance*, The Indian Express, (16/10/2019), available at https://indianexpress.com/article/opinion/columns/govt-calling-the-

The paper will first elaborate on the controversy around the judicial appointments process. Subsequently, the paper delves into an analysis of the Collegium system of judicial appointments and critiques the modular inadequacies of the Collegium. It specifically analyzes the Supreme Court's reasoning in the *Supreme Court Advocate-on-Record Association and others* v. *Union of India* (2016)[8] case and emphasizes the importance of Justice Chelameswar's dissent.

The article concludes by highlighting the need for robust public debate on the judicial appointments process in light of the institutional experience and guidance from foreign models. Here, the article proposes a meaningful institutional dialogue between the judiciary and the other two organs of government, so as to ensure a participative, transparent and credible constitutional mechanism for the appointment of judges.

2. From Independence to Primacy: The Deadlock Over Judicial Appointments

Judicial independence is both a highly contested and valued ideal in a democracy.[9] A major point of contention in the debate over independence of the Indian judiciary, has been the method of appointment of judges. The Constitution in India devised a mechanism of 'consultation' with those judges of the Supreme and/or High Court

supreme-court-shots-narendra-modi-6070659/, last seen on 23/12/2018; F. Mustafa, *The danger of reciprocity: on the independence of the Supreme Court***,** The Hindu, (19/01/2019), available at https://www.thehindu.com/opinion/op-ed/the-danger-of-reciprocity/article26030925.ece, last seen on 23/12/2018; Rekha Sharma, *Seniority cast aside*, The Indian Express, (19/01/2019), a

vailable at https://indianexpress.com/article/opinion/columns/supreme-court-judges-appointment-dinesh-maheshwari-sanjiv-khanna-seniority-cast-aside-5545527/lite/, last seen on 23/12/2018.

8 Supra 1.

9 F.A. Hannsen, *Is There a Politically Optimal Level of Judicial Independence?*, 94(3) American Economic Review 712 (2004); I. Kaufman, *The Essence of Judicial Independence*, 80 Columbia Law Review 671 (1980).

as deemed necessary by the President.[10] However, through the *interpretative gloss of Article 124*[11], the last word on appointments has been reserved with judiciary through a slew of cases.[12] The method prevailing currently is the Supreme Court's collegium system, which originated from three of its own judgements known collectively as the Three Judges Case.[13] It consists of the five senior-most judges of the Supreme Court,[14] and is a method for judges themselves to appoint and transfer their subordinate counterparts, without the interference of other branches of government.

2.1. The Judicial Collegium's Control over Appointments Process

The collegium system has not been mentioned either in the Constitution or in any subsequent amendments. It is notable that the role of the executive in the process of judicial appointments and transfers has been substantially mitigated,[15] and the "consultation" of the CJI by the President enshrined under Articles 124(2)[16] and 217(1)[17] of the Constitution, has now been translated into "concurrence".[18]

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10 Art. 124(2), 217, the Constitution of India; *Independence of the Judiciary*, 264, 267 in *Courts of India: Past to Present* (2016); P. B. Mehta, *A Plague on Both Your Houses: NJAC and the Crisis of Trust*, 57, 70 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018).

11 See Supra 1, Justice Chelameswar, at¶ 1178, 1177, 1212, 1217, 1213.

12 Editorial, *An Assertion of Primacy*, The Hindu, (17/10/2015), available at https://www.thehindu.com/opinion/editorial/supreme-court-bench-order-on-national-judicial-appointments-commission-act-an-assertion-of-primacy/article7770892.ece, last seen on 12/01/2019.

13 S.P Gupta v. President of India And Ors., AIR 1982 SC 149; Supreme Court Advocates-On-Record Association v. Union of India, (1993) 4 SCC 441; Special Reference No. 1 of 1998 In Re Presidential Reference, AIR 1999 SC 1.

14 P. Bhushan , *The Dinakaran Imbroglio: Appointments and Complaints against Judges*, 44(41) Economic and Political Weekly 10, 10 (2009); A. Chandrachud, *The Insulation of India's Constitutional Judiciary*, 45(13) Economic and Political Weekly 38, 40 (2010).

15 M. Shukla, *Judicial Accountability: Welfare and Globalization*, 51 (2010).

16 Art. 124(2), the Constitution of India.

17 Art. 217(1), the Constitution of India.

18 Art. 124(2), the Constitution of India.

While attempts have been made to justify the system as one that safeguards the independence of the judiciary from the legislature and executive, it has often come under scrutiny for allegations of cronyism and nepotism. In fact, the two men who spearheaded the system, Justice J.S. Verma and Fali S. Nariman, later regretted having formed it.[19] This is reflected also in F.S. Nariman's book *Before Memory Fades*, where the chapter dealing with the second and third judges case is titled: "A Case I Won but Which I Prefer to Have Lost".[20]

It was also alleged, in opposition to the collegiate system, that, "it has now become a matter of practice and convenience to recommend advocates who are the sons, daughters, relatives and juniors of former judges and Chief Justices. Nepotism and favouritism is writ large."[21] A similar situation arose soon after, when a list of fifteen names recommended by the Collegium, had allegedly been "proposed on extraneous criteria such as caste, religion, office affiliations, political considerations and even personal interests and quid pro quo."[22]

The lack of transparency in the collegiate system of appointment, provides a rather opportunistic avenue for cases of favoritism without the risk of accountability. Moreover, the fact that the process is ad hoc and lacks specific objective criteria, has caused an infiltration of politics in the judicial system, and nepotism at the hands of the higher judiciary.[23] This has led to a situation where a

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19 G. Jacob, *Collegium system had flaws, says K.T. Thomas*, The Hindu, (18/10/2015), http://www.thehindu.com/todays-paper/collegium-system-had-flaws-says-kt-thomas/article7776060.ece, last seen on 02/02/2019.

20 F. S. Nariman, *Before Memory Fades*, (Faber 2010).

21 N.G.R. Prasad et al., *The costly tyranny of secrecy*, The Hindu, (05/07/2013), http://www.thehindu.com/opinion/lead/the-costly-tyranny-of-secrecy/article4881975.ece, last seen 02/02/2019.

22 Ibid.

23 P. Bhushan, *Judicial Accountability: Asset Disclosures and Beyond*, 44(37) Economic and Political Weekly 8, 10 (2009).

person without familial ties with acting or previous judges being appointed as a High Court judge, is a rare exception.[24] Nevertheless, the Law Commission of India in its 230th Report, has itself recognized a phenomenon known as the 'Uncle Judges Syndrome', whereby a person appointed as a High Court Judge has kith and kin practicing in the same court.[25] This has given rise to cases of favoritism, which eventually results in judicial nepotism.[26] The occurrence of self-perpetuation in this highly insulated process, where only judges select future judges, is not in line with the democratic principle of checks and balances that has been emphasized in the Constitution.[27] As a matter of fact, the judiciary does not enjoy the sole prerogative in relation to appointment of judges in any other major democratic country, including the United States, the United Kingdom and France.[28] Hence, there is an urgent need for a critical review of the opaque system of judicial appointments.[29]

In a nutshell, this assertion of independence has led to evolution of appointment mechanism from consultation[30] to concurrence[31] to collegium[32] to current state of constant conflict and

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24 *Writings on Human Rights, Law, and Society in India: A Combat Law Anthology*, 63 (Harsh Dobhal, 2011).

25 Law Commission of India, *230th Report: Reforms In The Judiciary- Some Suggestions*, available at http://lawcommissionofindia.nic.in/reports/report230.pdf, last seen on 15/06/2020.

26 S. Verma, *Every third HC judge is 'uncle'*, Hindustan Times (03/05/2014), available at https://www.hindustantimes.com/punjab/every-third-hc-judge-is-uncle/story-emvLdM8SlnlknyCQ4A7uLM.html, last seen on 12/12/2019.

27 Editorial, *Closed Brotherhood*, 44(12) Economic and Political Weekly 6, 6 (2009).

28 Ibid.

29 B.V. Rao, *Crisis in Indian Judiciary,* 5 (2001).

30 S. P. Gupta v. President of India & Ors, AIR 1982 SC 149.

31 Supra 1..

32 Special Reference No. 1 of 1998 In Re Presidential Reference, AIR 1999 SC 1; Dept. of Justice, Ministry of Law and Justice, Govt. of India, *Memorandum Showing the Procedure for Appointment of the Chief Justice of India and Judges of the Supreme Court of India*, available at http://doj.gov.in/appointment-of-judges/memorandum-procedure-appointment-supreme-court-judges, last seen on 15/06/2020.

confusion. Scholars view this as an aftermath of complete constitutional usurpation[33] by the judiciary that sustained its *independence* as juxtaposed to a discredited and politically fragile mandate of the executive. In the last two decades, a series of attempts to pass various versions of NJAC legislation introduced by coalition governments had failed. However, the incumbent single party majority government steadfastly disturbed the existing equilibrium through passage of the ninety-ninth Constitutional Amendment Act and the NJAC Act, 2014, giving rise to various controversies regarding the appointment of judges.[34] After the acts were held unconstitutional in 2015, these controversies have primarily been about the delay in confirmation of appointments, internal dissent regarding lack of transparency in collegium and finalization of the draft Memorandum of Procedure wherein concerns about excessive executive sanction on the pretext of national security have been raised.[35]

2.2. The NJAC Case: Contentious Case of Primacy

An attempt to counter this uncontrolled independence was made via the Constitution 99th Amendment Act and National Judicial Appointments Commission (NJAC) Act of 2014, whereby the NJAC- a constitutional body- was set up and regulated respectively.[36] The NJAC was proposed to consist of six members, of which three members would be from within the judiciary and three members would be external to the judiciary.[37] The arguments favoring the NJAC

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33 Supra 7, at 62.

34 P. Bhushan, *Scuttling Inconvenient Judicial Appointments*, 49(28) Economic and Political Weekly 12, 15 (2014).

Editorial, *Judiciary in Turmoil*, The Hindu (31/12/2018), available at https://www.thehindu.com/opinion/editorial/judiciary-in-turmoil/article22431846.ece, last seen on 18/09/2019.

36 *NJAC vs collegium: the debate decoded*, The Hindu (16/10/2015), available at http://www.thehindu.com/specials/in-depth/njac-vs-collegium-the-debate-decoded/article10050997.ece, last seen on 18/09/2019.

37 P.S. Krishna, *NJAC vs collegium: The arguments and counter-arguments*, Business Standard (16/10/2015), available at http://www.business-

included a "more transparent and efficient" replacement of the Collegiate system, while maintaining the independence of the judiciary through the veto power granted to the judiciary representatives.[38] Additionally, the inclusion of civil society representatives and political leaders would ensure greater accountability in the judicial appointments and selection process.[39] However, in an unprecedented judgement of the *Supreme Court Advocates-on-Record Association* v. *Union of India*[40], the Supreme Court held it to be unconstitutional, since it violated of the basic structure of the Constitution and 'compromised' the independence of the judiciary.[41] The judiciary- executive contestation is best represented by the debate on *judicial primacy* in the appointments process in the light of this judgment.

The judgement assumes the requirement of judicial primacy in appointments but makes no persuasive case as to why this is so essential. After all, as established above, nepotism is as prevalent under the judiciary as political favoritism was under the executive (prior to 1993). In the majority judgement, judicial primacy is read into the heart of judicial independence.[42] Justice Khehar alludes to the Indian democracy's imperiled state during the National Emergency of 1975 to emphasize the absolute need of judicial primacy to safeguard democratic polity.[43] This highlights the conception of the judiciary as

standard.com/article/current-affairs/njac-vs-collegium-the-arguments-and-counter-arguments-115101601449_1.html, last seen on 18/09/2019.

38 G. S. Bhatti, *Judicial Appointments In India: The Chronicle Of The Turf For Ascendency And Superiority*, 5(2) Journal of Global Research & Analysis 76, 84 (2016).

39 A. Sengupta, *Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgement*, 48 Economic & Political Weekly 27, 27 (2015).

40 Supra1.

41 R. Abeyratne, *Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective*, 49 The George Washington International Law Review 569, 569-570 (2017).

42 Supra 4; A. P. Kumar, *Justice Lokur's Concurring View: The Future of Appointment Reform*, *in* Appointment of Judges to the Supreme Court of India, *Supra* 4, at 146-154.

43 Supra 1, at¶ 316, 317, 318.

the sole vanguard and interpreter of the constitution.[44] This betrays a cynical sense of self-importance which democratic institutions should ideally be careful about.[45]

As is the illustrious tradition of dissent in the Supreme Court judgement, the dissenting judgement of Justice Chelameswar underlines the fidelity to the constitutional scheme of checks and balances. It accords the appropriate respect to the constitutional amendment and propounds that lack of judicial primacy as per the institutional design of NJAC Act did not *'damage or destroy'* the basic structure.[46] According to Justice Khehar, the constitutional amendment has to merely affect the basic structure to be considered unconstitutional.[47] The divergence in the judicial application of basic structure doctrine by Justice Khehar and Justice Chelameswar,[48] shows the real bone of contention between the political conflict between the two institutions.[49] It is important to recognize the reasoning given by Justice Chelameswar that honestly acknowledges the flaws and opacity of the existing collegium system[50] while showing judicial respect towards the other institutions. Justice Chelameswar explains the need for clear separation of powers and checks and balances so as to ensure no institution enjoys absolute power by quoting Constituent Assembly Debates.[51] He underlines the need for reform by stating that the opaque and ad-hoc system of appointment was in fact inimical to judiciary's independence and public legitimacy.[52]

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44 Supra 7.
45 Supra 7.
46 Ibid, at ¶1178; Supra 5.
47 Ibid, at ¶ 341, 258, 1167.
48 Supra 5; Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of Basic Structure Doctrine* (2010).
49 Supra 7, at 59.
50 Supra 1, at 471, 508; Supra 5.
51 *Constitution Assembly Debates,* vol. 8, no. 3 (Lok Sabha Secretariat) 24 May 1949, 258.
52 Supra 64, at ¶533.

Justice Chelameswar also recounts the prophetic words of Thomas Babington Macaulay's to the House of Commons: "Reform, that you may preserve" to emphasize the urgency of judicial reforms.[53] He also solemnly notes that the rejection of the Executive's attempts to reform the institution has imposed greater burden on the judiciary to make the legal system more fair and efficient. Thus, he preferred to suggest improvements in the framework of the proposed NJAC so as to reach a fine balance between the interests of both the institutions.[54] Hence, the analysis shows the *crisis of trust* that is negatively affecting the executive-judiciary engagement on crucial matter of judicial reforms in general and judicial appointments in particular.[55]

3. The Way Forward: Striking a Balance between Accountability and Independence

The existing system of judicial appointments leaves much to be desired for all the stakeholders. While the duly elected Executive is denied a meaningful legal-institutional role in the appointment process, the judicial collegium's decisions regarding appointment face prolonged delays by the Executive.[56] In that context, key elements of the judicial appointments procedure need to be rethought. This includes the rather opaque functioning of the collegium, the lack of a credible evaluation criteria for candidates, and the rampant self-perpetuation and nepotism.

While an attempt was made to make the minutes of the proceedings of the collegium public, the essence of the exercise was abandoned soon thereafter.[57] This instance highlights the need to

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53 T. B. Macaulay's address on 2nd March 1831 in the House of Commons on Parliamentary Reforms; Supra 64, at ¶534, 535; Supra 5.

54 Supra 7.

55 Supra 7.

56 Supra 9.

57 A. P. Kumar, *Supreme Court stops uploading collegium resolutions on website: Move is major self-inflicted wound, smacks of institutional cowardice*, The Firstpost (22/10/2019) available at https://www.firstpost.com/india/supreme-court-stops-uploading-

prioritize comprehensive structural and institutional transformation over piecemeal reforms.

Hence, it is important to critically consider and seek guidance from certain reforms implemented in foreign jurisdictions. _The framework of judicial appointments in the United Kingdom was laid out in the Constitutional Reform Act 2005, which set up an independent Judicial Appointments Commission (JAC).[58] According the Act, appointments must be made "solely on merit" and only once the selecting body is convinced that the candidate is "of good character".[59] The JAC follows five stipulated merit criteria when choosing candidates. These include intellectual capacity (appropriate knowledge of law and expertise in the chosen area), personal qualities (including professionalism, decisiveness, ability to work constructively with others and objectivity), an ability to understand and deal fairly (to treat everyone with respect regardless of their background, and a willingness to listen patiently), communication skills (including the ability to explain and justify decisions succinctly and maintain authority when challenged), and lastly, efficiency (involving the ability to work under pressure and to produce scrupulous judgements swiftly).[60]

These criteria go a long way in ensuring that only the most deserving and meritorious candidates obtain the highest posts of the judiciary- after all, judges are the keystone of the arch of Justice.[61] The

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collegium-resolutions-on-website-move-is-major-self-inflicted-wound-smacks-of-institutional-cowardice-7536991.html, last seen on 01/01/2020.

58 Parliament of the United Kingdom, *Judicial Appointments- Constitution Committee* (2012), available at https://publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27204.htm#n6, last seen on 15/06/2020.

59 S. 63, Constitutional Reform Act 2005 (United Kingdom).

60 Judicial Appointments Commission, Government of the United Kingdom, *Amending the JAC's merit criterion: 'an ability to understand and deal fairly'*, Judicial Appointments Commission (2011), available at https://jac.judiciary.gov.uk/sites/default/files/sync/news/jac_merit_criterion_consultation_feb_11.pdf, last seen on 15/06/2020.

61 V.R. Krishna Iyer, *Justice & Beyond*, 25 (1982).

adoption of such criteria by the Indian judiciary would significantly reduce corruption in the judicial system, while also reinstating the largely alienated public confidence in the system. In fact, two criteria- the ability to deal fairly, and efficiency- are particularly befitting for the Indian scenario. With regards to the former, there exists an immensely diverse caste and religious background in India that allegedly seeps in prejudices obstructing the rule of law and fair dispensation of justice. In relation to the latter, it is no secret that there is a huge backlog of cases in the judicial system yet to be heard and decided upon.[62] The appointment of the most efficient candidates as judges would undoubtedly help to reduce this backlog and ensure justice to the Indian citizens- after all, justice delayed is justice denied.[63]

Furthermore, in the United States, candidates being considered for appointment to the Supreme Court are questioned by the Senate, about not only their judicial perspectives, but also about aspects of their personal life. These proceedings are televised and open for viewing by the general public.[64] In light of the recent jurisprudence about live-streaming the court proceedings and the thrust on transparency, such a level of transparency in the Collegium proceedings should be publicized. The initiative to publish the minutes of the Collegium meetings is a creditworthy step in this regard. The argument that publicizing the reasons for rejecting a candidate could "affect their reputation",[65] should be discarded as a trivial

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62 V. Doshi, *India's long wait for justice: 27m court cases trapped in legal logjam*, The Guardian (05/05/2016), available at https://www.theguardian.com/world/2016/may/05/indias-long-wait-for-justice-27-million-court-cases-trapped-in-a-legal-logjam, last seen on 15/06/2020.

63 *Justice Delayed is Justice Denied*, 1(6) Journal of the American Institute of Criminal Law and Criminology 975, 975 (1911).

64 M. Katju, *One Way to Fix the Collegium is to Televise its Proceedings*, The Wire, Nov. 5, 2015, https://thewire.in/law/one-way-to-fix-the-collegium-is-to-televise-its-proceedings.

65 B. Panda, *Not very collegial: The Supreme Court is split wide open today due to its opaque collegium system*, The Times of India (18/01/2018), available at

consideration when faced with the need for transparency and accountability- aspects to which judicial independence does not and should not extend.

3.1. The Need for Meaningful Institutional Dialogue

The "judiciary versus executive" debate has created more heat than light[66] and internal and institutional turmoil in the superior judiciary has been worrisome.[67] The case in favor of the Collegium has long been to avoid political influences from seeping into the judiciary, and thus to maintain the independence and impartial ideal of the judicial system. While it has been criticized for perpetuating judicial overreach, nepotism and appointment of corrupt judges, the issue is perhaps incorrectly attributed solely to the composition of the collegium. What is required is not necessarily a re-composition of the collegium to include external members such as in the NJAC, or even a wholly independent body altogether. If the method of appointment is regulated, then it will not matter, who appoints the judges. The solution lay in two essential steps- increasing transparency and establishing explicit criteria for appointment.

The need to remove the opaqueness in the appointment process has been suggested, but never implemented. It has been advocated as a beneficial step in furtherance of eliminating corruption, even by members of the higher judiciary, including former Chief Justice V.N. Khare.[68] Currently, there are several insinuations of

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https://blogs.timesofindia.indiatimes.com/toi-edit-page/not-very-collegial-the-supreme-court-is-split-wide-open-today-due-to-its-opaque-collegium-system, last seen on 15/06/2020.

66 V. Upadhyay, *Reclaiming the Judicial Ground*, 43(33) Economic and Political Weekly 13, 15 (2008).

67 Supra 33.

68 T. Anwar, *Collegium system not perfect, but superior to NJAC, says former CJI*, Firstpost (16/10/2015), available at https://www.firstpost.com/india/collegium-system-not-perfect-superior-njac-says-former-cji-2242812.html, last seen on 15/06/2020.

groupism, nepotism, cronyism and favoritism which have prevented worthy candidates from selection to High Court and Supreme Court benches.[69] If the appointments are made public, along with the reasons for appointing, rejecting or transferring a particular candidate, a system of accountability for the Collegium's decisions will be created, thus ensuring fair and honest appointments to the maximum.

In such a situation, it is very important for both the institutions to engage in meaningful institutional dialogue and explore the efficacy of solutions like Judicial Councils which promise the institutional check and balances in the process. [70] While the judiciary needs to acknowledge the executive as a co-producer of the Constitution[71] and not exercise judicial review without judicial restraint, the executive should consider the constructive criticisms of its proposed judicial council i.e. the NJAC.[72]

The interim order in *Nadeem Ahmad, Advocate* v. *Federation of Pakistan*[73] by the Supreme Court of Pakistan can shed light on the importance of institutional dialogue. The order reconsidered the provisions relating to judicial appointment in the crucial Constitution (Eighteenth Amendment) Act, 2010 (18th Amendment). The interim order, where the Court ordered the Parliament to amend these provisions to safeguard judicial independence, led to the Constitution (Nineteenth Amendment) Act, 2010 (19th Amendment) which incorporated considerable modular safeguards. This portrayed a unique example on how questions of basic structure can be resolved

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69 Ibid.

70 M. Rohatgi, *Checks and Balances Revisited: The Role of the Executive in Judicial Appointments*, *in* Appointment of Judges to the Supreme Court of India, Supra 4, at 84, 95.

71 Supra 7.

72 A. Datar, *Eight Fatal Flaws: The Failings of NJAC*, *in Appointment of Judges to the Supreme Court of India*, 122, 134 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018).

73 [2010] PLD 1165 (Supreme Court of Pakistan).

through an institutional dialogue that respects the reasonable interests of each other in positive spirit.[74]

Ultimately, there must be graceful recognition of people's faith in the higher judiciary. In other words, the absolute majority political executive in India should recognize the special place that its predecessors have ceded to the 'Supreme' court.[75] The Court should prefer *methods of prodding* to communicate the institution of its excesses and shortfall in duty over absolute invalidation or judicial execution so as to evolve harmonious dynamics of communication between the organs of polity.[76] Supreme Court's own suggestions of upholding constitutional statesmanship in case of institutional discord can be very insightful in the process of judicial reform to honour the principles of independence, transparency and accountability.[77]

4. Conclusion

The need for institutional and administrative reforms in the Indian judiciary cannot be disputed. The higher judiciary finds itself at the crossroads wherein on one hand it is applauded for its ability to cause the arc of moral universe to tend towards justice,[78] but on the other hand it is severely criticized for its ad-hoc, inconsistent and

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74 Ibid at ¶8, 10, 13; M. D. Mahmood, *The Judiciary and Politics in Pakistan: A Study* (1992); J. Khawaja, *Foreword*, in *The Politics and Jurisprudence of the Chaudhry Court 2005–2013* (M.H. Cheema & I. S. Gilani eds., 2015); S. Khosa, *Judicial Appointments in Pakistan*, 246, 254 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018).

75 S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, (2nd edn., 2003).

76 State of UP and Ors v. Jeet S Bisht and Anr, (2007) 6 SCC 586.

77 G. Bhatia, *"Working A Democratic Constitution": The Supreme Court's Judgment In NCT Of Delhi v Union Of India*, Indian Constitutional Law and Philosophy, available at https://indconlawphil.wordpress.com/2018/07/04/working-a-democratic-constitution-the-supreme-courts-judgment-in-nct-of-delhi-v-union-of-india/ last seen on 15/06/2020; supra 61.

78 Navtej Singh Johar & Ors v. Union of India, (2018) 10 SCC 1 ¶20; G. Bhatia, *The narrow and the transformative*, The Hindu (31/07/2018), available at https://www.thehindu.com/opinion/lead/the-narrow-and-the-transformative/article24555861.ece, last seen on 31/07/2019.

opaque manner of functioning.[79] The direction that the institution takes will undeniably depend on what the institution considers itself to be. The recent imbroglio over judicial appointments from the NJAC case to the delay in judicially recommended appointments to the controversy over breach of seniority can also be resolved once the judiciary takes a stock of the Collegium system of appointments. This serious and hard task of engagement with the other organs of government and the public at large was evaded in the crucial NJAC case.

However, the judicial dissent by stalwarts like Justice Chelameshwar shows there is scope for serious deliberative discourse on these fundamental challenges. It would be cynical to conclude that 'judicial accountability' and 'judicial independence' are antithetical concepts. A fine balance should be aspired for where the judiciary is devoid of political influences, while maintaining utmost fidelity to its constitutional duty to enforce the fundamental right of the citizens and safeguard the forms and values of constitutional democracy.

Several reforms have been proposed to ensure that this balance is achieved, and they need to be seriously considered. The Campaign for Judicial Accountability and Reforms has proposed a more transparent mechanism for shortlisting of candidates for appointment and promotion. In addition to these, recommendations of Sr. Adv. Gopal Subramanian, Sr. Adv. Arvind Datar and ASG Pinky Anand can be good starting points in a serious institutional dialogue for the new memorandum of procedure.[80] These include a more participative and consultative selection process aided by a competent secretariat which

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[79] M. Moitra, *The Supreme Court of India is a Court of Rights, Not of Contempt,* The Wire (29/04/2020), available at https://thewire.in/law/the-supreme-court-of-india-is-a-court-of-rights-not-of-contempt, last seen on 02/05/2020.

[80] Read *G. Subramanium's 7 neo-collegium suggestions*, Legally India, available at https://www.legallyindia.com/supreme-court/read-gopal-subramanium-s-7-neo-collegium-suggestions-read-submission-pinky-anand-arvind-datar-20151105-6842, last seen on 15/06/2020.

can record and verify the credentials of all the candidates. Adherence by the courts and especially the Collegium to RTI and less ambiguous definitions of terms guiding contempt of court are also important to increase transparency.

Additionally, a serious attempt should be made to formulate objective criteria in order to ensure that only scrupulous, decisive and efficient judges are awarded high posts in the judiciary. The judicial appointment process should be open to public scrutiny. The robust and voluntary disclosure of information about the candidates, their credentials and the proceedings of the selection committees would also go a long way in portraying to the public, that the true essence of justice is being honoured with complete transparency. Ultimately, the autonomous Bar Associations and Bar Councils along with a vibrant and assertive legal academia, media and larger civil society must play an active role in the ensuring the transparency and integrity of the selection process. The opportunity to include 'eminent persons' in the selection process that the NJAC partially provided should not be forgotten and appropriate provisions for effective and meaningful civil society participation in this critical process should be seriously considered.[81] This selection procedure should provide for appropriate mechanism for affirmative action for the under-represented communities and ensure that the appointments reflect the constitutional vision of diversity and inclusion.[82] The debate must move beyond the questions of judicial primacy to adopting a truly democratic and meritorious process for judicial appointments.

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81 M. Divan, *Opening up Appointments: Civil Society Participation in the NJAC*, 104-108 in *Appointment of Judges to the Supreme Court of India* (A. Sengupta and R. Sharma eds., 2018).

82 Ibid.

TEXT MISREAD, BASIC STRUCTURE MISAPPLIED: THE 100% RESERVATIONS VERDICT

Shrutanjaya Bhardwaj[*]

Abstract

In Chebrolu Leela Prasad Rao v. *State of Andhra Pradesh (the 100% reservations judgment), the Supreme Court interpreted the non-obstante clause in Schedule V, Paragraph 5(1) of the Constitution erroneously. It read the phrase "notwithstanding anything in this Constitution" as "*notwithstanding anything in Article 245 and subject to Part III of the Constitution*". It did so, I demonstrate, by breaching three well-established rules of interpretation: first, that unambiguous text should be interpreted literally; second, that no words in the Constitution are otiose; and third, that the same phrase when used in different places in the Constitution carries the same meaning in all those places.*

The Court further held that the non-obstante clause must be interpreted consistent with the basic structure of the Constitution, and since Article 14 is part of the basic structure, the non-obstante clause cannot override Article 14. I argue that this reasoning places the cart before the horse. Since the basic structure is a reflection of the original Constitution, it is implausible that an original provision could be inconsistent with the basic structure. Further, because the basic structure doctrine has been held to apply prospectively from 1973, it cannot apply to original provisions of the Constitution enacted in 1950.

Keywords: Non-obstante, Notwithstanding, Basic Structure, interpretation, Schedule V.

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Introduction

In *Chebrolu Leela Prasad Rao* v. *State of Andhra Pradesh* ("*Chebrolu*")[1] a constitution bench of the Supreme Court invalidated a notification issued by the Governor of Andhra Pradesh providing for 100% reservations in selections to the post of teachers in the scheduled areas of Andhra Pradesh. The notification was struck down on multiple grounds and the Court laid down several legal and constitutional propositions in the process. This comment focuses on and critiques only one of those propositions – not laid down in express terms but very clearly implied nonetheless – i.e. that the non-obstante clause in Schedule V, Paragraph 5(1) of the Constitution, which reads "notwithstanding anything in this Constitution", in fact means "notwithstanding Article 245 and subject to Part III of this Constitution". The Court used tools of textual interpretation as well as the idea of "basic structure" to arrive at this conclusion. I argue, through this comment, that the Court made a mistake on both counts.

Facts and Judgment

Schedule V of the Constitution deals with the administration and control of Scheduled Areas and Scheduled Tribes.[2] Paragraph 6 of the Schedule confers power on the President to declare areas as Scheduled Areas.[3] Paragraph 5 of the Schedule, which was at the heart of the dispute in *Chebrolu*, confers wide-ranging powers on the Governor. Specifically, Paragraph 5(1) provides as follows:

> *Notwithstanding anything in this Constitution*, the Governor may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State

1 2020 SCC Online SC 383.
2 Schedule V, the Constitution of India.
3 Ibid, at ¶6.

> subject to *such exceptions and modifications as he may specify* in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.[4] (emphasis supplied)

Purportedly in exercise of powers under Paragraph 5(1), the Governor of Andhra Pradesh issued G.O. Ms. No. 3 on 10 January 2000 providing that certain legislations and rules made under them "shall apply to the appointment of posts of teachers in schools situated, in the Scheduled Areas in the State subject to the modification that all the posts of teachers in the Schools… shall be filled in by the local Scheduled Tribe candidates only".[5] Of these candidates, 33½% shall be women.[6] Thus, 100% of the posts of teachers in the areas were reserved for members of Scheduled Tribes.

G.O. Ms. No. 3 was challenged in the High Court of Andhra Pradesh. The High Court rejected the challenge, after which the appellants approached the Supreme Court in appeal. *Inter alia*, they took the ground that 100% reservations constitute a denial of the guarantee of equality enshrined in Articles 14 and 16.[7] In response, it was submitted that the non-obstante clause in Paragraph 5(1) overrides Part III of the Constitution, thereby pre-empting all arguments from Articles 14 and 16.[8] The Supreme Court framed seven issues and sub-issues in total and rendered its decision on all of them. Of those, the issue and sub-issue relevant to this comment are extracted below:

> *1. What is the scope of Paragraph 5(1), Schedule V to the Constitution of India?*
>
> *a.* …
>
> *b.* …

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4 Supra 2, at ¶ 5(1).
5 Supra 1, at ¶8.
6 Supra 1, at ¶8.
7 Supra 1, at ¶15.
8 Supra 1, at ¶31.

c. Can the exercise of the power conferred therein override fundamental rights guaranteed under Part III?

d. …

The Court answered sub-issue (c) in the negative, holding that the Governor's power under Schedule V, Paragraph 5(1) "is subject to some restrictions"[9] and "cannot override fundamental rights guaranteed under Part III of the Constitution".[10] I critique this finding below.[11]

Analysis

In reaching the conclusion that the non-obstante clause in Schedule V, Paragraph 5(1) does not override Part III, the Court adopted a two-pronged reasoning. The first aspect of the Court's reasoning is textual interpretation of the non-obstante clause. The second aspect is the invocation of the idea of "basic structure" to whittle down the wide textual scope of the clause. I suggest that the Court's reasoning is erroneous on both counts.

1.1. Textual Constitutional Interpretation

Observing that a non-obstante clause must be interpreted "in the context and purpose for which it has been carved out",[12] the Court holds that the clause "Notwithstanding anything in this Constitution" in Schedule V, Paragraph 5(1) only means that the Governor can

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9 Supra 1, at ¶154.

10 Supra 1, at ¶154.

11 It may be noted as a preliminary point that it was unnecessary for the Court to decide this issue at all. This is in view of the Court's finding on issue 1(a), where the Court found that the Governor acted *ultra vires* Schedule V and declared the notification as invalid on that ground alone.

See Supra 1, at ¶51.

The conflict between the non-obstante clause in Schedule V Paragraph 5(1) and Part III was hence a moot issue and should not have been decided.

See Govt. of National Capital Territory v. Inder Pal Singh Chadha, (2002) 9 SCC 461, at ¶6: "*Constitutional issues should not be decided unless that is necessary to do for the purpose of giving relief in a given case*."

12 Supra 1, at ¶75.

exercise his or her powers – which are legislative in nature – in spite of Article 245 of the Constitution which confers legislative powers only on Parliament and State Legislatures.[13] In other words, the Court reads the non-obstante clause as "Notwithstanding anything in Article 245". As a sequitur, it holds that the Governor cannot exercise his or her powers contrary to Part III of the Constitution. This conclusion is erroneous for three reasons.

First, it is a well-settled rule of interpretation that when the language used in a provision is clear and unambiguous, full effect must be given to it.[14] Specifically, it has been held that the Court cannot use "*a priori* reasoning as to the probable intention of the legislature in order to change the otherwise clear meaning of constitutional text"[15]. This principle has been applied to interpret the Constitution's non-obstante clauses as well.[16] In *Madhav Rao Jivaji Rao Scindia* v. *Union of India* ("*Privy Purses case*")[17], the Court cited with approval the following proposition that was laid down in an earlier judgment[18]:

> [T]he non obstante clause was to be understood as operating to set aside as no longer valid *anything contained in relevant existing laws which were inconsistent with the new enactment.*[19]
>
> (emphasis supplied)

The words used in the non-obstante clause of Schedule V, Paragraph 5(1) – "anything in this Constitution" – are crystal clear in

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13 Supra 1, at ¶74.

14 See Padma Sundara Rao v. State of Tamil Nadu, (2002) 3 SCC 533, at ¶12-14; Union of India v. Hansoli Devi, (2002) 7 SCC 273, at ¶9; Nathi Devi v. Radha Devi Gupta, (2005) 2 SCC 271, at ¶13.

15 Sri Venkataramana Devaru v. State of Mysore, 1958 SCR 895, at ¶25.

16 Madhav Rao Jivaji Rao Scindia v. Union of India, (1971) 1 SCC 85, at ¶374 (Shah, J. for himself and for six others).

17 Supra 16.

18 Aswani Kumar Ghosh v. Arabind Bose, 1953 SCR 1.

19 Supra 16.

excluding *all* provisions of the Constitution. Yet, the Court holds that the Governor's powers are "not meant to prevail over the Constitution"[20] and must be exercised "subject to Part III and other provisions of the Constitution".[21] This reading is not only different from but also diametrically opposite to the plain textual meaning of the non-obstante clause.[22] In the absence of any ambiguity in the text, I submit that there was no occasion for the Court to hold that the clause does not mean what it says.

Second, an equally well-settled rule is the rule against redundancy, which says that no word occurring in the Constitution can be held as otiose.[23] The doctrine *maxim ut res magis valeat quam pereat* implies that every statute must be interpreted so as to give full effect to it.[24] However, the Court's reading of the non-obstante clause in Schedule V, Paragraph 5(1) renders it otiose. Article 245(1), which confers legislative powers on Parliament and State Legislatures, itself opens with the words "Subject to the provisions of the Constitution"[25]. Therefore, even in the absence of the non-obstante clause in Schedule V, Paragraph 5(1), the Governor's powers under that provision would have prevailed over Article 245(1).[26] This makes it clear that the width of the non-obstante clause is larger than what the Court erroneously suggests.

Interestingly, the Court does recognize the rule against redundancy but applies it wrongly. It notes that Article 13(2) prohibits

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20 Supra 1, at ¶78.

21 Supra 1, at ¶78.

22 On the overriding effect of a non-obstante clause contained in a constitutional provision, see K.M. Nanavati v. State of Bombay, (1961) 1 SCR 497, at ¶20.

23 See Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma, (2002) 2 SCC 244, at ¶13.

24 See Girnar Traders (3) v. State of Maharashtra, (2011) 3 SCC 1, at ¶181.

25 Art. 245(1), the Constitution of India.

26 Samatha v. State of Andhra Pradesh, (1997) 8 SCC 191, at ¶85.

the State from making any "law" that is contrary to Part III[27], and if the non-obstante clause in Schedule V, Paragraph 5(1) is read as excluding Part III, Article 13(2) will be rendered redundant.[28] It is tough to understand the Court's logic here. Nobody contended that the non-obstante clause has the effect of repealing Article 13(2) completely. Since Article 13(2) applies to *any* law made by *any* State authority, not just the ones made by the Governor under Schedule V, Paragraph 5(1)[29], it would continue to strike at the parliamentary or state legislation that infringes upon fundamental rights, irrespective of how the non-obstante clause is interpreted. Saying that Article 13(2) is *excluded* for the limited purposes of Schedule V, Paragraph 5(1) is different from saying that it is *redundant*. The Court, I argue, overlooks this obvious distinction.

Third, another well-settled rule of interpretation is that a word or phrase that is used at multiple places in the same enactment carries the same meaning at each of those places unless the context compels a different interpretation.[30] This rule must also govern the phrase "Notwithstanding anything in this Constitution". A quick search through the Constitution reveals that this phrase is used in thirty-seven different provisions.[31] Given that the Constitution is an internally consistent document – a "logical whole"[32] – it would have been prudent on part of the Court to examine these thirty-seven provisions and how they have been interpreted in the past. That examination

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27 Art. 13(2), the Constitution of India.

28 Supra 1, at ¶77.

29 See Arts. 12, 13(2) and 13(3)(a), the Constitution of India.

30 See Bhogilal Chunilal Pandya v. State of Bombay, 1959 Supp. (1) SCR 310, at ¶5; Raghubans Narain Singh v. Uttar Pradesh Government, (1967) 1 SCR 489, at ¶7; Suresh Chand v. Gulam Chisti, (1990) 1 SCC 593, at ¶17; Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court, (1990) 3 SCC 682, at ¶67.

31 See generally the Constitution of India.

32 Kihoto Hollohan v. Zachillhu, 1992 Supp (2) SCC 651, at ¶27.

would have revealed that the other non-obstante clauses have been held to be "all embracing"[33]. For instance, the clause in Article 363(1), which bars judicial interference in disputes arising from treaties or arrangements between the Indian State and Rulers of former princely states,[34] has been interpreted as overriding *inter alia* the critical Articles 32[35] and 226[36]. Likewise, the non-obstante clause of Article 329, which bars judicial review of any law dealing with delimitation of constituencies or the allotment of seats to constituencies and challenges to elections except through election petitions prescribed under an appropriate legislation,[37] has been interpreted to exclude Article 226.[38] A similar exclusion has been implied from Articles 262[39], 243-ZG[40] and 243-O[41]. Even Article 13(2) has been held to be excluded by the non-obstante clause contained in the now-repealed Article 31(4).[42] It is difficult to spot anything different in the context

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33 State of Seraikella v. Union of India, 1951 SCR 474, at ¶16 (Kania, C.J. for himself and Vivian Bose, J.). See also R. C. Poudyal v. Union of India, 1994 Supp (1) SCC 324, at ¶176 (M.N. Venkatachaliah, J. for himself and two others, holding that if such a non-obstante clause occurs in a constitutional provision that was inserted by way of amendment, it would override all other provisions of the Constitution except to the extent that it encroaches upon the basic structure.)

34 Art. 363(1), the Constitution of India.

35 Supra 16, at ¶129 (Shah, J. for himself and six others).

36 Supra 16, at ¶129 (Shah, J. for himself and six others).

37 Art. 329, the Constitution of India.

38 N.P. Ponnuswami v. Returning Officer, Namakkal Constituency, 1952 SCR 218, at ¶14; Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405, at ¶21 (Krishna Iyer, J. for himself and two others), at ¶126 (Goswami, J. for himself and Shinghal, J.); Election Commission of India v. Ashok Kumar, (2000) 8 SCC 216, at ¶30.

39 Atma Linga Reddy v. Union of India, (2008) 7 SCC 788, at ¶34, 38; State of Karnataka v. State of Tamil Nadu, (2017) 3 SCC 362, at ¶48.

40 Anugrah Narain Singh v. State of Uttar Pradesh, (1996) 6 SCC 303, at ¶34.

41 State of Uttar Pradesh v. Pradhan Sangh Kshettra Samiti, 1995 Supp (2) SCC 305, at ¶44-45.

42 State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga, 1952 SCR 889, at ¶12-13 (Patanjali Sastri, C.J. for himself and Aiyar, J.); ¶47, 49-50 (Mahajan, J. for himself); ¶97-98, 105, 110 (Mukherjea, J. for himself).

of Schedule V that would warrant the drastically opposite interpretation placed upon the clause by the Court in *Chebrolu*.

Besides, a holistic look at the Constitution would also reveal that not all non-obstante clauses are worded so expansively as to exclude all provisions of the Constitution. Where the Framers wanted to exclude only a select few provisions, they expressly mentioned those provisions in the non-obstante clause. For instance[43], Article 6 applies "notwithstanding anything in Article 5",[44] Article 226 applies "notwithstanding anything in Article 32",[45] Article 253 applies "notwithstanding anything in the foregoing provisions of this Chapter"[46], and Article 276 applies "notwithstanding anything in Article 246"[47]. Of particular relevance is Article 363(1) which opens with the phrase "notwithstanding anything in this Constitution but subject to the provisions of Article 143"[48] – a great example of the fact that the word "anything" means what it says, and any intended exclusions would have to be separately provided. Therefore, the Court erred in not examining non-obstante clauses occurring elsewhere in the Constitution.

In summation, the Court held that the non-obstante clause should be read as "Notwithstanding anything in Article 245 and subject to Part III of the Constitution", notwithstanding its clear text. I have argued above that the Court's conclusion is contradicted by well-established principles of constitutional interpretation. In an apparent attempt to redeem its hitherto shoddy reasoning, then, the Court turns to the principle of basic structure.

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43 See also Arts. 92(2), 120, 133 and 331, the Constitution of India.
44 Art. 6, the Constitution of India.
45 Art. 226(1), the Constitution of India.
46 Art. 253, the Constitution of India.
47 Art. 276, the Constitution of India.
48 Art. 363(1), the Constitution of India.

1.2. The Basic Structure

It was contended before the Court, rightly, that original provisions of the Constitution such as Schedule V, Paragraph 5(1) cannot be tested on the anvil of the basic structure. The doctrine of basic structure was evolved in the specific context of constitutional amendments.[49] Further, it has a temporal cut-off – as held in *Waman Rao* v. *Union of India*[50] and later affirmed in *I.R. Coelho* v. *State of Tamil Nadu* ("*I.R. Coelho*"),[51], the doctrine cannot be applied even to constitutional amendments that were made before April 24, 1973. It would follow that the question of applying the doctrine to original provisions that existed in the Constitution as on January 26, 1950 does not arise.

The judgment records the Court's agreement with this argument. According to the Court, the basic structure doctrine was "not at all germane"[52] to the case as the dispute was not about the validity of any constitutional amendment but pertained only to validity of a notification issued by the Governor. Then, in a drastic U-turn, the Court holds:

> Every action of the legislature, whether it is Parliament or State, has to conform with the rights guaranteed in Part III of the Constitution. *The original scheme of the Constitution itself so provides*…. The Constitution has not conferred any arbitrary power on any constitutional functionary…. The provision of the Fifth Schedule beginning with the words "notwithstanding anything in this Constitution" cannot be construed as taking away the provision *outside the limitations on the amending power and has to be harmoniously construed*

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49 Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625, at ¶12 (Chandrachud, C.J. for himself and three others).

50 Waman Rao v. Union of India, (1981) 2 SCC 362, at ¶51.

51 I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, at ¶151.

52 Supra 1, at ¶61.

> *consistent with the foundational principles and the basic features of the Constitution*.[53]
>
> (emphasis supplied)

This is a blatant contradiction in terms. The Court applied the doctrine of basic structure to restrictively interpret – indeed, to read down – an original provision of the Constitution merely nine paragraphs after holding that the doctrine was irrelevant to the case. This is problematic not only because it violates the case law cited before (and by) the Court, but also because it turns the concept of basic structure on its head.

The "basic structure" of the Constitution has always been understood as implying a set of principles that are embodied in the Constitution as a whole.[54] After all, the doctrine of basic structure is a doctrine of constitutional identity[55]; it demands that the original shape of the Constitution not be destroyed.[56] In *M. Nagaraj* v. *Union of India*[57], the Court described the basic structure as a set of "systematic and structural principles underlying and connecting various provisions of the Constitution" which "give coherence" to the document and make it "an organic whole".[58] This idea of *coherence* is crucial. There cannot be inconsistencies within the Constitution, and certainly not between an express provision of the Constitution on the one hand and the values that we see as the "basic structure" of the document on the other hand. For if there are inconsistencies, on what basis can the values be termed as *basic* to the *entire* document? Therefore, I submit, the only way to find the document's basic features is to first look at its text, and to do so *holistically*. In the words of Beg, J.,

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53 Supra 1, at ¶61-62, 70.

54 See Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1, at ¶691 (Chandrachud, J. for himself); State of Karnataka v. Union of India, (1977) 4 SCC 608, at ¶120 (Beg, J. for himself); M. Nagaraj v. Union of India, (2006) 8 SCC 212, at ¶23-25.

55 M. Nagaraj v. Union of India, (2006) 8 SCC 212, at ¶28.

56 Ibid.

57 Supra 56.

58 Supra 56, at ¶24.

> [T]he doctrine of "a basic structure" was nothing more than a set of obvious inferences relating to the intents of the Constitution-makers arrived at by applying the established canons of construction rather broadly, as they should be so far as an organic constitutional document, meant to govern the fate of a nation, is concerned. But, in every case where reliance is placed upon it, …what is put forward as part of "a basic structure" must be justified by references to the express provisions of the Constitution. That structure does not exist *in vacuo*. *Inferences from it must be shewn to be embedded in and to flow logically and naturally from the bases of that structure.*[59]
> (emphasis supplied)

The Court's mistake in *Chebrolu* lies in its non-holistic approach to viewing the basic structure. The Court places the cart before the horse by *first* identifying the principles of Part III as part of the basic structure and *then* restrictively interpreting the all-encompassing non-obstante clause in Schedule V, Paragraph 5(1) as being subject to the those "basic features".[60] Rather than deriving the basic structure from the text, the Court applies its notions of basic structure to the text. If the Court had adopted the right process in determining the basic structure, it would have had to conclude that an *absolute* principle of non-arbitrariness – admitting of no exceptions whatsoever – is not part of the basic structure.

As an aside, it may also be worthwhile to briefly examine this issue *de hors* precedent. There is a larger conceptual issue regarding the basic structure at play here: is it correct to say that the basic structure *emanates from* the Constitution and is thus defined and limited by constitutional text? Or is the basic structure more accurately imagined

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[59] State of Karnataka v. Union of India, (1977) 4 SCC 608, at ¶120 (Beg, J. for himself).

[60] Supra 1, at ¶62, 70.

as a set of objective principles *predating* the Constitution, such that even constitutional text is subservient to those principles? If the latter view were adopted, the non-obstante clause of Schedule V, Paragraph 5(1) would be seen as subservient to the larger principle of equality which predates the Constitution, and hence the Court's decision in *Chebrolu* would not seem so bizarre after all.[61] The position taken by the Bavarian Constitutional Court (Germany) on this point is apposite.

> There are constitutional principles that are so fundamental and so much an expression of *a law that has precedence even over the constitution* that they also bind the framers of the constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles.[62]
>
> (emphasis supplied)

The reference to a higher law that "bind[s] the framers" makes it clear that the Bavarian Court views its constitution's fundamental principles as *predating* and *superior* to the document. While there may be nothing inherently wrong about viewing the Constitution as inferior to some meta values[63], problems begin to surface when one imagines a related concern: *who* decides that a constitutional provision is void? The likely candidate for this job – the judiciary – owes its very existence to the Constitution and, to use Nani Palkhivala's metaphor, is a

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61 The author grateful to the anonymous peer reviewer for suggesting this nuance.

62 Cited in The Southwest State Case 1 BVerfGE 14 (1951), quoted in Gautam Bhatia, *The Basic Structure Doctrine: Notes from Germany*, Indian Constitutional Law and Philosophy Blog, available at https://indconlawphil.wordpress.com/2013/09/24/the-basic-structure-doctrine-notes-from-germany/., last seen on 06.06.2020.

63 A fuller discussion on this issue would address other aspects such as the anti-democratic implications of unelected judges striking down constitutional provisions as invalid, and why that is worse than the present form of the Indian basic structure doctrine. That discussion is, however, beyond the scope of this paper.

"creature of the Constitution" and cannot act against it.[64] This is merely an extension of the common law doctrine of *ultra vires*- unless the Constitution empowers a court to declare parts of the document as invalid, the court cannot undertake such a project.[65] Neither is there any other entity (except of course the people) the existence of which does not flow from the Constitution. All constitutional entities are hence bound by the terms of the Constitution, and none of them wields the power to invalidate parts of constitutional text (even if it is assumed that some meta principles are superior to the Constitution). For this reason, the Bavarian Court's conception of fundamental constitutional features must be rejected as unimplementable.

Let us now return to *Chebrolu*. As discussed above, the Court restricted the scope of the non-obstante clause in Schedule V, Paragraph 5(1) so as to harmonize the clause with the value of non-arbitrariness. The apparent assumption underlying the Court's thought process is that a value that is part of the basic structure (such as non-arbitrariness) can never be excluded by other provisions of the Constitution, not even for limited purposes or in limited spheres. But this assumption flies in the face of the Court's own judgment in *I.R. Coelho*[66] where it acknowledged that the principle of equality can be excluded by the Constitution for limited purposes as was done by the Ninth Schedule[67], and at the same time held that the mere *excludability* of Article 14 through "limited exceptions… made for limited

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64 See Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, at ¶390. See also ¶1604 (Mathew, J.): "*Apart from its legal validity derived from the Indian Independence Act, its norms have become efficacious and a Court which is a creature of the Constitution will not entertain a plea of its invalidity*."

65 For an example of the application of the doctrine of *ultra vires* in Indian constitutional law, see Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788, at ¶40.

66 I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1.

67 Ibid, at ¶143.

purposes" would not "prevent it from being part of the basic structure".[68]

The Court's incorrect attitude towards the basic structure is further betrayed by the reliance it places on *R.C. Poudyal* v. *Union of India* ("*R.C. Poudyal*").[69] That case concerned a non-obstante clause which was identical to the one in Schedule V, Paragraph 5(1) with the exception that it appeared in Article 371-F which was inserted by a constitutional amendment in 1975.[70] Readers will immediately note that this provision falls within the category of provisions that *can* be adjudged against the basic structure, for it is a constitutional amendment inserted after 24 April 1973.[71] It is not surprising, therefore, that the Court in *R.C. Poudyal* held that the non-obstante clause in Article 371-F would have to be "construed harmoniously consistent with the foundational principles and basic features of the Constitution".[72] It went on to conclude that the clause would exclude all provisions of the Constitution except to the extent that the exclusion impinged on the basic structure.[73] Therefore, *R.C. Poudyal* did not offer any support to the Court in *Chebrolu* and was wrongly relied upon to reach an erroneous finding.

For these reasons, the Court's conclusion that the non-obstante clause in Schedule V, Paragraph 5(1) does not exclude Part III is manifestly wrong. It is a product of internal contradiction within the judgment, is contrary to prior case law on basic structure, and turns the concept of basic structure on its head.

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68 Supra 67, at ¶130.

69 Supra 1, at ¶71.

70 R. C. Poudyal v. Union of India, 1994 Supp (1) SCC 324.

71 Waman Rao v. Union of India, (1981) 2 SCC 362, at ¶51; I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, at ¶151.

72 Supra 70, at ¶102.

73 Supra 70, at ¶176.

Conclusion

The Court decided issue 1(c) wrongly. It first overlooked well-established principles of textual constitutional interpretation and effectively converted a non-obstante clause into its exact opposite – a "subject to" clause. It then misapplied the doctrine of basic structure to read down an original provision of the Constitution. It is hoped that the Court will soon have the chance to correct this error.

JAMMU & KASHMIR INTERNET RESTRICTIONS CASES: A MISSED OPPORTUNITY TO REDEFINE FUNDAMENTAL RIGHTS IN THE DIGITAL AGE

Devdutta Mukhopadhyay[*] *& Apar Gupta*[♦]

Abstract

In Anuradha Bhasin v. Union of India, the Supreme Court was called upon to review the constitutionality of the communication shutdown imposed in Jammu & Kashmir in August 2019. The Court's decision endorsed human rights principles of necessity and proportionality and recognized a derivative fundamental right to internet access. Yet, this principled adjudication failed to provide any immediate relief to the 12.5 million people of Jammu & Kashmir reeling under the longest internet shutdown imposed in any democracy. Our analysis considers why and how this occurred and how the absence of relief necessitated further litigation. Subsequently in Foundation for Media Professionals v. U.T. of Jammu & Kashmir, the Court once again declined to provide relief while denial of 4G mobile internet continued in Jammu & Kashmir during the COVID-19 pandemic. We first examine how the Court avoided any form of judicial review despite endorsing the rigorous and evidence-based proportionality standard in both judgements. We situate both judgements within a line of cases where the Court has given primacy to the 'national security' justification offered by the State. When national security

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grounds are invoked by the State, the Court adopts at least a facial, procedural review which is absent in these cases. This is important because the Court's recognition of a derivative fundamental right to internet access is yet to be actualized through the grant of relief. We then focus on negative and positive conceptions of a derivative fundamental right to internet access to criticize the Court's non-enforcement of the former and its cursory dismissal of the latter. Finally, we conclude that the Court's directions in Anuradha Bhasin and Foundation for Media Professionals have failed to act as a meaningful check on the executive branch but provide precedential value for future litigation.

Keywords: Jammu & Kashmir, Internet Shutdown, Freedom of Speech & Expression, Right to Internet Access, National Security.

Background and Timeline of the Cases

India has the highest number of internet shutdowns in the world.[1] This ranking, which even surpasses totalitarian regimes, has come at incredible cost. In quantifiable terms, network disruptions have cost the Indian economy over $1.3 billion in 2019.[2] While internet

1 *Targeted, Cut Off and Left in the Dark: The #KeepItOn report on internet shutdowns in 2019*, Access Now, available at https://www.accessnow.org/cms/assets/uploads/2020/02/KeepItOn-2019-report-1.pdf , last seen on 30/06/2020. See also Facebook Transparency Report, Facebook, available at https://transparency.facebook.com/internet-disruptions , last seen on 30/06/2020.

2 S. Woodhams and S. Migliano, *The Global Cost of Internet Shutdowns in 2019*, Top10VPN, available at https://www.top10vpn.com/cost-of-internet-shutdowns/, last seen on 30/06/2020. See also R. Kathuria, M. Kedia, G. Varma, K. Bagchi and R. Sekhani, *The Anatomy of an Internet Blackout: Measuring the Economic Impact of Internet Shutdowns in India*, Indian Council for Research on International Economic Relations, available at https://icrier.org/pdf/Anatomy_of_an_Internet_Blackout.pdf , last seen on 30/06/2020; D.M. West, *Internet shutdowns cost countries $2.4 billion last year*, Brookings Institution, available at https://www.brookings.edu/wp-content/uploads/2016/10/intenet-shutdowns-v-3.pdf , last seen on 30/06/2020.

shutdowns are a pan-India problem impacting diverse regions, the region of Jammu & Kashmir has been the worst affected.[3] This geo-politically sensitive region has witnessed the longest internet shutdown imposed by any democratic government[4] with ongoing restrictions on internet access crossing 360 days.[5]

A complete communication shutdown was first imposed in Jammu & Kashmir on 5 August 2019 and it continues till date with restrictions on 4G mobile internet access.[6] The communication shutdown was imposed immediately before abrogation of Article 370 of the Constitution of India which granted a special status to the erstwhile State. In the Kashmir region, landlines, mobile calling services, SMS services, mobile internet and fixed line internet were all suspended. In Jammu and Ladakh regions, similar restrictions were imposed but landline services remained operational.[7] The

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3 Jammu & Kashmir has experienced over 200 internet shutdowns since 2012. In comparison, Rajasthan which has the second highest number of internet shutdowns in India has experienced 68 internet shutdowns during the same period. *Internet Shutdowns*, Internet Shutdowns, available at https://internetshutdowns.in/, last seen on 30/06/2020.

4 N. Masih, S. Irfan and J. Slater, *India's Internet shutdown in Kashmir is the longest ever in a democracy,* The Washington Post (16/12/2020), available at https://www.washingtonpost.com/world/asia_pacific/indias-internet-shutdown-in-kashmir-is-now-the-longest-ever-in-a-democracy/2019/12/15/bb0693ea-1dfc-11ea-977a-15a6710ed6da_story.html , last seen on 30/06/2020.

5 As on 30/07/2020.

6 The most recent Order No. (Home) 89 TSTS of 2020 was issued on 29/07/2020 and it directed slowdown of mobile internet services till 19/08/2020. Order No. Home-89 (TSTS) of 2020 dated 29/07/2020, Home Department, Government of Jammu & Kashmir, available at http://jkhome.nic.in/89(TSTS)of2020.pdf, last seen on 30/07/2020.

7 The region wise breakdown is available in an affidavit dated 30/09/2019 filed by the Government of Jammu & Kashmir in *Anuradha Bhasin.* See *Recap Part II: Kashmir Communication Shutdown and Movement Restrictions Cases,* Internet Freedom Foundation, available at https://internetfreedom.in/recap-part-ii-kashmir-communication-shutdown-and-movement-restrictions-cases/ , last seen on 30/06/2020.

communication shutdown was accompanied by orders issued under Section 144 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") which imposed severe restrictions on the movement of the general public.

The communication shutdown coupled with movement restrictions made it effectively impossible for the people of Jammu & Kashmir to exercise their right to freedom of speech and expression under Article 19(1)(a) and the right to carry on any trade, occupation or business under Article 19(1)(g). In particular, the communication shutdown and movement restrictions severely impaired the functioning of the press at a time of significant constitutional and political upheaval. Journalists were unable to contact their sources or editors and were also prohibited from moving around freely to report.

In light of the impact on press freedom, a writ petition was filed before the Supreme Court of India under Article 32 of the Constitution by Anuradha Bhasin, Executive Editor of Kashmir Times to challenge the communication shutdown on 10 August 2019.[8] In her petition, Ms. Bhasin sought restoration of all communication services including landline, mobile and internet services and quashing of any order under which the communication shutdown was imposed for being violative of Articles 14, 19 and 21 of the Constitution of India. Along with Ms. Bhasin's lead petition, another petition filed by Ghulam Nabi Azad and a batch of interventions were substantively argued before the Supreme Court for nine days in November 2019. At the time of filing of these petitions and even during the course of the hearings before the Supreme Court, the petitioners were not provided

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[8] Two journalistic bodies, the Foundation for Media Professionals and the Indian Journalists Union also intervened in Anuradha Bhasin's petition, W.P. (Civil) No. 1031 of 2019 to support press freedom in Jammu & Kashmir. Another separate writ petition, W.P. (Civil) No. 1164 of 2019 was filed by Former Chief Minister of Jammu & Kashmir, Ghulam Nabi Azad which highlighted the impact of the communication shutdown and movement restrictions on the local economy. This petition was tagged with Anuradha Bhasin's lead petition.

access to all the orders under which these restrictions were imposed. Specific applications were filed seeking production of orders but despite this, the government only placed eight sample orders on record.[9]

Almost 160 days after the communication shutdown was imposed, the Court pronounced its judgement in the case on 10 January 2020.[10] While reports from mainstream press hailed the judgement as a victory, on closer legal analysis, several deficiencies were pointed out by legal commentators. They coalesced around the view that the judgement failed to provide any of the effective reliefs sought by the petitioners. Instead, the Court had directed the government to review its own orders in accordance with the proportionality standard. In addition to this, the Court noted that there were several gaps in the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules 2017 ("Telecom Suspension Rules"). To fill this lacuna, the Court issued guidelines requiring proactive publication of orders and periodic review of internet restrictions every seven working days by the Review Committee constituted under the Telecom Suspension Rules.[11]

The Government of Jammu & Kashmir responded to the Supreme Court's directions by partially restoring access to the internet. On 14 January 2020, it issued an order under the Telecom Suspension Rules which provided access to select 'whitelisted websites' at 2G mobile internet speed but there was a ban on social media and Virtual Private Networks.[12] The government slowly expanded the list of whitelisted websites and eventually removed the ban on social media

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9 An application for production of orders was filed by the Foundation for Media Professionals on 14/10/2019. See Supra 7

10 Anuradha Bhasin & Anr. v. Union of India & Ors., 2020 SCC Online SC 25.

11 Ibid, at ¶ 163.

12 Order No. Home-03 (TSTS) of 2020 dated 14/01/2020, Home Department, Government of Jammu & Kashmir, available at http://jkhome.nic.in/03(TSTS)%202020.pdf , last seen on 30/06/2020.

and Virtual Private Networks but till date, it has continued slowing down mobile internet speed in Jammu & Kashmir to 2G.[13] Here, it is pertinent to mention most Indian internet users access the internet through smartphones, and this also holds true in Jammu & Kashmir where there are approximately seventy three mobile internet subscribers for each fixed line internet subscriber.[14]

The outbreak of COVID-19 in India and the ensuing nationwide lockdown led to the issue of restrictions on internet access in Jammu & Kashmir being litigated before the Supreme Court again. On 31 March 2020, the Foundation for Media Professionals, which was an intervenor in Ms. Bhasin's petition, filed another petition before the Supreme Court of India under Article 32 of the Constitution.[15] The petition challenged the government's decision to deny 4G mobile internet access to the people of Jammu & Kashmir during a pandemic and nationwide lockdown when effective internet services were necessary to facilitate telemedicine, online learning, remote work and virtual court hearings.

The Court pronounced its judgement in Foundation for Media Professional's petition on 11 May 2020 and it once again abstained from granting any substantive relief.[16] Instead, the Court constituted a Special Committee consisting of senior bureaucrats belonging to the

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[13] Order No. Home-66 (TSTS) of 2020 dated 17/06/2020, Home Department, Government of Jammu & Kashmir, available at http://jkhome.nic.in/66(TSTS)2020.pdf , last seen on 30/06/2020.

[14] There are 0.08 million wireline broadband subscribers and 5.82 million wireless broadband subscribers in Jammu & Kashmir. Ministry of Communications, Government of India, *Telecom Statistics India- 2019,* available at https://dot.gov.in/sites/default/files/Telecom%20Statistics%20India-2019.pdf?download=1 , last seen on 30/06/2020.

[15] Prior to filing of the writ petition, Diary No. 10817 of 2020, the Foundation for Media Professionals also sent representations to the Government of Jammu & Kashmir urging restoration of complete internet access on January 30, 2020 and March 27, 2020.

[16] Foundation for Media Professionals & Ors. v. U.T. of Jammu & Kashmir & Anr., 2020 SCC Online SC 453.

central and union territory government to examine the material placed on record by all parties and to immediately determine the necessity of continuation of restrictions on internet access in Jammu & Kashmir.[17]

Since there was no information about the constitution and functioning of the Special Committee in the public domain, the Foundation for Media Professionals filed a contempt petition against members of the Special Committee before the Supreme Court on 09 June 2020.[18] During the first hearing in the contempt petition on 16 July 2020, the Attorney General revealed that the Special Committee had held two meetings and decided to defer the issue of restoration of 4G internet access for two months. However, the Attorney General insisted that the minutes of the meetings could only be shared with the judges in sealed cover.[19]

In sum, since 5 August 2019, despite two judgements of the Supreme Court, restrictions on internet access continue in Jammu & Kashmir. Hence, a question arises: Was the Court's abstinence from granting effective relief premised on adequate legal reasoning and consistent with well-founded principles of judicial review?

National Security and Abdication of Judicial Review

This section embarks on a legal analysis of the two judgements of the Supreme Court of India on the issue of internet restrictions in Jammu & Kashmir starting with the judgement in *Anuradha Bhasin v. Union of India* ("*Anuradha Bhasin*"). *Anuradha Bhasin* was the first case where the Supreme Court of India had to substantively consider the issue of internet shutdowns, and the three-judge bench had to first determine the appropriate standard of review in such cases. While the

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17 Ibid, at ¶¶ 23-24.

18 Foundation for Media Professionals v. Ajay Kumar Bhalla & Ors., Contempt Petition Civil No. 411 of 2020.

19 *Supreme Court directs Govt to file its reply in FMP's contempt petition*, Internet Freedom Foundation, available at https://internetfreedom.in/fmp-contempt-petition-reply/, last seen on 27/07/2020.

petitioners urged the Court to adopt the evidence-based proportionality standard previously endorsed by a nine-judge bench in *K.S. Puttaswamy v. Union of India*,[20] the government cautioned the Court against interfering in matters involving national security. In fact, national security was invoked at the very first threshold of legality to refuse disclosure of orders pursuant to which the communication shutdown and movement restrictions were imposed. The government eventually relented and produced a few sample orders but cited logistical difficulties in production of all the orders.

In its judgement in *Anuradha Bhasin*, the Court formally endorsed the proportionality standard as the appropriate standard to review restrictions on internet access but it simultaneously warned against "excessive utility of the proportionality doctrine in the matters of national security, sovereignty and integrity."[21] The Court neither explained why such an exception is warranted nor did it provide an alternate standard of review which would be appropriate for cases involving national security implications. Hence, the Court side-stepped any guarantee that the proportionality standard will be consistently applied in the future, and this loophole limits the judgement's ability to deter arbitrary executive action in case of internet shutdowns or even other matters in which the plea of national security could be raised.

The national security exception carved out by the Court in *Anuradha Bhasin* is also inconsistent with the structure of the Indian

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[20] K.S. Puttaswamy & Ors. v. Union of India & Ors., 2017 10 SCC 1. The proportionality standard requires any government measure which restricts fundamental rights to satisfy the following criteria: (i) the measure must have a basis in law (Legality Stage); (ii) the measure must pursue a legitimate goal (Legitimacy Stage); (iii) the measure must be a suitable method for achieving the goal (Suitability Stage); (iv) the measure must be the least restrictive alternative to achieve the goal (Necessity Stage); and (v) the measure must not have a disproportionate impact on the right holder (Balancing Stage).

[21] Supra 10, at ¶ 140.

Constitution which treats rights as the norm and restrictions as the exception and this foundational logic is inverted when an entire population is made to suffer for the misdeeds of a few. If national security concerns are too severe and imminent to be addressed without resorting to such extreme measures, then the Constitution permits suspension of judicial review vis a vis enforcement of certain fundamental rights but this requires a formal declaration of emergency.[22] By carving out an exception to robust judicial review in cases where a national security interest is invoked, the judgement in *Anuradha Bhasin* has shielded the government from the reputational costs and parliamentary scrutiny which would otherwise be associated with a formal declaration of emergency, while simultaneously allowing it to impose blanket restrictions on an entire population which can only be considered to be justifiable in a state of emergency.

The Court's understanding of what constitutes an 'emergency' is most flawed when it compares restrictions on telecommunication services during a 'public emergency' under the Telecom Suspension Rules with derogation of rights permitted under Article 4 of the International Covenant on Civil and Political Rights[23] but fails to recognize that the latter requires an official proclamation of emergency by the State. Such a comparison proceeds from a facial examination which fails to consider even the first principles of constitutional reasoning.

The decision in *Anuradha Bhasin* is best understood in the context of the Supreme Court's longstanding reluctance to engage in judicial review on substantive grounds in national security cases.[24] Through a long line of precedent relating to preventive detention and

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22 See Article 359, The Constitution of India, 1950.

23 Supra 10, at ¶ 101.

24 See Haradhan Shah v. State of West Bengal, 1975 3 SCC 198; AK Roy v. Union of India, 1982 1 SCC 271; Kartar Singh v. State of Punjab, 1994 3 SCC 569; Peoples' Union of Civil Liberties v. Union of India, 2004 9 SCC 580.

anti-terrorism laws, the Supreme Court has limited its role to ensuring procedural compliance in cases involving national security concerns and allowed individuals to challenge executive action only on narrow grounds such as non-application of mind, excessive delegation and mala fide.[25] However, *Anuradha Bhasin* marks a more dangerous version of this trend because it fails to provide both substantive and procedural justice.

In *Anuradha Bhasin*, the Court did not even undertake any kind of procedural review of the orders issued under the Telecom Suspension Rules and Section 144, Cr.P.C. since the government did not place all orders on record. However, the government did present eight sample orders before the Court which were assailed by the petitioners on several procedural grounds. For instance, the petitioners objected to the sample orders under the Telecom Suspension Rules 2017 being issued by the Inspector General of Police because he was not and could not be authorized to issue directions for suspension of telecom services under the proviso to Rule 2(1).[26] However, the Court did not answer even these procedural questions which could have been decided on narrow statutory grounds without any controversial constitutional adjudication.

In national security cases, the primary focus of the judiciary has been improving mechanisms of administrative review, but such an

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[25] Courts have not questioned the subjective satisfaction of executive officials in these cases and limited the scope of review to whether the decision-maker was authorized under the law to make the decision and had applied his/her mind before issuing an order. Courts have set aside orders for non-application of mind if the decision-maker failed to consider all relevant materials or if it relied on irrelevant factors. See D.P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India,* 22 Michigan Journal of International Law, 311, 331-332 (2001); S. Chopra, *National Security Laws in India: The Unraveling of Constitutional Constraints,* 17 Oregon Review of International Law, 1, 50-57 (2015).

[26] Consolidated written submissions of the petitioners and intervenors in *Anuradha Bhasin*. See Supra 7.

approach is at odds with the mandate of Article 32 of the Constitution which guarantees a fundamental right to seek remedy before the Supreme Court review for violation of fundamental rights under Part III. Following in this vein, the Court in *Anuradha Bhasin* began its discussion on internet shutdowns by noting that "procedural justice cannot not be sacrificed at the altar of substantive justice"[27] and then chose to focus on filling gaps in the Telecom Suspension Rules instead of determining the constitutionality of the communication shutdown imposed in Jammu & Kashmir.

These deficiencies became apparent in *Foundation for Media Professionals v. Union of India* ('*Foundation for Media Professionals*'), when the Court was soon forced to grapple with the inadequacies of procedural safeguards laid down by it in *Anuradha Bhasin*. Despite mandating publication of all orders and periodic review of the restrictions in *Anuradha Bhasin*, the Court was once again called upon to judicially review the restrictions on internet access because the government had continued slowing down mobile internet speed indiscriminately across all districts of Jammu & Kashmir amidst the COVID-19 pandemic and nationwide lockdown. The factual basis of this challenge was the change in circumstances caused by the COVID-19 pandemic and vagueness in the orders issued under the Telecom Suspension Rules which did not reflect any district specific reasons. Here it is important to note that the petitioners in *Anuradha Bhasin* and *Foundational for Media Professionals* took a strategic decision to incrementally challenge the exercise of powers granted by the Telecom Suspension Rules rather than the existence of such a power itself.

Unlike *Anuradha Bhasin*, the Court in *Foundation for Media Professionals* could not avoid judicial review by citing unavailability of the impugned orders. In *Anuradha Bhasin*, the Court had directed proactive publication of all orders issued under the Telecom Suspension Rules, and therefore, the petitioners were able to produce

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[27] Supra 10, at ¶ 86.

and challenge specific orders in *Foundation for Media Professionals*. In *Anuradha Bhasin*, the Court clearly held that the government cannot refuse disclosure of orders by citing logistical inconvenience; but it deviated from this principled stance by not penalizing the government in any manner for subverting judicial review by withholding the orders.

Coming back to *Foundation for Media Professionals*, the Court could have utilized this opportunity for course correction and conducted substantive review but instead, it outsourced the decision-making to another Special Committee consisting solely of executive officials which was established to review the restrictions on internet access in Jammu & Kashmir.[28] The Court did not offer any reasons for declining judicial review despite having access to the impugned orders and merely stated that unlike the previous Review Committee which only had officials from the union territory government, the new Special Committee would be better suited to address the issue since it also had officials from the central government.[29] Such a bald conclusion ignores the political realities and also ignores that subsequent to the conversion of Jammu & Kashmir into a Union Territory, the central government already has control over 'police' and 'public order' in the region through the Lieutenant Governor.[30]

The Court's proposed solution of outsourcing decision making to an executive controlled Special Committee in *Foundation for Media Professionals* also missed a crucial point about the importance of judicial review to ensure proper consideration is provided to humanitarian concerns. This has been most clearly recognized by the Supreme Court of Israel in its widely known *Beit Sourik* decision which held that while military commanders are best placed to decide military considerations

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[28] The members of the Special Committee include: (i) Secretary, Ministry of Home Affairs; (ii) Secretary, Department of Telecommunications; and (iii) Chief Secretary, Government of U.T. of Jammu & Kashmir.

[29] Supra 16, at ¶ 23.

[30] S.32(1), The Jammu & Kashmir Reorganization Act, 2019.

such as where a separation fence should be erected, constitutional judges are the experts at determining whether the humanitarian impact of any government action on the local population is disproportionate.[31] Relief is the essence of judicial review. This goes beyond constitutional rhetoric and as instructed in the opening lectures on public law in law schools across India, Article 32 of the Constitution of India is titled as 'Remedies for enforcement of rights conferred by this Part (III).' This is also why Article 32 has been characterized by Dr. B.R. Ambedkar as the heart and soul of the Constitution because the existence of fundamental rights under Part III of the Constitution is meaningless without an effective remedy to ensure their enforcement.[32]

Unfortunately, in cases with national security implications, the Supreme Court views itself as a 'mediator' between the petitioners and the government rather than a 'guardian' of fundamental rights.[33] As Professors Mrinal Satish and Aparna Chandra have persuasively argued, this approach is at odds with the Court's general interventionist approach and it is "not a thought out or conscious decision-making strategy but an opportunistic role reversal, smacking of judicial escapism."[34] The decisions in *Anuradha Bhasin* and *Foundation for Media Professionals* exemplify this kind of role reversal and represent a version of the judiciary which Lord Atkins famously characterized as "more executive minded than the executive."[35]

Right to Internet Access

In *Anuradha Bhasin*, the right to internet access was held to be a derivative fundamental right which enables the exercise of primary fundamental rights, but the Court's characterization of this right has

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31 Beit Sourik Village Council v. Government of Israel, HCJ 2056 of 2004, at ¶ 48.

32 Constituent Assembly Debates, Vol. VII, pg. 953.

33 M. Satish and A. Chandra, *Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror-Related Adjudication*, 21 National Law School of India Review, 51, 60 (2009).

34 Ibid, at 76-77.

35 Liversidge v. Anderson, 1942 A.C. 206

received surprisingly little scholarly attention. In human rights theory, derivative rights include auxiliary rights which facilitate exercise of a primary right..[36] Adopting a similar approach, the Court in *Anuradha Bhasin* relied on its past precedent in *Secretary, Ministry of Information & Broadcasting Government of India v. Cricket Association of Bengal*[37] and *Shreya Singhal v. Union of India*[38] to hold that the right to freedom of speech and expression includes the right to wide dissemination of information through different mediums. The Court then recognized the importance of the internet as a tool for dissemination of information and for trade and commerce in modern times, and finally concluded that "the right to freedom of speech and expression under Article 19(1)(a), and the right to carry on any trade or business under 19(1)(g), using the medium of internet is constitutionally protected."[39]

In order to fully understand the nature and scope of the derivative right to internet access recognized in *Anuradha Bhasin*, we must first examine the Court's general conception of fundamental rights under Part III of the Constitution. In the judgement, the Court asserts that barring the fundamental right to education under Article 21A, all other fundamental rights guaranteed by Part III of the Constitution are negative rights.[40] This is a rather questionable claim since the Indian Supreme Court has recognized various socio-economic rights which impose positive obligations on the State to provide food education and healthcare as a part of the fundamental right to life with human dignity under Article 21.[41] Therefore, there is

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36 See K. Mathiesen, *The Human Right to Internet Access: A Philosophical Defense*, 18 International Review of Information Ethics, 11, 13 (2012).

37 Secretary, Ministry of Information & Broadcasting Government of India v. Cricket Association of Bengal, (1995) 2 SCC 161.

38 Shreya Singhal v. Union of India, (2015) 5 SCC 1.

39 Supra 10, at ¶ 31.

40 Supra 10, at ¶ 23.

41 Peoples' Union of Civil Liberties v. Union of India, Writ Petition (Civil) No. 196 of 2001 (Right to Food); Unnikrishnan v. State of Andhra Pradesh, 1993 SCR 1

no *a priori* justification to limit the scope of the right to internet access to a purely negative right which only provides protection against interference by the government but does not impose any positive obligation on the government to facilitate internet access by creating necessary infrastructure.

Further, the Court's cursory dismissal of a positive right to internet access also ignores existing government policy which recognizes internet access as an essential service and seeks to ensure universal broadband coverage. For instance, in 2004, the Indian Telegraph Act, 1885 was amended to recognize a universal service obligation to "provide access to basic telegraph services to people in the rural and remote areas at affordable and reasonable prices" and a Universal Service Obligation Fund was created to achieve this goal.[42] Interestingly, another amendment was made in 2006 to increase the scope of this obligation by removing the word 'basic' which appeared as a qualifier before 'telegraph services."[43] More recently, the National Broadband Mission launched in 2019 also aims to provide universal, affordable, high speed and reliable broadband coverage across India in the next five years.[44]

Finally, a positive right to internet access has found recognition in international human rights law. In a landmark 2011 Report, the UN Special Rapporteur on Freedom of Expression has suggested that all state parties to the International Covenant on Civil and Political Rights should formulate concrete and effective policies to "make the Internet

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594 (Right to Education); Paschim Banga Khet Mazdoor Samity v. State of West Bengal, 1996 4 SCC 37 (Right to Health). See A. Surendranath, *Life and Personal Liberty*, 756, 768 in *Oxford Handbook of the Indian Constitution* (S. Choudhry, M. Khosla and P.B. Mehta, 1st ed., 2016).

42 Indian Telegraph (Amendment) Act, 2003.

43 Indian Telegraph (Amendment) Act, 2006.

44 Ministry of Communications, Government of India, *National Broadband Mission,* available at https://dot.gov.in/sites/default/files/National%20Broadband%20Mission%20-%20Booklet_0.pdf?download=1, last seen on 30/06/2020.

widely available, accessible and affordable to all segments of population."[45] The Special Rapporteur's recommendation flows from a clear understanding of how the internet enables exercise of a wide variety of human rights and emphasizes that the right to internet access has two dimensions: "access to online content" and "the availability of the necessary infrastructure and information communication technologies, such as cables, modems, computers and software."[46]

In view of the above, the Court's concern that "positive prescription of freedom of expression will result in different consequences which our own Constitution has not entered into"[47] is out of touch with its own prior precedent, governmental policy and international human rights norms which provide support for the recognition of a positive right to internet access. At this stage, it is important to clarify that recognition of a positive right to internet access would not impose an obligation on the government to provide a smartphone and internet connection to every citizen immediately since this may not be within the limited financial capacity of the State and would completely undermine the ability of democratically elected representatives to decide budgetary allocations in accordance with policy priorities. It is well established that States are required to ensure realization of socio-economic rights in a gradual and progressive manner because they need flexibility to develop and adopt a suitable implementation plan after considering budgetary constraints.[48] Therefore, the Court's seemingly pragmatic concern about the "socio-economic costs of such proactive duty"[49] are also unfounded.

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45 *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, May 16, 2011, Human Rights Council, *Official Record*, U.N. Document A/HRC/17/27, 19, available at https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf , last seen on 30/06/2020.

46 Ibid, at 4.

47 Supra 10, at ¶ 24.

48 Article 2, International Covenant on Economic, Social and Cultural Rights, 1966.

49 Supra 10, at ¶ 24.

Moreover, we must remember that in *Anuradha Bhasin* and *Foundation for Media Professionals*, the Court did not have to direct the government to create any new digital infrastructure. Rather, it was only expected to judicially review the constitutionality of restrictions imposed on the use of existing digital infrastructure during a public health crisis. By refraining from striking down interference by the government with access to existing internet services, the Court failed to even uphold the narrow negative right to internet access that the judgements did explicitly recognize. The principle of progressive realization may be appropriate in the context of positive rights because their enforcement requires the government to allocate its limited resources in specific ways but it should have no application in the context of a negative right against governmental interference which must be remedied in an urgent and binding manner.[50]

The silver lining of the judgements in *Anuradha Bhasin* and *Foundation for Media Professionals* is that the Court avoided falling into the trap of characterizing the internet as a luxury which is not essential enough for the survival of an individual to qualify as a human right. Skeptics have warned that recognition of internet access as a human right would lead to human rights inflation and weaken the force of human rights claims.[51] However, such a viewpoint fails to fully appreciate the centrality of internet access in modern life. Unlike newspapers, radio or television, the internet is not merely a medium for accessing information and entertainment, and it also fosters economic participation, social inclusion and civic engagement. For instance, during the COVID-19 pandemic, the internet has become a lifeline which has enabled people to access telemedicine, online education, e-commerce and virtual court hearings without violating

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50 I.A. Hartmann, *A Right to Free Internet: On Internet Access and Social Rights*, 13 Journal of High Technology Law, 299, 388 (2013).

51 B. Skepys, *Is There a Human Right to the Internet?*, 5 Journal of Politics and Law, 15, 25 (2012).

social distancing norms. Therefore, the Court in Anuradha Bhasin must be commended at least for recognizing that "the prevalence and extent of internet proliferation cannot be undermined in one's life."

Conclusion

In this comment, we analyzed *Anuradha Bhasin* and *Foundation for Media Professionals* to argue that the Court's refusal to review internet restrictions on both substantive and procedural grounds represents further erosion of judicial review in national security contexts. We explained that such denial of judicial review cannot be justified in the absence of an official proclamation of emergency under the Constitution and critiqued the Court's flawed understanding of what constitutes a state of emergency that would justify derogation of rights of citizens. We then examined the nature of the right to internet access recognized in these cases and argued that the Court's cursory rejection of a positive right to internet access is inconsistent with past judicial precedent, government policy and international human rights norms. More importantly, we emphasized that the present cases related to enforcement of a negative right against government interference with digital infrastructure which should have been addressed in an urgent and binding manner.

As we have explained, the judgements in *Anuradha Bhasin* and *Foundation from Media Professionals* suffer from serious flaws, but it may be premature to write off their promise and potential entirely. By formally rejecting some of the government's most extreme arguments about secrecy of orders and exclusion of judicial review, the Court has demonstrated a commitment to rule of law, albeit at its minimal, that mildly improved the status quo. Similarly, the Court's finding that internet restrictions must be territorially and temporally limited in scope serve utility for judicial review against indiscriminate and prolonged shutdowns imposed in the future. However, the continuing legacy of this decision will be marked by the Court's failure to put principles into practice which has resulted in the continuing denial of

effective internet access to the people of Jammu & Kashmir for almost a year.

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