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Editorial

"*At [72], only Constitutions, tortoises, and whales are dubbed 'young,*"[1] quipped one editorial, referring to the fact that India's oft-amended Constitution has only been in operation for a little over seven decades. Perhaps the fact that its text has served as the battleground for some of the fiercest (and most protracted) conflicts between the executive and the judiciary obscures the truth that Indian Constitution, is, in fact, young; barely a teenager when compared to the constitutions of the United States, Canada, and a majority of European nations. Yet, the Indian Constitution, in its relatively short lifespan, has experienced a profound transformation in character, retaining all the while what an editorial dubbed as the "…*ability and commitment to the project of expanding freedom.*"[2]

The immense faith that the Indian people place in the Constitution is often justified through its origins - the Constitution is indeed the culmination of a profound public struggle. However, it is also true that the Indian Supreme Court today has a unique role as the 'guardian' of the Indian Constitution, even against popularly-elected governments. Some key judicial decisions of the past year have been revisited as part of the editorial note's recap of significant constitutional developments. This is followed by a brief introduction to the contributions to this edition of the IJCL. Lastly, we acknowledge and thank the people without which this edition would not have been possible.

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1 Rajagopalan, S. (2020) *Five life lessons from India's Constitution*, THE MIND Available at: https://www.livemint.com/news/india/five-life-lessons-from-india-s-constitution-11579792540983.html.

2 Menaka Guruswamy,*Our Constitution, A Beacon of Freedom* (2021). Available at: https://indianexpress.com/article/opinion/columns/indian-constitution-a-beacon-of-freedom-7643596/.

2021 in Review

As living in 'unprecedented' times became precedented and 2021 slipped away with the country still under lockdown, the functioning of the Supreme Court was also restricted by the pandemic. That only three judgements were delivered by a Constitution Bench in the past year demonstrates the limited functioning. Nevertheless, the Supreme Court still had a productive year, and also saw a major refresh with nine new judges being added to the bench. Below is a discussion of the judgements and orders of the Supreme Court in the past year.

In January 2021, the Supreme Court, in *Rajeev Suri vs. Delhi Development Authority and Ors.,* rejected a challenge to the legality of the Government of India's Central Vista Project. In a 2-1 ruling that reaffirmed the standard of judicial review under Article 13, the Court decided that it did not have the jurisdiction to undertake a judicial review of an executive endeavour beyond what was permitted (or rather, necessitated) by the existing legal standard. The Court felt that the government had adhered to the 'recommended' procedural guidelines for projects of this kind, a view that Justice Sanjiv Khanna disagreed with in his dissenting opinion. He felt that the ingredient of 'public hearings' was missing from the project, and issued directions to not only conduct such hearings, but publicize them.

Early in 2021, in the case of *Libnus v. the State of Maharashtra*, it was held by the Bombay High Court (HC) that holding the hand or unzipping the trousers of a minor girl could not constitute 'sexual assault' within the meaning of the Protection of Children from Sexual Offences (POCSO) Act, 2021. The judgement was appealed by the State of Maharashtra, and the appeal was clubbed with other appeals filed by the Attorney General and the National Commission for Women in what eventually became *Attorney General for India v. Satish*

and Anr.. The three-judge bench crucially held that the single most important 'ingredient' of sexual assault under Sec. 7 of the POSCO Act was the 'sexual intent' of the offender. The Bombay HC in *Satish v. State of Maharashtra* had ruled that because there had been no skin-to-skin contact, the accused Satish could not be made criminally liable under Section 7 of the POSCO Act. The Court here took issue with such interpretation and held that the principle of '*ejusdem generis'* could not be used to interpret the statute in a manner that would have the effect of defeating the legislative intent underlying it. In this case, even though the prosecution had fulfilled its burden of proof to raise a presumption of sexual intent, one that the accused was not able to satisfactorily rebut, the Court was bound to treat this intent as proven. Similarly, in *Libnus,* the High Court wrongly applied the statute in absence of its context (i.e., only giving effect to the specific words 'any other act… involving physical contact') present in the Act to declare the accused innocent. However, the Supreme Court held that if sexual intent was successfully proven with the aid of the surrounding circumstances, the Court was duty bound to classify it under 'any other act' and punish the offender.

This was not the only occasion the Court stepped in to correct an "error of adjudication" on the front of gender justice. In the case of *Kirti vs Oriental Insurance*, the Supreme Court heard an appeal against a Delhi High Court judgement which barred the Motor Accident Claims Tribunal from awarding insurance compensation in the case of a deceased "non-earning" homemaker. In *Kirti,* the Court took the view that homemakers worked and contributed as much economic value to their households as the 'working members,' essentially obligating courts and tribunals in the future to ascribe a 'notional' income to deceased, non-earning homemakers covered under insurance policies. Additionally, the

Court did not specify or privilege any one methodology of calculation over another, but instead ruled that the methodology would have to be decided on a case-to-case basis to ensure the compensation awarded was "*fair, just, and reasonable.*"

Another landmark decision for women came with the Supreme Court's judgement in *Aparna Bhat v. State of Madhya Pradesh.* After the Madhya Pradesh granted bail to a sexual offender after the victim tied a 'rakhi' on his wrist, the Supreme Court took up the case and quashed the bail order, framing a set of rules and directions for lower courts to be bound by in the future. Amongst these were a blanket prohibition on contact between the victim and the accused as 'pre-condition' for bail, and a rigorous requirement of notifying the complainant if the offender is granted bail. Moreover, courts were instructed to strictly refrain from suggesting or recommending sexual assault victims and accused reach an 'understanding' in the form of marriage, mediation, and/or any other compromise. The Court also highlighted the urgent need to initiate gender sensitization programs at each level of the judiciary, including judicial training and legal education.

The Supreme Court displayed an impressive and heightened social sensitivity in its judgements this year. *Patan Jamal Vali v. State of Andhra Pradesh,* a case dealing with the rape of a visually-challenged, Scheduled Caste woman was particularly significant. A two-judge bench of the Court noted that it was critical to employ an *"intersectional lens"* to analyse how *"…multiple sources of oppression operate cumulatively to produce a specific experience of subordination for a blind Scheduled Caste woman".* The Court, thus, elected to not simply apply the distinct applicable law to the facts of the case, but instead located the victim in society and within the framework of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989. This

would ensure that effect was given to the true purpose of the legislative that sought to protect uniquely oppressed Dalit and Adivasi women from sexual violence and subordination.

In fact, just as the Court ruled in *Patan Jamal Vali* that a conviction under Section 3(2)(v) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act could be sustained as long as caste identity was one of the motivations of the offender, in *Ravinder Kumar Dhariwal v. Union of India*, the Court reiterated that a person with a disability was entitled to all the protections under the Rights of Persons with Disabilities Act, 2016 as long as the disability itself was one of the grounds for the occurrence of the offence/discrimination.

The Court also extensively developed India's free speech and privacy rights jurisprudence. In a slew of cases, such as the ones involving Munawar Faruqui and Vinod Dua, the Court stepped in uphold the individual's democratic entitlements. In the former case, for example, the Supreme Court not only granted interim bail to stand-up comedian Munawar Faruqui, but also took up another case and stayed the production warrant issued in connection with a case registered against him by the Uttar Pradesh Police in 2020. The bench, led by Justice R.F. Nariman, noted that Faruqui's request for bail had been denied not once, but thrice in the period of just a month, with a single-judge High Court bench inexplicably stating in early January that the possibility of Faruqui conspiring with co-accused Nalin Yadav to provoke the complainant could not be ruled out. Considering that Faruqui had not actually said anything at the point he was arrested, the Court granted him bail and also issued notice to the Madhya Pradesh government over his petition.

In the case of *Vinod Dua V. Union of India*, the two-judge bench of Justice UU Lalit and Justice Vineet Saran similarly quashed

the FIR against journalist Vinod Dua, holding that mere criticism of the government could not amount to sedition. The Court examined the statements made by Dua in his YouTube show at length, finally concluding that his disapprobation of the alarming pandemic situation could not be construed as attempting to disturb public peace within the meaning of Sections 124A and 505(1)(b) of the IPC.

In another important judgement,*Manoharlal Sharma v. Union of India*, the three-judge bench of then Chief Justice NV Ramana, Justice Surya Kant, and Justice Hima Kohli constituted an Expert Committee to test the veracity of the allegations made in connection with the Pegasus Spyware case. Acknowledging that it had initially been reluctant to interfere in the matter, the Court held that the "*public importance and the alleged scope and nature of the large-scale violation of the fundamental rights of the citizens of the country*" made it necessary for the judiciary to intervene. In another statement that may shape preventive detention jurisprudence in the years to come, the Court asserted that the "*mere invocation of national security by the State* [could] *not render the Court a mute spectator."*

This inclination of the Court to take matters into its own hands was also reflected in a number of other cases. The Court not only legitimated Dua's criticism of the government's handling of the lockdown, it also expressed its own dissatisfaction with the executive's policy in a number of actions. In the *suo moto* writ petition *In Re: Problems and Miseries of Migrant Labourers,* the Court observed the precarious situation of migrant workers during the pandemic, and passed a number of prospective directions to ensure their social security, particularly their food security. Similarly, the crisis of inadequate oxygen supply, particularly during the second wave of the COVID-19 pandemic, prompted the Court to intervene through *Union of India v. Rakesh Malhotra.* In this case, a two-judge bench

comprising then Justice DY Chandrachud (currently Chief Justice) and Justice MR Shah directed setting-up of a twelve-member expert 'National Task Force' to furnish a methodology to allocate oxygen between the States and Union Territories. In yet another *suo moto* case connected to the pandemic, the Supreme Court closed the case against the Uttar Pradesh Government after it postponed the Kanwar Yatra to the next year.

The Court delivered a number of important judgements pertaining to corporate, commercial, and competition laws as well. In a breach of precedent, the Court in *NN Global Mercantile Pvt Ltd v. Indo Unique Flame Ltd* held that even if stamp duty had not been paid on a contract containing an arbitration clause, the clause could be valid. The issue will be taken up by a larger bench in the future. In another important judgement pertaining to arbitration law, the Supreme Court ruled in connection with the Amazon-Future Group case that emergency arbitration was valid under Indian law.

On the front of 'cheque-bounce' cases, the Court in *In Re: Expeditious Trial Of Cases Under Section 138 Of N.I. Act 1881* issued a large number of guidelines to ensure that such cases are resolved expeditiously in lower courts. In *P Mohanraj v. Shah Brother IspatPvt. Ltd*, the Court also held that such cases are barred by the moratorium imposed by the Insolvency & Bankruptcy Code when insolvency is initiated against the company. The crux of the decision here was that they were to be considered 'civil proceedings' in the sense of the IBC, which led the Court to describe the NI Act as a "*civil sheep in criminal wolf's clothing.*"

In connection with the IBC, on the other hand, the Court was relatively inactive. It intervened in *Jaypee Kensington v. NBCC* to direct the UP Government to free an arrested court-appointed Insolvency Resolution Professional. It also rejected a challenge to the

application of IBC to personal guarantors of corporate debtors in *Lalit Kumar Jain v. Union of India.*

On the equality law front, the Court delivered a few, but highly relevant, judgements. Affirmative action has been incredibly contentious from the inception of the Constitution to contemporary times, and 2021 was no different. The Court dealt with a number of matters pertaining to reservations in the past year, the most important of these being *JaishriLaxmanrao Patil v. Chief Minister,* wherein the Maharashtra Socially and Educationally Backward Classes, Act 2018 was challenged in the Supreme Court. Relying upon the 50% reservation rule formulated in the landmark 1992 Indra Sawhney case, the Court struck down the reservations for Marathas in Maharashtra. It also ruled that only the Union Government had the power to identify Other Backward Classes (OBCs). This decision was effectively reversed in just a few months with the promulgation of the 105th Constitutional Amendment, which amended Article 342A to restore the power of the State Governments and Union Territories to identify and specify Socially and Economically Classes. The status of OBCs/SEBCs was also dealt with in other judgements, such as *PichraWarg Kalyan Mahasabha Haryana v. State of Haryana*, wherein the Court held that conception of 'creamy layer' had both social and economic dimensions, and *Vikas KrishnaraoGawli v. State of Maharashtra*, wherein the Court struck down reservations for OBCs in local body elections in Maharashtra. In an interesting development, the Government in the course of the of *Neil Aurelio Nunes v. Union of India* hearings agreed to reformulate the eligibility criteria for the Economically Weaker Sections (EWS) quota.

Lastly, in what was perhaps the most significant constitutional development pertaining to the interface between legislative and judicial action in 2021, a three-judge bench comprising Justices R F

Nariman, K M Joseph and B R Gavai struck down the majority of the new provisions inserted through the 97th Constitutional Amendment in *Union of India v. Rajendra Shah*. This was done to the extent that clauses dealing with the working of cooperative societies working within a state were concerned. The Court felt that this subject matter fell in the state list and *"… belonged' wholly and exclusively to the State legislatures to legislate upon*" and any change would require the ratification by at least one-half of the state legislatures as per Article 368(2) of the Constitution. While Justices Nariman and Gavai struck down only that part of the amendment which dealt with cooperative societies confined to states, Justice Joseph in a separate judgment struck down the entire amendment.

Now, on to the contributions in this edition of the IJCL.

Contributions

This edition of the IJCL starts with an insightful article by Anurag Bhaskar on the interpretation of Article 16(4). He argues against treating it as a mere enabling provision to Article 16(1), instead suggesting that it should be highlighted as a right on its own merits. This interpretation draws from the seminal cases of *NM Thomas* and *Indira Sawhney*. He also analyses the trajectory of reservation cases that were decided in the first 25 years after the enactment of the constitution, and sees how they chip away at the effect of *Indira Sawhney*.

Ridwanul Hoque charts the evolution of the Basic Structure Doctrine in Bangladesh, by focussing on the impact Dr. Kamal Hossain, the Chair of the Constitution Drafting Committee, had on this process. In particular, he looks at Dr. Hossain's involvement in the notable 8th Amendment Case, where he successfully argued for the recognition of the basic structure.

Shruti Bedi writes about proportionality and the burden of proof. Her analysis is both theoretical and practical, with a focus on

the divergent ways courts have interpreted and applied the burden of proof in the necessity stage of the proportionality test. She notes that the inconsistent use and deferential attitude that the courts adopt towards the government have ensured that the test does not provide sufficient protection against violations of rights.

Thulasi K. Raj undertakes a comparative analysis of discrimination and same-sex relations. She focuses on India, Botswana and Kenya. She concludes that the Kenyan High Court made a mistake by refusing to decriminalise same-sex relations when both India and Botswana did. Her analysis is focused on the relationship between decriminalisation and anti-discrimination law, and highlights how sexual orientation is often not a protected ground, leading to difficulties for petitioners. She also notes that the supposed neutrality of criminal law has meant that demonstrating discrimination is difficult.

AnupriyaDhonchak and Rahul Bajaj write about the right to education and how it interacts with the government's copyright in school textbooks. They set the paper in the context of the pandemic and the ongoing shift to online education. They argue that the IP policy adopted by the government for school textbooks acts to restrict access to them. In order to resolve this, they suggest the use of alternative licensing strategies in line with a rights based approach, in particular the right to education.

Lalit Panda investigates the development of equality of law in India. He focuses on two recent developments: the manifest arbitrariness test and the application of the principle of substantive equality to discrimination law. He finds both of these doctrines as wanting - the former for failing to bring order to arbitrariness and the latter for being inadequate and in thrall of textual limitations. Further, he identifies that the two doctrines may be incompatible. To resolve this, he suggests that both doctrines be integrated into a common set of principles on how questions of 'relevance' are to be answered.

Devansh Shrivastava and Anubhav Bishen examine the Disturbed Areas Act 1991 in Gujarat through the lens of constitutional public policy. Their paper focuses on the difficulties and dangers inherent in trying to integrate communities with a history of violence and conflict, by using the example of Gujarat. This history has often resulted in ethnic segregation and informal boundaries. They analyse the Disturbed Areas Act through the framework of Article 15(2), and also examine the challenge in the Gujarat High Court to the constitutionality of the act.

Shubhangi Maheshwari and ShreyNautiyal look at the interplay between the right of religious freedom and other rights. They examine the distinction between Article 25, and 26, specifically the way only Article 25 is made subject to other rights, an issue which has risen to prominence with the *Sabrimala* case. They argue in favour of a holistic reading of the articles along with other fundamental rights. This argument relies on Richard H. Fallon's constructivist theory of constitutional interpretation. They also suggest that the essential religious practices test allows the court to settle issues on the basis of definitions and not balance right to religious freedom with other rights such as equality. Instead, they consider the anti-exclusion test as proposed by Justice Chandrachud in Sabrimala to be the way forward.

Nirmalya Chaudhuri writes in favour of a right to not be mislead in order to fix accountability for election promises. She argues that it is impossible for politics alone to provide a remedy against broken election promises. In light of this, she argues that relief can be found in Article 19(1)(a) and 21 of the Constitution, through a right to make a well-informed choice. By making misleading promises, it is argued that politicians take away from the rights of a voter. In order to remedy this, she suggests that the promises in an election manifesto be made legally binding.

Maladi Pranay analyses the constitutional adjudication of the Supreme Court during the pandemic. He notes that the Indian state's response to Covid-19 has been executive heavy, and characterised simultaneously be executive overreach and underreach. Through a descriptive account, he shows how the court's response was circumstantial, and based on the nature of the executive action, and the sphere in which action took place.

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RESERVATION AS A FUNDAMENTAL RIGHT: INTERPRETATION OF ARTICLE 16(4)

Anurag Bhaskar[*]

Abstract

From the time of the drafting of the Indian Constitution, the constitutional scope of reservations has remained nebulous. In its early judgments, the Supreme Court of India treated Article 16(4) as an exception to Article 16(1), further holding that Article 16(4)2 was merely an enabling provision. Though this position was altered by larger bench decisions in NM Thomas and Indra Sawhney, a number of succeeding judgments directly breached these precedents. Accordingly, this article critiques the approach of treating Article 16(4) as a mere enabling provision, arguing that Article 16(4) reflects a fundamental right as per the judicial interpretation given in the NM Thomas and Indra Sawhney cases. This is done by analysing the trajectory of reservation cases adjudicated upon by the Supreme Court, including the significant constitutional shift that happened with the reading of Article 16(4) as consisting of a substantive right of representation. It is concluded that the effect of Indra Sawhney was chipped away with judicial indiscipline of later court decisions, and the courts ought to hold the State accountable for implementing the fundamental right to reservation. It also

[*] Assistant Professor (Law), Jindal Global Law School, Sonipat; LL.M. (Harvard Law School). I am heavily indebted to Surendra Kumar, Disha Wadekar, and Raja Sekhar Vundru, as some of the ideas discussed in this paper came to my mind because of frequent discussions with them. I further acknowledge Pratik Kumar, Priyanka Preet, Kumar Shanu, Aniket Chaudhary, and the anonymous reviewer for their comments. I am also grateful to the student team of Indian Journal of Constitutional Law for coordinating with me for the paper.

presents a paradigm for realizing the furthest possible extent of the fundamental right to reservation.

Introduction

From the time of the drafting of the Indian Constitution to the present-day judgments, the constitutional scope of reservations has remained contentious. In its initial judgments, the Supreme Court of India treated Article 16(4), which empowers the State to make reservations for backward classes in public employment, as an exception to Article 16(1),[1] which provides for equality of opportunity. It was further held that Article 16(4)[2] is merely an enabling provision, i.e., it is upon the discretion of the State to provide reservation for backward classes. This position changed after the larger bench decisions in *State of Kerala v. NM Thomas*[3] (hereinafter "*NM Thomas*") and *Indra Sawhney v. Union of India*[4] (hereinafter "*Indra Sawhney*"), as it was held that Article 16(4) is not an exception, but a facet of Article 16(1). However, succeeding judgments have held reservations under Article 16(4) to be merely an enabling provision, and not a fundamental right.

This article critiques the approach of treating Article 16(4) as a mere enabling provision. It argues that Article 16(4) reflects a fundamental right, because of the judicial interpretation given in *NM Thomas* and *Indra Sawhney*. I highlight that these judgments renewed the constitutional understanding about Article 16(4), which had otherwise taken a backseat due to a series of judgments during the first two and half decades after the enactment of the Constitution. I

1 Article 16(1) provides: "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State."

2 Article 16(4) provides: "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."

3 (1976) 2 SCC 310.

4 1992 Supp (3) SCC 217.

further argue that the continuing judicial approach of treating Article 16(4) as an enabling provision is a result of a breach of the precedent in *Indra Sawhney*. I add that the fundamental right to seek reservation is available to Scheduled Castes (SCs) and Scheduled Tribes (STs) by default, while it would be available to Other Backward Classes (OBCs) after fulfilling the conditions propounded in *Indra Sawhney*.

Part ii of the paper analyses the trajectory of reservation cases which were delivered during the first two and half decades after the enactment of the Constitution. It indicates that the proposition of Article 16(4) being an enabling provision is linked to the judicial approach of considering Article 16(4) as an exception to Article 16(1). Part III discusses the constitutional shift that happened as a result of *NM Thomas* and *Indra Sawhney*. It points out how Article 16(4) was read as consisting of a substantive right of representation. Part IV analyses the judgments which came after *Indra Sawhney*. It scrutinizes how these judgments, delivered by comparatively smaller benches, deviated from the precedent of the larger bench in *Indra Sawhney*. This part argues that the effect of *Indra Sawhney* was chipped away with judicial indiscipline of later court decisions. Part V asserts that the courts ought to hold the State accountable for implementing the fundamental right to reservation. It also presents an assessment of the possible extent of the fundamental right to reservation. In conclusion, Part 6 criticizes the judicial approach of restricting reservation provisions by one means or the other.

I. The 'Utterly Unsatisfactory' Judgments[5]

A. The First Setback from Madras High Court

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5 I have borrowed this phrase from the speech of Dr. B.R. Ambedkar, which he made while presenting the first constitutional amendment and in reference to *State of Madras v. Champakam Dorairajan,* AIR 1951 SC 226. See 'Parliamentary Debates' (*Parliament of India* ,1951) p. 9006-07, <https://eparlib.nic.in/bitstream/123456789/760696/1/ppd_18-05-1951.pdf≥ accessed 15 March 2022.

The discussion on the scope of Article 16(4) must begin with the seven-judge bench decision in *State of Madras v. Champakam Dorairajan*[6] (hereinafter "*Champakam Dorairajan*"). Though the judgment did not directly deal with interpretation of Article 16(4), it had repercussions on the future interpretation of said Article and the idea of reservations.

The main premise of this case was a challenge to a reservation policy in the form of a Communal G.O., in existence in the erstwhile Madras State even before the enactment of the Constitution.[7] The Communal G.O. provided for the apportionment of the seats in medical and engineering colleges among distinct social groups according to certain proportions.[8] In 1950, this policy was challenged in separate petitions by two Tamil Brahmins, Champakam Dorairajan and Srinivasan, before the Madras High Court on the ground that their fundamental rights under Article 15(1)[9] and Article 29(2)[10] of the Constitution were violated.[11] It was argued that the "two

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6 AIR 1951 SC 226.

7 The Communal G.O. in Madras state was in existence since 1921. See Chintan Chandrachud, *The Cases That India Forgot* (Juggernaut Books 2019) 113.

8 Under the Communal G.O., for every 14 seats to be filled by the selection committee, candidates used to be selected strictly on the following basis: "Non-Brahmin (Hindus) – 6; Backward Hindus – 2; Brahmins – 2; Harijans (Scheduled Castes) – 1; Anglo-Indian and Indian Christians – 1; Muslims – 1.

9 Article 15(1) provides: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

10 Article 29 which occurs in Part III of the Constitution under the head "Cultural and Educational Rights" and with marginal note "Protection of interests of minorities", runs as follows: "(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

11 Ajantha Subramanium remarks that the timing of this case "signalled the effort by Tamil Brahmins to take advantage of a new post-independence political configuration", where the support of the judiciary was sought against

applicants would have been admitted to the educational institutions they intended to join and they would not have been denied admission if selections had been made on merits alone", and not on the basis of division of seats among different groups. Even though Dorairajan had not applied for admission in a medical college, the petitions were allowed by the High Court on 27 July 1950.[12] Reservations in higher education were declared unconstitutional in the same year when the Constitution came into force.

When the Madras State appealed, the Supreme Court, on 9 April, 1951, upheld the decision of the High Court. The Supreme Court relied solely upon a plain reading of Article 29(2), and did not deal with the arguments made on Article 14 and 15. The Court held that Srinivasan was denied admission "for no fault of his except that he is a Brahmin and not a member of the aforesaid communities". It was further added that "Such denial of admission cannot but be regarded as made on ground (sic) only of his caste", which is prohibited by Article 29(2). Therefore, the Communal G.O. was struck down for being discriminatory.

The Court also rejected the argument put forward on behalf of the Madras State that the Communal G.O. proportioning seats for different communities was giving effect to Article 46. It noted that Article 46 was a directive principle, which cannot override fundamental rights. The Court relied on the wording of Article 16(4) to hold that since a similar provision was not present under Article 29, it significantly indicated that "the intention of the Constitution was not to introduce at all communal considerations in matters of admission into any educational institution maintained by the State or receiving aid out of State funds." The Court added that giving effect

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reservation in existence in Madras. See Ajantha Subramanium, *The Caste of Merit: Engineering Education in India* (Harvard University Press 2019) 209.

12 *Champakam Dorairajan v. State of Madras*, AIR 1951 Mad 120.

to Article 46 would have rendered Article 16(4) "wholly unnecessary and redundant".[13]

However, in completely relying on Article 29(2), the Court made the preliminary error of considering this Article to be providing rights to every citizen. Even in its plain reading, Article 29 dealt with the "protection of [the] interests of minorities", as clearly indicated by its marginal note in the Constitution. Besides, Article 29, taken with Article 30, deals with "cultural and educational rights" of minorities (whether based on religion or language), as the overall content of the two Articles indicates. Brahmins, being one of the most dominant social groups, could not have therefore been covered within the meaning of Article 29.[14] The Court also considered the constitutional provisions in isolation to each other — an approach which was completely overturned in the 1970s.[15]

The implication of *ChampakamDorairajan* was not just that it had adopted a formal problematic interpretation or, what scholar Bastian Steuwer calls, a "deceptive simplicity".[16] It also laid down the foundation of a legacy against reservations in the country.As Steuwer has argued, the judgment started "a perennial discussion concerning

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13 In later years, the Supreme Court changed this approach, as it read fundamental rights and directive principles harmoniously. See *Minerva Mills v. Union of India*, AIR 1980 SC 1789.

14 In his writings, Dr Ambedkar had challenged the hegemony of Brahmins in public services. In 1928, he stated; "It is notorious that the public services of the country in so far as they are open to Indians have become by reason of various circumstances a close preserve for the Brahmins and allied castes. The non-Brahmins, the depressed classes and the Mohamedans are virtually excluded from them." See Anurag Bhaskar, 'Reservations, Efficiency, and the Making of Indian Constitution' (2021) 56(19) Economic & Political Weekly 42, 46; See also Chintan Chandrachud, *The Cases That India Forgot* (Juggernaut Books 2019) 121.

15 See *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

16 Bastin Steuwer, 'Constitutional Crossroads: The shadow of the First Amendment", *The Caravan* (30 April, 2021) <https://caravanmagazine.in/books/law-first-amendment-constitution> accessed 15 March 2022.

reservations".[17] — whether caste-based reservations are discriminatory or unjustified, and contrary to the idea of merit. Harvard Professor Ajantha Subramanium has aptly noted, "[The judgment] laid the groundwork for subsequent arguments about upper-caste rights as consistent with democratic principles and lower-caste rights as a violation of these principles".[18] In later years, the debate shifted primarily to the constitutional question whether provisions regarding reservations, such as Article 16(4), are an exception to the general principle of equality and non-discrimination.

In response to the judgments of the High Court and the Supreme Court in this case, the provisional Parliament, which "had broadly the same composition as the Constituent Assembly",[19] passed the Constitution (First Amendment) Act, 1951, which inserted clause 4 in Article 15.[20] The provision was inserted to clarify that "any special provision that the State may make for the educational, economic or social advancement of any backward class of citizens may not be challenged on the ground of being discriminatory".[21] B.R. Ambedkar, as the then-law minister, used harsh words to criticize the *ChampakamDorairajan* judgment, and termed it "utterly unsatisfactory".[22] He added that the constitutional interpretation

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17 ibid.

18 Subramanium (n 11) 210.

19 It was a provisional Parliament, as the first general elections had still not happened, and were scheduled for winter of 1951. See Chandrachud (n 14) 123.

20 Article 15(4) provides: "Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

21 'The Constitution (First Amendment) Act, 1951', (*Ministry of Law and Justice*) <https://legislative.gov.in/constitution-first-amendment-act-1951> accessed 15 March 2022.

22 'Parliamentary Debates', (*Parliament of India*, 1951), p. 9006-07, <https://eparlib.nic.in/bitstream/123456789/760696/1/ppd_18-05-1951.pdf> accessed 15 March 2022.

done "to block the advancement of the people who are spoken of as the weaker class", such as in this judgment, must be prevented.[23] The first amendment to the Constitution thus solidified an understanding that "equality and non-discrimination must be read so as not to preclude affirmative action" or reservation.[24]

B. Article 16(4): An exception to Article 16(1)?

Despite the first amendment, a critical view of reservations continued in the Supreme Court. A challenge to reservation in public employment was heard by a Constitutional bench of the Supreme Court in *General Manager, Southern Railway v. Rangachari*[25] (hereinafter "*Rangachari*"). A writ petition to restrain the railway administration from implementing a policy of reservation in promotions in the posts of railway services was allowed by the Madras High Court. When the issue arose in appeal, the Supreme Court considered the scope of Articles 16(1), 16(4), and 335 to determine whether reservation in promotions was permissible under the Constitution. The judges were in agreement on the point that Article 16(1) covered all matters related to employment, including that of promotions, and that the SC/STs are *inherently* included within the meaning of "backward class of citizens" in Article 16(4).

However, only a majority decision of 3:2 held that reservation in promotions would be permissible under Article 16(4). Writing for the majority, Justice P.B. Gajendragadkar (as he then was) held that the power under Article 16(4) can only be applied to provide

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23 ibid.

24 See Steuwer (n 16). It must also be noted that the basic structure doctrine has been evolved to even defend constitutional amendments. In his concurring opinion in *Govt. of NCT Delhi v. Union of India*, (2018) 8 SCC 501, Justice DY Chandrachud explained: "it is necessary to remember that the exercise of the constituent power may in certain cases be regarded as enhancing the basic structure". The first constitutional amendment can certainly be considered as enhancing the basic structure that equality and reservation go together.

25 AIR 1962 SC 36.

reservation in promotions, if the State is of the opinion that the backward class of citizens are not adequately represented in the services. This condition contemplated by the Court under Article 16(4) was held to be referring to both quantitative as well as qualitive representation, i.e. adequate representation not only in the lowest rungs of services but also in senior posts.[26] Justices K.N. Wanchoo and N. Rajagopala Ayyangar disagreed on this point. Justice Wanchoo held that reservation at all levels of services or "even of a majority of them" would destroy the fundamental right under Article 16(1) or make it "practically illusory". Justice Ayyangar was of the view that the term "inadequacy of representation" in Article 16(4) "refers to a quantitative deficiency in the representation of the backward classes in the service taken as a whole and not to an inadequate representation at each grade of service or in respect of each post in the service".

Even though the conclusions were different, the judges were unanimous in declaring Article 16(4) an exception to Article 16(1). The majority noted that this position of Article 16(4) – as an exception to the larger principles of equality and non-discrimination – was similar to Article 15(4), which, as the majority of the bench noted, was "an exception to the prohibition of discrimination on grounds specified in Article 15(1)". In his dissenting opinion, Justice Wanchoo reiterated that "the exception [under Article 16(4)] should not be interpreted so liberally as to destroy the fundamental right [under Article 16(1)] itself". Justice Ayyangar added, in his dissent, that Article 16(4) *enabled* the State to provide for reservation "when

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[26] Justice Gajendragadkar held: "The advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the services as well."

once the State forms the opinion about the inadequacy of the service."

All the judges also drew a relation between Articles 16(4) and 335. While the Court in *Champakam Dorairajan* was not ready to read Article 46 (a directive principle) in consonance with Article 16(4), the judges in *Rangachari*subjected Article 16(4) to a restriction under Article 335,[27] which included the term "efficiency of administration" in considering the claims of SC/STs in the services. It must be noted that Article 335 is neither a fundamental right nor a directive principle. While the majority upheld reservation in promotions under Article 16(4), it also held that reservation of appointments or posts "mean[s] some impairment of efficiency"[28], and that "the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments or posts." The majority advised that "an attempt must always be made to strike a reasonable balance between the claims of backward classes and the claims of other employees as well as the important consideration of the efficiency of administration". Justice Wanchoo said that the consideration of efficiency is implicit in Article 16(4), even though it is not mentioned in the text of the Article. He noted that "efficiency of administration" is to be "jealously safeguarded even when considering the claims" of SC/STs. Justice Ayyangar agreed with Justice Wanchoo's dissent, and

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27 Article 335 provided: "The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State."

28 Such a view has been proven as empirically incorrect and biased. See, Ashwini Deshpande and Thomas E. Weisskopf, 'Does affirmative action reduce productivity? A case study of the Indian railways' (2014) 64 World Development 169; Sukhadeo Thorat, Nitin Tagade, and Ajaya Naik, 'Prejudice against reservation policies: how and why?' (2016) 51(8) Economic and Political Weekly 61.

added that there was an "inter-connection between Art. 16 and Part XIV dealing with Services, because Article 335 forms, as it were, the link between Part XIV and the provisions for reservation in favour of the backward communities in Art. 16(4)".[29]

The *Rangachari* decision (both majority and minority) strengthened the critical discourse against reservation, which was started in *Champakam Dorairajan*. What was called "merit" in *Champakam Dorairajan* was declared sacred by the name of "efficiency" in *Rangachari*.

C. Articles 16(4) and 15(4) read in the same vein as Exceptions and Enabling provisions

The principles laid down in *Rangachari*were reinforced in *M.R. Balaji v. State of Mysore*[30](hereinafter "*Balaji*"). A Constitution bench was hearing the challenge to the 68 percent reservation provided to backward classes in engineering, medical, and other technical institutions in the erstwhile Mysore state. This reservation was distributed as follows: 28% for OBCs; 22% for More Backward Classes; 15% for SCs; and 3% for STs. This scheme was challenged on the grounds that it was "irrational" and "a fraud on Article 15(4)". To adjudicate the issue, the Court had to determine the scope of Article 15(4). This was the first time the interpretation of said Article was under direct consideration of a Constitution bench.

Writing a unanimous verdict, Justice Gajendragadkar (who had previously authored the majority decision in *Rangachari*)held that since Article 15(4) was added as a response to the decision to *Champakam Dorairajan*,"there is no doubt that Article 15(4) has to be read as a proviso or an exception to Articles 15 and 29(2)". The Court further held that "it would be erroneous to assume that the

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29 For a critique, see Bhaskar (n 14).

30 AIR 1963 SC 649.

appointment of the Commission (under Article 340) and the subsequent steps that were to follow it constituted a condition precedent to any action being taken under Art. 15(4)". It was added that "backwardness" under Article 15(4) must be "both social and educational", and "not either social or educational".

While it was noted that the interests of the society at large would be served by promoting the advancement of the weaker elements of society, the Court treated the issue of social and economic justice as being contrary to the principle of equality. It was recorded that for the realization of economic and social justice, "Article 15(4) authorises the making of special provisions for the advancement of the communities there contemplated even if such provisions may be inconsistent with the fundamental rights guaranteed under Article 15 or 29(2)". Finally, it held that a "special provision contemplated by Art. 15(4) […] must be within reasonable limits", and thus struck down the 68 percent reservation.

Viewing reservations provided for a majority of seats as "subverting the object of Article 15(4)", the Court, though "reluctant to say definitely what would be a proper provision to make" laid down a broad cap of 50% on reservations. It held, "Speaking generally and in a broad way, a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case". The Court introduced the 50% limit as it wanted to defend the notion of "merit". It was stated:

> The demand for technicians, scientists, doctors, economists, engineers and experts for the further economic advancement of the country is so great that it would cause grave prejudice to national interests if considerations of merit are completely excluded by whole-sale reservation of seats in all

> Technical, Medical or Engineering colleges or institutions of that kind.

However, these statements were made without critically engaging or considering how an abstract conception of merit acts to the exclusion of marginalized social groups.[31]

Relying upon his own observations on "efficiency" under Article 335 made in *Rangachari*, Justice Gajendragadkar reiterated that any reservation "at the cost of efficiency of administration" is constitutionally impermissible. As the observations in *Rangachari* were made in the context of reservation in services made under Article 16(4), Justice Gajendragadkar extended that "what is true in regard to Article 15(4) is equally true in regard to Article 16(4)". The 50% limit was applied to Article 16(4) as well. However, the Court did not provide any reason for connecting the application of Article 335 (dealing with services) to Article 15(4), which generally dealt with reservation in educational institutions.

Furthermore, while the case dealt specifically with the interpretation of Article 15(4), the Court interpreted Article 16(4) to mean that "unreasonable, excessive or extravagant reservation…

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31 For a comprehensive discussion on how an exclusionary notion of "merit" acts to disadvantage of marginalized communities, see Amartya Sen, 'Merit and Justice' in Arrow KJ, et al (eds), *Meritocracy and Economic Inequality* (Princeton University Press 2000). Sen argues, "If the results desired have a strong distributive component, with a preference for equality, then in assessing merits (through judging the generating results, including its distributive aspects), concerns about distribution and inequality would enter the evaluation… In most versions of modern meritocracy, however, the selected objectives tend to be almost exclusively oriented towards aggregate achievements (without any preference against inequality), and sometimes the objectives chosen are even biased (often implicitly) towards the interests of more fortunate groups (favouring the outcomes that are more preferred by "talented" and "successful" sections of the population. This can reinforce and augment the tendency towards inequality that might be present even with an objective function that inter alia, attaches some weight to lower inequality levels". See also Michael J. Sandel, *The Tyranny of Merit: What's Become of the Common Good?* (Penguin 2020).

would, by eliminating general competition in a large field and by creating wide-spread dissatisfaction amongst the employees, materially affect efficiency".[32] In making these observations on Article 16(4), the Court added that "in this connection it is necessary to emphasise that Article 15(4) is an enabling provision; it does not impose an obligation, but merely leaves it to the discretion of the appropriate government to take suitable action, if necessary". The only reason to suddenly refer to Article 15(4) as an enabling provision seems to be to develop a similar proposition for Article 16(4) – that it was, similarly, discretionary. The Court also set in motion a simplistic, though flawed, narrative of linking backwardness with "primarily" poverty, which would continue to the present era.[33]

In summary, the 50% limit in *Balaji* was based on the premise that Articles 15(4) and Articles 16(4) are exceptions to the Articles 15(1) and 16(1) respectively, and that there must be a limit on the span of exceptions. In its readiness to set judicially-crafted limitations on reservations, the Court made broad observations on Article 16(4), even though the challenge in the case was primarily based on the interpretation of Article 15(4).[34] Furthermore, the observation of

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32 Deshpande, Weisskopf (n 28).

33 In *Balaji,* the Court noted: "It appears that the Maharashtra Government has decided to afford financial assistance, and make monetary grants to students seeking higher education where it is shown that the annual income of their families is below a prescribed minimum. However, we may observe that if any State adopts such a measure, it may afford relief to and assist the advancement of the Backward Classes in the State, because backwardness, social and educational, is ultimately and primarily due to poverty." In a Constitution bench reference order (dated 27 August, 2020), *State of Punjab v. Davinder Singh*, (2020) 8 SCC 1, it was noted: "Reservation is a very effective tool for emancipation of the oppressed class. The benefit by and large is not percolating down to the neediest and poorest of the poor."

34 In *Indra Sawney,* this approach of *Balaji* was disapproved. It was noted, "Since the decision in *Balaji*, it has been assumed that the backward class of citizens contemplated by Article 16(4) is the same as the socially and educationally backward classes, Scheduled Castes and Scheduled Tribes mentioned in Article 15(4)… In our respectful opinion, however, the said assumption has no basis.

Article 15(4) being an enabling provision was made in the connection of putting a limitation on that Article, as it was read as an exception to Article 15(1).[35]

D. The 'Great Dissent' of Justice Subba Rao

In the nine-judge bench judgment in *K.S. Puttaswamy (Retd.) v. Union of India*[36](hereinafter "*Puttaswamy"*), the Supreme Court unanimously declared privacy to be a fundamental right. In his concurring opinion in *Puttaswamy*, Justice RF Nariman termed the dissenting opinion of Justice K. Subba Rao in *Kharak Singh v. State of Uttar Pradesh*[37] as a 'great dissent'. In the latter, Justice Subba Rao had recognised a constitutionally protected right to privacy, while the majority opinion declined to recognise such a right.

In my view, the dissenting opinion of Justice Subba Rao in the Constitution bench decision in *T. Devadasan v. Union of India*[38](hereinafter "*Devadasan"*) must also be considered as a 'great dissent'.[39]

Justice Subba Rao emphasized the importance of reservation as a facet of equality, contrary to what the previous judgments had

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Clause (4) of Article 16 does not contain the qualifying words "socially and educationally" as does Clause (4) of Article 15… Thus, certain classes which may not qualify for Article 15(4) may qualify for Article 16(4).

35 In *Balaji,* it was stated: "… like the special provision improperly made under Art. 15(4), reservation made under Art. 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution. In this connection it is necessary to emphasise that Art. 15(4) is an enabling provision; it does not impose an obligation, but merely leaves it to the discretion of the appropriate government to take suitable action, if necessary."

36 (2017) 10 SCC 1.

37 (1964) 1 SCR 332.

38 AIR 1964 SC 179.

39 Ironically, Justice RF Nariman adopted an approach on reservation in *Jarnail Singh v. Lachhmi Narain Gupta*, (2018) 10 SCC 396, which would be contrary to Justice Subba Rao's views in *Devadasan.* For a critique of *Jarnail Singh* decision, see Anurag Bhaskar and Surendra Kumar, 'Promotions, Creamy Layer, and the Reservation Debate' (2021) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3755254> accessed 15 March 2022.

held. In Part 3 of this article, I narrate how Justice Subba Rao's position was later approved by larger benches.

In *Devadasan*, a policy of "carry forward rule".[40] was held unconstitutional by a majority of 4:1. The majority of judges noted, "In order to effectuate the guarantee each year of recruitment will have to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities." While discussing the *Balaji* judgment, the Court reiterated that Article 16(4) is by way of proviso or an exception to Article 16(1), and therefore "cannot be so interpreted as to nullify or destroy the main provision". It was held that the "over-riding effect of clause (4) on clauses (1) and (2) could only [be] extended to the making of a reasonable number of reservation of appointments and posts in certain circumstances". The need for maintaining the efficiency of administration, emphasized in *Rangachari*, was reiterated in this case as well.

In his dissenting opinion, Justice Subba Rao questioned the premise of a strict judicial discourse on reservation which had built up in previous cases. As he noted, "Centuries of calculate[d] oppression and habitual submission reduced a considerable section of our community to a life of serfdom". It was to undo this situation, he stated, that the Constitution introduced Article 16(4). It was further

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[40] Carry forward rule means: "If a sufficient number of candidates considered suitable by the recruiting authorities, are not available from the communities for whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies thus treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course; and to the extent to which approved candidates are not available in that year against this additional quota, a corresponding addition should be made to the number of reserved vacancies in the second following year". See *Devadasan* (Justice Mudholkar's majority opinion).

emphasized that "the expression 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in an what by the main provision but falls outside it." This was an important observation. Contrary to what previous judgments or the majority in *Devadasan*had held**,** Justice Subba Rao wrote, "[Article 16(4)] has not really carved out an exception but has preserved a power untrammelled by the other provisions of the Article."

For the first time, a judge of the Supreme Court, even if in a dissenting opinion, was treating reservation provisions not as an exception to the larger equality principle, but as an expression of it. How that power ought to be exercised, he noted, is open to the discretion of the State, and not for the Court to prescribe. Accordingly, Justice Subba Rao stated that "reservation of appointments can be made in different ways", including the provisions for "carry forward", taking into consideration the "entire cadre strength". However, he also noted that the power under Article 16(4) is directory and permissive.

Justice Subba Rao further questioned the generalised principles which were framed against reservations by previous judgments, as follows: First, Article 335 has no bearing on the matter of interpreting Article 16(4). Second, even if the appointments were made on minimum qualifications, it is for the State, and not the judges, to consider "how far the efficiency of the administration" would be dealt with. This is because, after all, "the State, […] is certainly interested in the maintenance of standards of its administration." Third, the 50% limit envisaged by *Balaji*was applicable only to educational colleges, and not to services. Even further, since the judgment in *Balaji* had used expressions such as "generally" and "broadly" when referring to the 50% limit, it showed

that "the observations were intended only to be a workable guide but not an inflexible rule of law even in the case of admission to colleges."

While the majority in *Devadasan* reiterated the principles laid down in *Rangachari* and *Balaji,* the dissenting opinion of Justice Subba Rao marked a shift, though in a dissent, in the constitutional understanding of reservations. Justice Subba Rao called out the anxiety of the judges to put limitations on reservations. In particular, Justice Subba Rao questioned the opinion of Justice Gajendragadkar in *Balaji* for its scientifically unproven limit of 50%, over-emphasis on judicial scrutiny of "efficiency of administration", and eagerness to put limit on Article 16(4), even though its interpretation was not in question in *Balaji*.The importance of Justice Subba Rao's dissent would be later seen in the cases of *NMThomas* and *Indra Sawhney*.

E. Article 16(4): Only an Exception, not a Fundamental Right?

While the decision in *Rangachari* influenced the subsequent court judgments as well as the government to put restrictions on the reservation policy, the dissenting opinion of Justice Subba Rao in *Devadasan* became a ground for government employees from SC and ST communities to make a claim for a mandatory reservation policy from/by the government.

In the Constitution bench decision of *C.A. Rajendran v. Union of India*[41](hereinafter "*Rajendran"*), an Office Memorandum of the Union government was challenged under Article 32 of the Constitution on the grounds that it did not provide for any reservation in Class I and II services, but only in certain types of Class III and IV Services. The Court noted that the impugned policy of the Government was made subsequent to the decision in

41 AIR 1968 SC 507.

Rangachari, after which it was advised that "there was no constitutional compulsion to make reservation for SCs and STs in posts filled by promotion and the question whether the reservation should be continued or withdrawn was entirely a matter of public policy". Because of *Rangachari*'s emphasis on "efficiency", it was noted that the Union Government decided to withdraw reservation to SC/STs in promotions to Class I and Class II. The dissenting opinion of Justice Subba Rao in *Devadasan* was relied upon by the petitioner to argue that "Article 16(4) was not an exception engrafted on Art. 16, but was in itself a fundamental right granted to SCs and STs and backward classes and as such it was untrammelled by any other provision of the Constitution."

The Court in *Rajendran*unanimously rejected the petition, while holding that Article 16(4) does not confer any fundamental right to reservation. The reasons for this holding can be summarized in three propositions. First, relying upon the previous decisions of *Rangachari*, *Balaji*, and the majority view in *Devadasan*, the Court reiterated that Articles 14, 15 and 16 form "part of the same constitutional code of guarantees and supplement each other". While it was held that Article 16 is "only an incident of the application of the concept of equality enshrined in Article 14 thereof", Article 16(4) "is an exception clause and is not an independent provision and it has to be strictly construed." Second, the scope of Article 16(4), even according to the minority judgment of Justice Subba Rao on which the petitioner relied, was held only "an enabling provision", which confers a discretionary power on the State to make reservation. It does "not confer any right on the petitioner and there is no constitutional duty imposed on the Government" to make reservations for SC/STs "either at the initial stage of recruitment or at the stage of promotion". Third, it was held that the language of

Art. 16(4) must be interpreted in the context and background of Article 335, which gives "paramount importance" to "efficiency of administration", which in turn requires no reservation "in the higher echelons of service".

The decision in *Rajendran* denied to recognise a fundamental right to reservation. However, the reasoning adopted and the precedents followed in this judgment would be subsequently overturned.

II. The Constitutional Shift in *NM Thomas*&*Indra Sawhney*

A. Article 16(4) held to be a part of Article 16(1)

In *NM Thomas***,** a seven-Judge bench dealt with the validity of a test-relaxation rule for SCs and STs in promotions from lower division clerks to upper clerks.[42] The rule gave preferential treatment to SC/STs. The said rule was upheld by a 5:2 majority of the Court. All the judges wrote their separate opinions. A majority of four judges (Ray, Mathew, Fazal Ali, Krishna Iyer) upheld the rule under Article 16(1). According to the majority, Article 16(4) was held to be facet of Article 16(1). While in his concurrence, Justice Beg upheld the rule under Article 16(4), Justices Khanna and Gupta gave dissenting opinions, and considered the rule to be unconstitutional.

The majority of four judges noted that Articles 14, 15(1), and 16(1) guarantee the content of equality for everyone, including those from backward classes. Other methods of advancement such as giving preferences to underrepresented backward classes were held to be valid under within Article 16(1), which permits reasonable classification, similar to Article 14. As Justice Fazal Ali noted, the clerks belonging to SC/STs were only given a further extension of

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42 Under the rule, the Kerala government granted "temporary exemption to members already in service belonging to any of the Scheduled Castes and Scheduled Tribes from passing all tests (unified and special or departmental tests) for a period of two years". See *NM Thomas*.

time to pass the test because of their backwardness, and not any exemption from passing the test. This could only be done under Article 16(1) and not under Article 16(4). It was held by the majority that preferential treatment for members of the backward classes can mean equality of opportunity for all citizens.

In elaboration, Chief Justice Ray noted that "Article 16(4) indicates one of the methods of achieving equality embodied in Article 16(1)." Justice Mathew noted that "If equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1)", but "an emphatic way of putting the extent to which equality of opportunity could be carried viz., even up to the point of making reservation." Justices Fazal Ali and Krishna Iyer explicitly disagreed with previous judgments which considered Article 16(4) to be an exception to Article 16(1), and approved the dissent of Justice Subba Rao in *Devadasan*. In the words of Justice Fazal Ali, "Clause (4) of Article 16 of the Constitution cannot be read in isolation but has to be read as part and parcel of Article 16(1) and (2)". Justice Krishna Iyer held that Article 16(4) is "an illustration of constitutionally sanctified classification". He added, "Article 16(4) need not be a saving clause but put in due to the over-anxiety of the draftsman to make matters clear beyond possibility of doubt" for the rights of SC/STs, whose "only hope is in Article 16(4)".

Justices Fazal Ali and Krishna Iyer also expressed doubt on the rigidity of the 50% limit on reservations put by *Balaji*judgment. Justice Fazal Ali noted that the 50% limit is "a rule of caution and does not exhaust all categories". He added that "[a]s to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical

formula so as to be adhered to in all cases." For instance, he stated a reservation of 80% jobs for backward classes of citizens in a State would be justified, if their population constituted 80 per cent of the total population. Both Fazal Ali and Krishna Iyer further agreed that 50% limit cannot be used to exclude "carry forward" rule, as the recruitment depends on "the total strength of a cadre". Justice Fazal Ali also noted that in considering Article 16(4), "one should not take an artificial view of efficiency", and that "a concession or relaxation in favour of a backward class of citizens particularly when they are senior in experience would not amount to any impairment of efficiency".

Disagreeing with the majority, Justice HR Khanna held that the question of giving preferential treatment for members of backward classes could not be contained in Article 16(1), and had to be located in Article 16(4). Justice Khanna further opined that if it was permissible to "accord favoured treatment" to backward classes under Article 16(1), then Article 16(4) "would have to be treated as wholly superfluous and redundant", and therefore the Court should not accept a view which would have the effect of rendering Article 16(4) "redundant and superfluous."[43] Accordingly, he held that "preferential treatment [to SC/ST clerks in the case] is plainly a negation of the equality of opportunity for all citizens" in employment under the State. According to Justice Khanna, Article 16(4) was "a proviso or exception" to Article 16(1), and could not be applied beyond a limited way, otherwise the "ideals of supremacy of merit, the efficiency of services and the absence of discrimination in sphere of public employment would be the obvious casualties".

[43] Justices Khanna and Gupta adopted the approach taken in *Champakam Dorairajan*, *Balaji* and other cases.

Justice AC Gupta agreed with the view of Justice Khanna on Article 16(4).

While Justice Beg agreed with the majority to uphold the rule of relaxation, he disagreed with them on the point of preferential treatment being located within Article 16(1). On this point, Justice Beg concurred with Justices Khanna and Gupta. Though it is not clear from judgment whether Justice Beg considered Article 16(4) as an exception to Article 16(1), Justice Beg held that test-relaxation could only be given under Article 16(4).

Even though the majority in the seven-judge bench decision of *Thomas*did not explicitly overrule *Devadasan*, the principles enunciated in *Thomas* were a departure from the decisions in *Devadasan* and *Balaji*. The majority in *NM Thomas* also did not refer to Article 16(4) as enabling. In his concurring opinion in a three-judge bench decision in *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*[44](hereinafter *"ABSKS"*), Justice O. Chinnappa Reddy summarized the constitutional shift created by *NM Thomas*:

> All five learned judges who constituted the majority were emphatic in repudiating the theory (propounded in earlier cases) that Article 16(4) was in the nature of an exception to Article 16(1). All were agreed that Article 16(4) was a facet, an illustration or a method of application of Article 16(1)

If Article 16(4) was held to be a facet of Articles 14, 15, and 16(1), then it would become a fundamental right in itself, which would be enforceable in courts.[45] As Justice Chinnappa Reddy noted in *ABSKS*, Article 16(4) "recognises that the right to equality of opportunity includes the right of the underprivileged to conditions

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44 (1981) 1 SCC 246.

45 Marc Galanter, *Law and Society in Modern India* (OUP India 1992) 277.

comparable to or compensatory of those enjoyed by the privileged". The post-*NM Thomas*jurisprudence accepted "the principle to treat equally what are equal and unequally what are unequal", and that "to treat unequals differently according to their inequality is not only permitted but required".[46] *NM Thomas* also dismissed the strict efficiency argument propounded in *Rangachari* and other judgments.

B. *NM Thomas* approved in *Indra Sawhney:* Article 16(4) as a fundamental right[47]

The enforceability of reservations as effected by *NM Thomas* was confirmed in a nine-judge bench decision of *Indra Sawhney* (also called the *Mandal Commission* case[48]). The Court was dealing with the validity of 27% reservation provided to OBCs and 10% reservation for economically weaker sections (EWS) in the vacancies in posts and services under the government of India which were to be filled by direct recruitment. This was in addition to the 22.5% reservation given to SC/STs. By a 6-3 majority opinion, the Court upheld the constitutional validity of the 27% reservation provided to the OBCs, provided that the socially advanced persons/sections ("creamy layer") are excluded from the benefits of this reservation. The 10% EWS reservation was struck down.

There were six separate opinions in the judgment. However, seven out of nine judges (in their respective separate opinions) reinforced that Article 16(4) is a facet of Article 16(1).[49] Justice RM Sahai, in his dissent, also noted that Articles 16(1) and 16(4) operated in the "same field". This, in effect, makes a total of eight out of nine

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46 *St. Stephen's College v. University of Delhi*, (1992) 1 SCC 558.

47 I am grateful to Surendra Kumar (Assistant Prof., JGLS) for this section of the paper, as a previous discussion with him made me think on the line of argument presented in this section.

48 For a brief legal history, see Bhaskar and Kumar (n 39).

49 M.H. Kania, C.J., M.N. Venkatachaliah, S.R. Pandian, A.M. Ahmadi, Kuldip Singh, P.B. Sawant, and B.P. Jeevan Reddy, JJ.

judges, who found Article 16(4) to be a part of Article 16(1). On this point, the majority view in *Devadasan* was explicitly overruled, and the decision in *Balaji* was termed "untenable". It was declared that "the view taken by the majority in *Thomas* is the correct one".[50]

It was held that Article 16(4) is an instance of classification implicit in and permitted by Clause (1). The plurality opinion of Justice BP Jeevan Reddy clarified this in clearest terms: "even without Clause (4), it would have been permissible for the State to have evolved such a classification and made a provision for reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms." Justices Pandian, Sawant, Kuldip Singh, and Sahai agreed on this point of classification permitted by Article 16(1), of which Article 16(4) explicitly provides jobs-reservation for backward classes.[51]

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50 *Indra Sawhney (*Justice Jeevan Reddy's plurality opinion, on behalf of M.H. Kania, C.J., M.N. Venkatachaliah, A.M. Ahmadi, JJ., and himself).

51 Justice Pandian stated: "No Reservation can be made under Article 16(4) for classes other than backward classes. But under Article 16(1), reservation can be made for classes, not covered by Article 16(4)."
In his concurring opinion, Justice Sawant stated: "Clause (4) of Article 16 is not an exception to Clause (1) thereof. It only carves out a section of the society, viz., the backward class of citizens for whom the reservations in services may be kept. The said clause is exhaustive of the reservations of posts in the services so far as the backward class of citizens is concerned. It is not exhaustive of all the reservations in the services that may be kept. The reservations of posts in the services for the other sections of the society can be kept under Clause (1) of that Article."
On this point, Justice Kuldip Singh's dissenting opinion also stated: "Thus the State power to provide job reservations is wholly exhausted under Article 16(4). No reservation of any kind is permissible under Article 16(1). Article 16(4) completely overrides Article 16(1) in the matter of job-reservations… Article 16(4) thus exclusively deals with reservation and it cannot be invoked for any other form of classification. Article 16(1), however, permits protective discrimination, short of reservation, in the matters relating to employment in the State-services."
Justice Sahai held a similar view in his dissent: "Article 16(4) being part of the scheme of equality doctrine it is exhaustive of reservation, therefore, no reservation can be made under Article 16(1) … Preferential treatment in shape

In his plurality opinion, Justice Jeevan Reddy noted that the objective behind Article 16(4) was the "sharing of State power", as the State power, which was "almost exclusively monopolised by the upper castes i.e., a few communities, was now sought to be made broad-based". Therefore, Article 16(4) aimed at "empowerment of the deprived backward communities - to give them a share in the administrative apparatus and in the governance of the community." Justice Jeevan Reddy held that "for assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally". The plurality opinion further clarified that "No special standard of judicial scrutiny can be predicated in matters arising under Article 16(4)", and that, this understanding is clear, which need not be explained. In his concurrence, Justice S. Ratnavel Pandian noted explicitly, what was already there[52] in the reasoning of other judges, that Article 16(4) is "proclaiming a 'Fundamental Right' enacted about 42 years ago for providing equality of opportunity in matters of public employment to people belonging to any backward class". He added that "it is highly deplorable and heart-rending to note" that this fundamental right "has still not been given effect to in services under the Union of India and many more States". The reasoning given by the majority of judges thus considers Article 16(4) as a fundamental right.

This understanding is also strengthened from the fact that majority of judges in *Indra Sawhney* did not hold Article 16(4) to be an enabling provision. Justice Thommen, in his dissenting opinion, was the only judge to have considered Article 16(4) as an exception to Article 16(1), and therefore "an enabling provision conferring a

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of weightage etc. can be given to those who are covered in Article 16(1) but that too has to be very restrictive."

52 Seven other judges in *Indra Sawhney* had held Article 16(4) to be a part of Article 16(1).

discretionary power on the State". In his dissent, though Justice Sahai had noted that Articles 16(1) and 16(4) operate in same field, but held that only the former is by default enforceable in a court of law. According to him, Article 16(4) is "not constitutional compulsion but an enabling provision", which "operates automatically whereas the other comes into play on identification of backward class of citizens and their inadequate representation". The plurality opinion authored by Justice Jeevan Reddy, and even the dissenting opinion of Justice Kuldip Singh, did not make any such distinction between Articles 16(1) and 16(4). In fact, Justice Jeevan Reddy's plurality opinion rejected a submission by senior advocate Ram Jethmalani, who had argued that Article 16(4) is an enabling provision and not a source of power.[53]

Though Justice Sawant also held 16(4) to be a facet of Article 16(1), he noted that "Article 16(4) is couched in an enabling language". However, he added a caveat to it, "The reservations in the services under Article 16(4), except in the case of SCs/STs, are in the discretion of the State." This meant that Justice Sawant viewed reservation for SC/STs as mandatory. Other judges in *Indra Sawhney* had also considered SC/ST to be already within the term "backward class".[54] Justice Pandian also referred to Article 16(4) as "an enabling

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53 Justice Jeevan Reddy's plurality opinion noted: "Mr. Ram Jethmalani submits that Article 16(4) is merely declaratory in nature, that it is an enabling provision and that it is not a source of power by itself. He submits that unless made into a law by the appropriate Legislature or issued as a rule in terms of the proviso to Article 309, the "provision" so made by the Executive does not become enforceable. At the same time, he submits that the impugned Memorandums must be deemed to be and must be treated as Rules made and issued under the proviso to Article 309 of the Constitution. We find it difficult to agree with Sri Jethmalani." In the case, Ram Jethmalani had appeared for the State of Bihar.

54 Justice Jeevan Reddy's opinion (on behalf of M.H. Kania, C.J., M.N. Venkatachaliah, A.M. Ahmadi JJ., and himself), Justice Pandian's concurring opinion.

provision and permissive in character overriding Article 16(1) and (2)", but he clarified that this "enabling" nature does not give any discretion to the State. As he summed it, "The power conferred on the State under Article 16(4) is one coupled with a duty and, therefore, the State has to exercise that power for the benefit of all those, namely, backward class for whom it is intended." This explanation of 'power + duty' makes Article 16(4) a mandatory provision – a fundamental right for backward classes, as Justice Pandian also noted in one of the paras of his concurring opinion.

Therefore, in effect, only two judges (Thommen, Sahai) in *Indra Sawhney*held Article 16(4) to be a mere "enabling provision" for making reservation for SC/STs, and only three judges (Thommen, Sahai, Sawant) held it to be an enabling provision for other backward classes.[55] The majority of judges in *Indra Sawney* thus placed Article 16(4) on the pedestal of fundamental rights.

Even though Articles 16(1) and 16(4) were held to be operating in the same field, a majority of judges endorsed a general limit of 50% on reservations contemplated in Article 16(4).[56] This would seem to be a contradiction in itself, because the 50% limit was previously envisaged, when Article 16(4) was considered as an exception to Article 16(1) on the reasoning that the exception cannot

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55 Even if one argues that Justice Kuldip Singh agreed entirely with Justice Sahai's reasoning (though he did not seem to explicitly agree on this point), that still does not make it the majority opinion of *Indra Sawhney*to hold Article 16(4) as mere enabling.

56 Justice Jeevan Reddy's plurality opinion (on behalf of M.H. Kania, C.J., M.N. Venkatachaliah, A.M. Ahmadi JJ., and himself) was in favour of a flexible limit of 50%.i.e it could be breached in certain circumstances. Justices Kuldip Singh, Sahai, and Thommen were in favour of a strict 50% limit.

exceed the main rule. The judges argued that it was now done to harmonise the rights under Articles 16(4) and Article 16(1).[57]

However, the majority[58] also held that while 50% limit shall be the rule only under Article 16(4), it could be breached out in "certain extraordinary situations inherent in the great diversity of this country and the people". The plurality opinion authored by Justice Jeevan Reddy noted:

> It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative […]

The opinion called for "extreme caution" to be exercised and a "special case made out". Both Justices Pandian and Sawant did not find any logic in the 50% limit, and did not consider reservations over 50% to be violative of Article 14 or 16. Both judges noted the extent of reservations beyond 50% would depend upon the facts and circumstances of each case.[59] Justice Pandian further noted, "The percentage of reservation at the maximum of 50% is neither based on scientific data nor on any established and agreed formula." Though

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57 For a critique of the 50% limit, see Alok Prasanna Kumar, 'Revisiting the Rationale for Reservations: Claims of 'Middle Castes' (2016) 51(47) Economic & Political Weekly 10.

58 Justice Jeevan Reddy's plurality opinion (on behalf of M.H. Kania, C.J., M.N. Venkatachaliah, A.M. Ahmadi JJ., and himself); Justice Pandian; Justice Sawant.

59 Justice Sawant's concurring opinion noted: "It has already been pointed out earlier that Clause (4) of Article 16 is not an exception to Clause (1) thereof. Even assuming that it is an exception, there is no numerical relationship between a rule and exception, and their respective scope depends upon the areas and situations they cover. How large the area of the exception will be, will of course, depend upon the circumstances in each case."

he put a caveat here that "reservations made either under Article 16(4) or under Article 16(1) and (4) cannot be extended to the totality of 100%".

Reservation in promotions was declared as unconstitutional by a majority of eight judges on the ground that it dilutes efficiency of administration.[60] Justice Ahmadi refrained from expressing an opinion on the ground that the issue was not argued before the Court, thereby upholding the argument of the Union government that "Constitutional questions should not be decided in vacuum and that they must be decided only if and when they arise properly on the pleadings of a given case." The Court, however, held that its verdict on promotions would operate "only prospectively" after five years, and would "not affect promotions already made, whether on temporary, officiating or regular/permanent basis".

NM Thomas and *Indra Sawney* authoritatively rejected the view of previous Constitution bench judgments (*Rangachari, Balaji, Devadasan, Rajendran)*, which had considered Article 16(4) to be merely enabling, and an exception, rather than a fundamental right in itself. These two judgments clarified that the right to reservation itself is a fundamental right under Articles 16(1) and 16(4). *Indra Sawney* also reiterated that SCs and STs shall be deemed backward for the purpose of reservations.

III. Judicial Indiscipline post 1995

A. Deliberate judicial ignorance to move back to *Balaji* era?

Before the five-year deadline set by *Indra Sawney* on reservation in promotions could end, the Parliament passed the 77th amendment to the Constitution in June 1995. The Union Government inserted a new clause (4A) after Article 16(4), which

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60 For a critique of the efficiency argument, see Bhaskar (n 14).

restored the constitutional power of the State to provide "reservation in matters of promotion to any class or classes of posts" in public services to SC/STs.The Statement of Objects and Reasons of the amendment noted the representation of SC/STs in public services has not reached the "required level".[61]

After the reservation in promotions were restored, two judgments in the cases of *Union of India v. Virpal Singh Chauhan*[62] (hereinafter "*Virpal*") and *Ajit Singh (I) v. State of Punjab*[63](hereinafter "*Ajit Singh I"*) introduced the concept of a "catch up rule", according to which the senior general category candidates who were promoted after SC/ST candidates would regain their seniority over such SC/ST candidates promoted by reservation earlier.However, other three-judge benches in *Ashok Kumar Gupta v. State of Uttar Pradesh*[64] (hereinafter "*Ashok Kumar Gupta*") and *Jagdish Lal v. State of Haryana*[65] (hereinafter "*Jagdish Lal")* took a view contrary to *Virpal* and *Ajit Singh I*,and held that the rights of the reserved candidates under Article 16(4) and Article 16(4A) were fundamental rights. This conflict between *Virpal and Ajit Singh I* on one side, and *Ashok Kumar Gupta* and *Jagdish Lal* on the other, led to a reference to a Constitution bench in the case of *Ajit Singh (II) v. State of Punjab*[66](hereinafter "*Ajit Singh II"*).

The Constitution bench was asked to clarify the general rule relating to seniority[67] in matters of reservation in promotions, and

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61 The Constitution (Seventy Seventh Amendment) Act, 1995, (*Ministry of Law and Justice*)<https://legislative.gov.in/constitution-seventy-seventh-amendment-act-1995> accessed 15 March 2022.

62 AIR 1996 SC 448.

63 (1996) 2 SCC 715.

64 (1997) 3 SCR 269.

65 AIR 1997 SC 2366.

66 (1999) 7 SCC 209.

67 In simple words, the question was: whether the candidates from general category, who were senior at lower level, would regain their seniority on being

whether the rights of the reserved candidates under Article 16(4) and Article 16(4A) were fundamental rights. The Court considered Articles 14 and 16(1) as "the permissible limits of affirmative action by way of reservation under Articles 16(4) and 16(4A)". It was held that while the "right to be considered for promotion" is a fundamental right within Article 16(1), reservation in promotions under Articles 16(4) and 16(4A) "do not confer any fundamental rights nor do they impose any constitutional duties". It was added that the said articles "are only in the nature of enabling provision vesting a discretion in the State to consider providing reservation". It was noted, "There is no directive or command in Article 16(4) or Article 16(4A) as in Article 16(1)". This view was clearly contrary to larger benches in *NM Thomas* and *Indra Sawhney,* which did not consider Article 16(4) as merely enabling.

In coming to its conclusion of upholding the "catch up rule", the Constitution bench in *Ajit Singh II* relied upon judgments rendered by previous Constitution benches in *Rajendran* and *Balaji*.However, the Court did not even discuss the decisions in *NM Thomas*and its approval in *Indra Sawhney*.As mentioned in this article, the position of law on reservations in *Balaji* and *Rajendran* was completely changed after *NM Thomas*. Ironically, while referring to *Rajendran* and *Balaji*, the Court noted that "Unfortunately, all these rulings of larger benches were not brought to the notice" of the bench in *Ashok Kumar Gupta* and *Jagdish Lal*, which had considered that *Indra Sawney* reiterated the reservation as a fundamental right. What Justice Jeevan Reddy's plurality opinion in *Indra Sawhney* had held about maintaining a balance of 50% limit in making reservations, the judges in *Ajit Singh II* quoted it in a very different context -

promoted at a later date than SC/ST candidates who were promoted earlier through reservation.

whether Article 16(4) is a fundamental right.[68] In fact, the excerpt of Justice Reddy's decision cited in *Ajit Singh II*clearly noted that Article 16(4) is not an exception to Article 16(1)..[69]

The *Ajit Singh II* bench, being a smaller bench than *Indra Sawhney*, was bound by the latter decision. In disobeying *Indra Sawhney*, it showed judicial indiscipline, which seems to be deliberately done to restrict the right of reservation. However, whatever may be the reasons in showing this indiscipline and inconsistency, the *Ajit Singh II* decision made efforts to take the constitutional jurisprudence back to the era of *Balaji,* which was declared "untenable" in the larger bench decision in *Indra Sawhney*.

After *Ajit Singh II*, the Parliament enacted a series of constitutional amendments.The Constitution (Eighty First Amendment) Act, 2000, which added Article 16(4B), allowed the States to "carry forward" the unfulfilled/backlog vacancies from previous years beyond 50% limit. By way of the 85th constitutional amendment, the Parliament negated the "catch-up rule" (upheld by

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68 In *Ajit Singh II,* the Constitution bench cited the following excerpt from Justice Jeevan Reddy's opinion in *Indra Sawhney* toclaim that Article 16(4) is a not a fundamental right: "It needs no emphasis to say that the principal aim of Articles 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is a means of achieving the very same objective. Clause (4) is a special provision - though not an exception to Clause (1). Both the provisions have to be harmonised keeping in mind the fact that both are restatements of the principles of equality enshrined in Article 14. The provision under Article 16(4) - conceived in the interests of certain sections of society - should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society." However, the next sentence in Justice Jeevan Reddy's opinion (which *Ajit Singh II* choose to omit from the quote) makes it clear that the point was on 50% limit, and not on 16(4) not being a fundamental right: "From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in Clause (4) of Article 16 should not exceed 50%."

69 ibid.

Ajit Singh II) by amending Article 16(4A) to mean "matters of promotion, with consequential seniority".[70] with retrospective effect.

B. The Continued Misappropriation of *Indra Sawhney*

The constitutional amendments regarding reservation in promotion with retrospective effect were challenged in 2002. A Constitution bench in *M. Nagaraj v. Union of India*(hereinafter "*Nagaraj*") unanimously upheld the validity of these constitutional amendments, but not before subjecting them to certain conditions. The unanimous judgment, authored by Justice SH Kapadia, laid down that any law under the said constitutional amendments can be made only if the State collects "quantifiable data" showing backwardness of SC/STs, their inadequacy of representation in services, efficiency of administration, exclusion of creamy layer, and that the 50% ceiling limit in reservations is not breached.[71]

In *Nagaraj*, without discussing the previous judgments on the issue, the Court started with the presumption that, "Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4A) is enabling." Later on, it referred to *Ajit Singh II*. It was held: "If Articles 16(4A) and 16(4B) flow from Article 16(4) and if Article 16(4) is an enabling provision, then Articles 16(4A) and 16(4B) are also enabling provisions… The State is not bound to make reservation for SC/ST in the matter of promotions". As explained under previous sub-heading, the view of *Ajit Singh II* was contrary to *Indra Sawhney*, and *Nagaraj* repeated the same.

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70 Consequential seniority, in simple words, would mean that if a person (A) from the SC/ST category is, by reservation, promoted earlier than a senior person (B) belonging to the general category, then person (A) would be considered the senior at the higher-level post. This would remain, even after the person (B) from the general category is eventually promoted to the same post.

71 For a critique of the conditions set by *Nagaraj* decision, see Bhaskar and Kumar (n 39).

The *Nagaraj* bench had referred to the holding in *Indra Sawney***,** but ironically to decide against it. By a majority of 8-1, the judges in *Indra Sawhney*case had categorically held that Article 16(4) is a part of the equality principle enshrined in Article 16(1). Contrary to this authoritative holding, the Constitution bench in *Nagaraj*ruled that Articles 16(1) and 16(4) "operate in different fields", and like *Ajit SinghII*, illegally sought to take the constitutional jurisprudence to the pre-*NM Thomas* era.

Indra Sawhney had also warned against a special or strict standard for scrutiny of constitutional provisions on reservation, but *Nagaraj*, in effect, adopted a strict standard, as it laid down certain prerequisites before the right under Article 16(4) and 16(4A) could be availed.[72] Even the *Balaji* judgment, on which the *Nagaraj* bench had relied, had held against a mandatory condition precedent to any action to implement reservation.[73] The strict standards made it impossible to implement reservations, as the policies were struck down in several cases by applying the criterion laid down by *Nagaraj*.[74] The bench also applied the standards of determining OBCs on the SCs and STs.[75]

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72 Justice Jeevan Reddy's plurality opinion in *Indra Sawhney* held: "No special standard of judicial scrutiny can be predicated in matters arising under Article 16(4)".

73 To repeat, in *Balaji,* it was held: "It is true that the Constitution contemplated the appointment of a Commission whose report and recommendations, it was thought, would be of assistance to the authorities concerned to take adequate steps for the advancement of Backward Classes; but it would be erroneous to assume that the appointment of the Commission and the subsequent steps that were to follow it constituted a condition precedent to any action being taken under Art. 15(4)."

74 *Anil Chandra v. Radha Krishna Gaur*, (2009) 9 SCC 454; *Suraj Bhan Meena v. State of Rajasthan*, (2011) 1 SCC 467; *UP Power Corporation v. Rajesh Kumar*, (2012) 7 SCC 1; *General Categories Welfare Federation v. Union of India*, (2012) 7 SCC 40; *Rohtas Bhankhar v. Union of India*, (2014) 8 SCC 872; *S. Panneer Selvam v. State of Tamil Nadu*, (2015) 10 SCC 292; *Chairman & Managing Director, Central Bank of India v. Central Bank of India SC/ST Employees Welfare Association*, (2015) 12 SCC

It is for these reasons that the correctness of *Nagaraj* was doubted. Yet, another Constitution bench in the case of *Jarnail Singh v. Lachhmi Narain Gupta*[76] (hereinafter *"JarnailSingh"*)refused to refer *Nagaraj* to a larger bench.[77]In effect, the Constitution bench decisions in *Ajit Singh II*, *Nagaraj*, and *Jarnail Singh* chipped away the constitutional jurisprudence settled in the larger bench of *Indra Sawhney*. The minority view in *Indra Sawney,* that Article 16(4) is a mere enabling provision, was misappropriated as that of the majority, by *Ajit Singh II* and *Nagaraj*. There can be no justification for this indiscipline or deliberate ignorance.

C. The Effect of Indiscipline in Later Decisions

Because of the indiscipline of the Constitution benches, there were repercussions for the rights of SCs and STs. While on one hand, reservation policies were being struck down by applying the standards set in *Nagaraj*, on the other, the State was left unaccountable if it decided not to implement the right to reservation.[78]

308; *Suresh Chand Gautam v. State of UP*, (2016) 11 SCC 113; *BK. Pavitra (I) v. Union of India*, (2017) 4 SCC 620.

75 Furthermore, the judgment in Indra Sawhney had adopted the test of "backwardness" and "creamy layer" for determination of status of other "backward classes". By subjecting the SCs and STs to the "backwardness" and "creamy layer" criteria, Justice Kapadia (and other judges) in *Nagaraj* went against the larger bench ruling in Indra Sawhney, which held SCs and STs to be deemed backward for the purpose of reservation. Also, the 50% limit was reiterated again, as the Nagaraj decision noted that "even if the State has compelling reasons… the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50%". However, there was no discussion done on his aspect, and this was abruptly added into the conclusion.

76 (2018) 10 SCC 396.

77 The *Jarnail Singh* bench, despite having same strength as *Nagaraj* bench, revised *Nagaraj* to the effect that it removed the condition for collection of data for determining the backwardness of SCs and STs. Ideally, the issues should have been referred to a larger bench. For a critique of *Jarnail Singh*, see Bhaskar and Kumar (n 39).

78 I prefer to call this - "dual approach to avoid reservations".

In a two-judge bench decision in *Suresh Chand Gautam v. State of Uttar Pradesh*[79](hereinafter "*Suresh Chand Gautam*"),a writ petition was filed under Article 32 with the prayer commanding the respondent State to enforce Articles 16(4A) and 16(4B) or, alternatively, directing the respondents to constitute a committee which could survey and collect necessary qualitative data of SCs and STs in services, as providedin*Nagaraj*. The petition was dismissed on the ground that the larger benches such as *Nagaraj* have held that the State is not bound to make reservation for SCs and STs in matter of promotions, and as a result, "there is no duty" on the State.

The Court added that issuing a mandamus to collect the data "will be in a way, entering into the domain of legislation, for it is a step towards commanding to frame a legislation or a delegated legislation for reservation." The Court further observed that while it asked the State on several occasions[80] to issue certain guidelines for "for sustaining certain rights of women, children or prisoners or under-trial prisoners", but this "category of cases falls in a different compartment" and "sphere than what is envisaged in Article 16(4-A) and 16(4-B)". This is because, as the Court attempted to clarify, the constitutional validity of Articles 16(4A) and 16(4B) was upheld with "certain qualifiers", as they were enabling provisions.[81]

Another two-judge bench in *Mukesh Kumar v. State of Uttarakhand*[82](hereinafter "*Mukesh Kumar*")heard the challenge against the Uttarakhand government's refusal to provide reservation in promotions, despite a committee constituted by the government to collect quantifiable data as per the *Nagaraj* criteria noting that there

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79 (2016) 11 SCC 113.

80 *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241; *D.K. Basu v. State of West Bengal*, (2015) 8 SCC 744.

81 In holding this, *Suresh Chand Gautam* also relied upon the minority view in *Indra Sawhney*.

82 (2020) 3 SCC 1.

was inadequate representation of SC/STs in government services in the state. The two-judge bench dealt with the questions "whether the State Government is bound to make reservations in public posts and whether the decision by the State Government not to provide reservations can be only on the basis of quantifiable data relating to adequacy of representation of persons belonging to Scheduled Castes and Scheduled Tribes." Relying upon the decisions in *Rajendran*, *Indra Sawhney, Ajit Singh (II), Nagaraj, Jarnail,* and *Suresh Chand Gautam*,the bench in *Mukesh Kumar* reiterated that "Article 16(4) and 16(4A) do not confer a fundamental right to claim reservations", as they are enabling provisions.

The dual approach to avoid the right to reservation is quite visible in *Mukesh Kumar,* as it was held thatthe "collection of data regarding the inadequate representation [of SC/STs] is a pre-requisite for providing reservations, and is not required when the State Government decided not to provide reservations". That is to say that the State is not required to justify its decision through data of adequate representation of SCs and STs, if it decides not to provide reservation.

It must be repeated here that the majority of judges in *Indra Sawhney* overturned the effect of *Rajendran*, and that *Ajit Singh II*, *Nagaraj*, and *Jarnail* are contrary to *Indra Sawney*. But, *Suresh Chand Gautam* and *Mukesh Kumar* only followed the cases of *Rajendran, Ajit Singh II, Nagaraj* and *Jarnail Singh* in holding that Article 16(4) is merely enabling.

IV. Enforceability of a Fundamental Right to Reservation

As I have narrated, the right to claim reservation under Article 16(4) has been recognised as a part of the larger fundamental right of equal opportunity under Article 16(1). Both *NM Thomas* and *Indra Sawhney* have held to this effect. The language of Article 16(1) is

that of a positive right, from which Article 16(4) carves out a right for backward classes, in particular for SCs and STs. A right has a corresponding obligation on the State, which cannot be neglected.[83] Therefore, Article 16(4) also imposes a positive obligation on the State. It does not remain merely enabling. Furthermore, there would be a right of reservation for backward classes under Article 16(1), even if there was no Article 16(4). To reiterate, Article 16(4) expresses what is implicit in Article 16(1). After *Indra Sawhney,* reservation for backward classes no longer remains a discretion of the State. Now, a question may arise regarding the extent of this right, i.e., to what extent reservations may be applied.[84]

While Articles 330 and 332 provide for reservation of seats for SCs and STs in Lok Sabha and State Legislative Assemblies in proportion to their population, such an explicit criterion is missing from the text of Articles 15 and 16. However, Justice Mathew in his concurring opinion in *NM Thomas* had invoked the idea of proportional equality even in services.[85] After referring to certain American decisions,[86] Justice Mathew emphasized this idea, while noting: "The concept of equality of opportunity in matters of employment is wide enoughto include within it compensatory measures to put the members of the SCs and STs on par with the

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83 For an insightful discussion on rights and corresponding obligation/duties, see Justice DY Chandrachud's opinion in *Justice Puttaswamy (Retd.) v. Union of India,* (2017) 10 SCC 1 (Aadhaar judgment).

84 This point needs to be considered in light of the facts that the 50% limit on reservations has been consistently questioned and critiqued, and that a fundamental right may have certain restrictions.

85 In *NM Thomas,* Justice Mathew's concurring opinion noted:"There is no reason why this Court should not also require the state to adopt astandard of proportional equality which takes account of the differing conditions andcircumstances of a class of citizens whenever those conditions and circumstancesstand in the way of their equal access to the enjoyment of basic rights or claims."

86 *Griffin v. Illinois*, (1955) 351 US 12; *Douglas v. California*, (1963) 372 US 353; *Harper v. Virginia Board of Elections*, (1966) 383 US 663.

members of other communities whichwould enable them to get their *share of representation* in public service." He added that compensatory measures ensure SCs and STs "their due share of representation in public services".

However, *Indra Sawhney* held that Article 16(4) "speaks of adequate representation and not proportionate representation". It was, though, noted that "the proportion of population of *backward classes* to the total population would certainly be relevant". It was held that the reservation limit should generally not exceed 50%, but it can be exceeded in an "extraordinary situation". This also implies that in some circumstances where the representation is insufficient, 'adequate representation' may even be greater than 'proportional representation'.[87]

While Justice Mathew's view was in the context of SC/ST reservation, it can be deduced from *Indra Sawhney* that its general view on adequate representation within 50% limit was applicable to OBCs, as the percentage of reservation provided to SCs and STs in services was already the same as what was proportionally provided to them in Lok Sabha and State Legislative Assemblies. As the plurality opinion in *Indra Sawhney* held, "From this point of view, the 27% reservation provided by the impugned Memorandums in favour of backward classes is well within the reasonable limits. *Together with reservation in favour of Scheduled Castes and Scheduled Tribes*, it comes to a total of 49.5%."

Furthermore, to undo the effect of *Indra Sawhney* on promotions, the Parliament had restored its power (by the 77th, 81st,

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87 I am grateful to Advocate Disha Wadekar for sharing this point with me. In fact, during a meeting (22 April 1947) of the Advisory Committee to the Constituent Assembly, it was clarified that under the reservation clause, the State may give a greater representation than the proportion of the population. See B. Shiva Rao, *The Framing of India's Population: A Study,* Indian Institute of Public Administration (1968) 194.

and 85th constitutional amendments) to provide reservation in promotions, which can be done taking into consideration the total strength of posts. The *Nagaraj* judgment—which upheld these amendments, though with problematic restrictions—had also noted: "In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. *Egalitarian equality is proportional equality*." Based on this line of reasoning, *BK Pavitra II v. Union of India*[88] held, "Social justice, in other words, is a matter involving the distribution of benefits and burdens". Accordingly, it was held that "it is open to the State to make reservation in promotion for SCs and STs proportionate to their representation in the general population."

The above discussion indicates that there has been no restriction on giving, at least, proportional representation to SCs and STs in matters of reservation in services. While there is a general (though flexible) limit of 50% imposed on overall reservation, yet the proportion of OBCs to the population would be relevant in determining the percentage of reservation to be given to them. The percentage of reservation would thus depend on the circumstances of each case. In special circumstances, reservation may exceed 50% as per the *Indra Sawhney* mandate.

V. Conclusion

This article makes it clear that the decisions in *NM Thomas* and *Indra Sawhney* gave effect to Article 16(4) as a fundamental right. It is also clear that the judgements after *Indra Sawhney* have erroneously misinterpreted and misquoted it. That Article 16(4) is an enabling provision was a minority view in *Indra Sawhney*, and yet the decisions in *Ajit Singh II*, *Nagaraj*, and *Mukesh Kumar* treated it as a

88 (2019) 16 SCC 129.

majority opinion to restrict the provisions on reservations under Article 16(4). These judgments have, to put it bluntly, smuggled in the constitutional jurisprudence what had been denied in the larger bench decision of *Indra Sawhney*. It can be a possibility that the *Indra Sawhney* judgment was not read and understood properly in later decisions, as is also evident from a recent Constitution bench reference order in *State of Punjab v. Davinder Singh*,[89] where the reference order (authored by Justice Arun Mishra), noted that "Six out of nine Judges in Indra Sawney held that Article 16(4) is not an exception to Article 16(1)", even though there were eight judges who had held so.

It must also be noted that while the Supreme Court of India read various rights within Article 21 and expanded its scope, the same Court has used different methods, and even indiscipline, in restricting the provisions on reservations.

While on one hand, it has struck down government policies on reservations, on the other, it has refused to interfere when the governments have decided not to provide reservations in promotions by relying upon the minority view in *Indra Sawhney*. In *Mukesh Kumar*, the two-judge bench went to the extent of saying that, "Even if the under-representation of SCs and STs in public services is brought to the notice of this Court, no mandamus can be issued by this Court to the State Government to provide reservation". If the judgments after *Indra Sawhney* made a habit to rely upon the minority view in *Indra Sawhney,* then the following view from the minority opinion of Justice Sahai should, ideally, also have been followed:

> Reservation in public services either by legislative or executive action is neither a matter of policy nor a political issue. The higher courts in the

89 (2020) 8 SCC 1.

> country are constitutionally obliged to exercise the power of judicial review in every matter which is constitutional in nature or has potential of constitutional repercussions.

Reservation is a matter of rights, which should have been enforced by the Court.

The erudite scholar, Marc Galanter, had foreseen this approach of the Supreme Court. After the *NM Thomas* decision, Galanter had noted, "It would not be surprising if the courts would shrink from affirmative enforcement of these reconceptualized rights to equality (reservation)".[90] Not only the Supreme Court evaded accepting the settled position on the enforceability of reservation, but it also reduced reservation, as scholar K.G. Kannabiran observes, "from a philosophical premise to a matter of quantification".[91]

In *Puttaswamy*, a nine-judge bench explicitly overturned the decision of *ADM Jabalpur v. Shivakant Shukla*[92], even though its effect was taken away by the 44th constitutional amendment.The *ADM Jabalpur* decision was a dark chapter in the history of the right to life under Article 21.Similarly, it is high time that the Supreme Court explicitly overturns *Champakam Dorairajan,* which had laid down the foundation against reservations.

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90 Galanter (n 45).

91 Kalpana Kannabiran, *Tools of Justice: Non-discrimination and the Indian Constitution* (Routledge 2015) 193.

92 AIR 1976 SC 1207.

THE EVOLUTION OF THE BASIC STRUCTURE DOCTRINE IN BANGLADESH: REFLECTIONS ON DR. KAMAL HOSSAIN'S UNIQUE CONTRIBUTION

Ridwanul Hoque[*]

Abstract

Dr Kamal Hossain, the former Minister of Foreign Affairs of Bangladesh, can be credited with the development of the basic structural doctrine in the country's jurisprudence. As Chair of the Constitution Drafting Committee of the Constituent Assembly of Bangladesh in 1972, and also as participant in various cases of constitutional importance, Dr Hossain made remarkable contributions to the rule of law. This article is an exploration of the many endeavours of Dr Hossain, and traces the comparative legal lines of argument throughout his legal career. In the 8th Amendment Case*, Dr. Hossain argued for the establishment of the doctrine, to preserve the "Constitution" or its identity. In the* 13th Amendment Case*, he arguably developed a limited model of the doctrine when he submitted that a constitutional scheme, arising from a political consensus during a national crisis and aimed at strengthening democracy, can never be seen as unconstitutional. His invocation of the teleological approach, and his championing of the basic Structure Doctrine in South Asian jurisprudence is instrumental; this article aims to capture the zeitgeist of the constitutional reforms from the vantage of its most vaunted actor.*

I. INTRODUCTION

The doctrine of basic structure needs no introduction to the reader of South Asian constitutional jurisprudence. For the doctrine's

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entrenchment in the South Asian law, much credit has been given to judges, especially the Indian constitutional judges. However, there are many people and institutions as well as public legal mobilizations that contributed to the doctrine's founding, growth, and achievements. Dr. Kamal Hossain, one of Bangladesh's finest jurists, is such a person. This tributary paper focuses on Dr. Hossain's unique contribution to the establishment and development of the doctrine of basic structure, which indeed is a protective tool for constitutionalism.

Dr. Kamal Hossain was the Chair of the Constitution Drafting Committee of the Constituent Assembly of Bangladesh in 1972. Dr. Hossain is also a renowned international lawyer with experiences of appearing before international courts and tribunals. As a constitutional lawyer, he has made an enormous contribution to the journey and survival of the Bangladeshi Constitution. His firm faith in constitutionalism is reflected in his preeminent constitutional law practice, beginning in the pre-1971 period when Bangladesh (the then eastern wing of Pakistan) experienced a situation of 'constitution-without-constitutionalism'.[1] After the emergence of Bangladesh, Dr. Hossain made significant contributions to Bangladeshi constitutionalism. He was involved in political and legal movements in a leading role, but his involvement in the famous *8th Amendment Case,* during an autocratic regime, when he fought for constitutional integrity, has been the most remarkable of his contributions. In that case,the Appellate Division of the Supreme Court of Bangladesh[2]

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1 On this concept, see Angelo Rinella, 'Constitutions Without Constitutionalism' (2017) 21 Revista General De Derecho Público Comparado 1; On constitutionalism in pre-1971 Pakistan with a bearing on East Pakistan politics, see G. W. Choudhury, *Constitutional Development in Pakistan* (Longmans 1959), G. W. Choudhury, *The Last Days of United Pakistan* (C. Hurst & Co 1975).

2 The Supreme Court of Bangladesh comprises two divisions: the High Court Division (HCD) and the Appellate Division (SCAD). The original jurisdiction

accepted his argument that parliament lacks power to amend the Constitution in a way that destroys its basic features or essential cores. This is how the idea of 'unconstitutional constitutional amendment' or the doctrine of basic structure came to be entrenched into Bangladesh's constitutional law.

II. BASIC-STRUCTURE DOCTRINE

It is not my objective here to give a detailed account of the birth and evolution of the basic-structure doctrine (BSD), on which the literature is now quite voluminous.[3] Instead, I will first briefly describe the contention of the doctrine and cite the Bangladeshi cases in which the doctrine has been used. Details of the BSD cases in which Dr. Kamal Hossain appeared as a counsel or*amicus curiae* will follow this section.

The doctrine theorises that the constitution of any nation is based on some basic or fundamental features that are not amenable to amendment by parliament. The underlying rationale is that since these core features form the basic "structure" of a constitution, the dismantling of any of them will lead to the very structure of the constitution falling apart. As such, parliament does not have power to

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of constitutional judicial review lies with the HCD, and any decision, order, or judgment of that Division is appealable to the SCAD.

3 For Bangladesh, see Ridwanul Hoque, 'Judicialization of Politics in Bangladesh: Pragmatism, Legitimacy, and Consequences', in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia*(New York: Cambridge University Press 2015); Rokeya Chowdhury 'The Doctrine of Basic Structure in Bangladesh: From "Calf-path" to *Matryoshka* Dolls' (2014) 14 Bangladesh Journal of Law43; Salimullah Khan, 'Leviathan and the Supreme Court: An Essay on the "Basic Structure" Doctrine' (2011) 2 Stamford Journal of Law 89; MJU Talukder and MJA Chowdhury 'Determining the Province of Judicial Review: A Re-evaluation of "Basic Structure" of the Constitution of Bangladesh', (2008) 2(2) Metropolitan University Journal161; Muhammad Ekramul Haque, 'The Concept of Basic Structure: A Constitutional Perspective from Bangladesh,' (2005) 16:2 The Dhaka University Studies,Part F 123.

demolish any basic structural pillar of the constitution even through the amendment procedure.

The logic underpinning the notion of unamendability is that the idea of limits on the amending powers of parliament is concomitant with the idea of the constitution itself, and hence need not be necessarily expressed. This is what may be called the 'implied' or 'unwritten' version of the doctrine, first established in Bangladesh in *Anwar Hossain Chowdhury v Bangladesh*(1989), popularly known as the *8th Amendment Case*.[4] Many constitutions in the world, however, expressly limit the parliament's power to amend certain basic provisions. This aspect of the doctrine may be called its 'written' or 'express' version, usually entrenched through an 'eternity clause'. For example, the German Constitution of 1949 (*theBasic Law*) provides that the principles of human dignity, federalism, democracy, and the socialist Republican character of the State cannot be amended (arts. 79(3), 1 & 20). The Constitution of Bangladesh entrenched this expressive version of the basic-structure doctrine into article 7B in 2011 via the 15th Amendment to the Constitution.[5]

The establishment of the implied or unwritten version of the doctrine in Bangladesh in the *8th Amendment Case* was greatly informed of and influenced by the famous Indian decision in *Kesavananda BharativState of Kerala* (1973),[6] that first authoritatively established in South Asia and arguably the common law world, the doctrine of inviolability of constitutional basics. Before *Kesavananda*, however,

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4 (1989) BLD (AD) (Spl) 1.

5 For a critique of this eternity clause, see Ridwanul Hoque 'Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and For All?', in Richard Albert and Bertil E Oder (eds), *An Unconstitutional Constitution?: Unamendability in Constitutional Democracies* (New York: Springer 2017).

6 *AIR 1973 SC 1461.*

several Indian decisions including *Golak Nath v State of Punjab* (1967)[7] (cited before the Bangladeshi courts by Dr. Hossain) expressed views that came close to entrenching the basic-structure doctrine. In such a context, India passed its 24th Constitutional Amendment, which laid down that parliament's amending power would be unrestricted, and also inserted the Kerala Land Reforms Act 1969 within the list of judicially non-reviewable statutes.

In *Kesavananda,* a religious leader from Kerala whose properties were acquisitioned under the 1969 Act challenged the vires of that Act and some constitutional amendments (24th, 25th and 26th). By a majority of 7:6, the Indian Supreme Court held that parliament's amendment power extended to all parts of the Constitution including its fundamental rights provisions, but not to "basic features" thereof. While most provisions of the challenged Amendments were held to be valid, the majority court struck down that part of the 26th Amendment that sought to exclude judicial review.[8] The Court held that judicial review was one of those "basic features" that could not be excluded by amendment, thereby introducing the basic-structure doctrine or theory of unconstitutional constitutional amendments in South Asian constitutionalism.

The implied constitutional doctrine of basic structure is now firmly established in Bangladesh, India, and Pakistan.[9] In Bangladesh, the doctrine has so far been invoked by the Appellate Division of the Supreme Court to strike down five Amendments, namely the 8th

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7 AIR 1967 SC 1643 (controversially holding that fundamental rights are so 'sacrosanct' that parliament does not have power to amend any of those rights); *Golak Nath* ruling was fundamentally modified by *Kesavananda* (n 6).

8 Arun K. Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Oxford: Hart Publishing 2017) 226.

9 The doctrine, although not uncontroversial, is increasingly gaining a hold in other civilian and common-law systems of constitutionalism, including in the UK where the doctrine of parliamentary sovereignty has the strongest roots, on which see *Jackson v Attorney General* [2006] 1 AC 62 (*per* Lord Steyn).

(partially), 5th, 7th, 13th and 16th Amendments, respectively in 1989, 2010, 2011, 2011 and 2017. A review of the Appellate Division's *16th Amendmentdecision*,[10] however,is awaiting a hearing at the time of writing this paper (July 2021).

The doctrine has also been unsuccessfully invoked in several cases to challenge certain constitutional amendments that provide for the reservation of seats for women in parliament. In *Farida Akhter vBangladesh* (2007),[11] for example, the Appellate Division endorsed the 14th Amendment that renewed the provision of reserved seats for women and held that the system was not incompatible with the Constitution's "basic structure". Also, interestingly, the High Court Division in *Hamidul Huq Chowdhury v Bangladesh* (1981)[12] refused to declare the 4th Amendment void since (the court reasoned) the people had "not resisted it", and also because it was recognised by judicial authorities. The Court further reasoned that the Amendment could not be struck down because many parts of it were incorporated in the martial law regulations validated by the Constitution (Fifth Amendment) Act 1979. Curiously, however, the same court accepted the view that the Fourth Amendment (by changing, *inter alia*, the parliamentary system to a one-party Presidential system) "altered and destroyed" "the basic and essential features of the Constitution". The Court observed that "[i]t was, in our opinion, beyond the powers of Parliament […] under a *controlled constitution* to alter the essential features and basic structures of the Constitution".[13] While making this observation, the Court was "in agreement with the views

10 *BangladeshvAsaduzzaman Siddiqui* (2017) CLR (AD) (Spl) 1.
11 (2007) 15 BLT (AD) 206.
12 (1981) 33 DLR (HCD) 381.
13 ibid [17] (Sultan Hossain Khan J, emphasis mine).

expressed in" the Indian Supreme Court's decisions in *Golak Nath v State of Punjab* (1967)[14] and *Minerva Mills Ltd. v Union of India* (1980).[15]

Hamidul Huq Chowdhury, though self-contradictory in reasoning, arguably provided the Supreme Court with the first but lost opportunity to engage with the question of unamendability of basic features of the Constitution. On appeal, the Appellate Division totally avoided the basic-structure arguments and observations of the High Court Division.[16]

Of the five basic-structure cases in Bangladesh, Dr. Hossain was involved in the *8th, 13th,* and *16th Amendment* cases. In the following sections, I take up these three cases to portray Dr. Hossain's role in the evolution of this doctrine. Before that, however, I begin with a pre-1971 case which is indeed the progenitor of the doctrine in South Asia, and which saw Dr. Hossain as a counsel.

III. SOUTH ASIAN GENESIS OF THE DOCTRINE AND DR. KAMAL HOSSAIN'S ROLE

During the hearing of *the 8th Amendment Case,*[17] Dr. Hossain emphasised that the idea of unamendability of basic constitutional features was not an alien concept in Bangladeshi constitutional jurisprudence. Rather, he pointed out, it was in the 1963 Dacca High Court case of *Muhammad Abdul Haque v Fazlul Quader Chowdhury*[18] that the doctrine's genesis was to be found. In this regard, one may quote Justice Shahabuddin Ahmed in the *8th Amendment Case:*

Dr. Kamal Hossain has emphasised that the doctrine of basic structure as applied by the Indian Supreme Court had originated

14 AIR 1967 SC 1643.
15 AIR 1980 SC 1789.
16 *Hamidul Huq Chowdhury v Bangladesh* (1982) 34 DLR (AD) 190.
17 *Anwar Hossain Chowdhury* (n 4).
18 (1963) 15DLR (Dacca) 355.

from a decision of the then Dhaka High Court which was upheld in appeal by the Pakistan Supreme Court […].[19]

Dr. Hossain appeared as a counsel for the petitioner in the aforementioned case, in which Mr. Haque, a member of National Assembly of Pakistan, challenged the legality of the respondents' membership of the Assembly after their appointment to the President's Council of Ministers, through a writ of *quo warranto* under art. 98 of the 1962 Constitution. Article 104(1) of the Constitution provided that a member of parliament would cease to be a member upon becoming a minister. Exceptionally, art. 224(3) empowered the President to issue Orders to make certain "adaptations" in order to remove any "difficulty" that may stand in the operation of the Constitution, in exercise of which the President promulgated an Order (No. 34 of 1962) that enabled members of parliament to be appointed as ministers. There is little doubt, therefore, that the Order was an executive constitutional amendment in disguise.

Mr. Haque brought this matter to the then Dacca High Court, in effect asking the Court to examine the compatibility of the Order with art. 104(1) of the Constitution. The Attorney-General opposed the court's jurisdiction to test the vires of any Presidential Order that was to remove any difficulty in the operation of the Constitution. Mr. Justice Murshed, with whom Siddiky and Chowdhury JJ agreed, dismissed the government's arguments and found the Order of the President not to be of the kind contemplated in the Constitution. The Court thus asserted its constitutional review power to scrutinize the validity of any law, including a constitutional instrument such as the Presidential Order.

Dr. Hossain appeared for the petitioner with senior counsel Mr. A.K. Brohi. Among other points, Mr. Brohi, and Dr. Hossain

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19 ibid [309].

placed emphasis on the fundamental character of the provisions that established 'separation of powers' and argued that President's Order 34 was incompatible with that scheme.

Justice Murshed observed as follows:

> Art. 104(1) and the allied articles relating to the same subject constitute one of the main pillars of the Constitution which envisages a sort of [p]residential form of [g]overnment where the Ministers are not responsible to the Legislative Assembly, but to the President himself. […]. This concept of a separation of the executive body from the [l]egislature, […], is *the very basis* of present Constitution. *Mr. Brohi has aptly described it as the corner-stone which supports the arch of the Constitution*.[20]

His Lordship continued to say that "it is of the very essence of a written constitution that it is not susceptible of an easy change", and regarded the impugned Order as a *de facto* constitutional amendment as it "wiped out" a vital provision of the Constitution without resorting to the special machinery of the amendment (at p. 382). In arriving at this conclusion, Justice Murshed also endorsed the opinion expressed by Justice Munir in a Presidential Reference (1957),[21] to the effect that the President cannot "destroy a basic or vital provision of the Constitution" while exercising the constitutional power to make "adaptations".

The decision in *Haque* was appealed, but the Pakistani Supreme Court unanimously refused to accept the appeal. Affirming the Dacca High Court, Chief Justice Cornelius in *Fazlul Quader Chowdhury v Muhammad Abdul Haque* (1963)[22] held that the judicial power to examine the constitutionality of any law or Order was very

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20 *Abdul Haque* (n 19) 382 [76] (emphasis added).
21 (1957) 9 DLR (SC) 178.
22 (1963) PLD (SC) 486.

"fundamental", and that a constitutional provision could not be interpreted in isolation to negate that power. It was further observed that "franchise" and the "form of Government" were fundamental features not subject to alteration by a Presidential Order under the Constitution.

Two years later, in his partial dissent in *Sajjan Singhv State of Rajasthan* (1965)[23] Justice Mudholkar of the Indian Supreme Court approvingly cited Cornelius J's above view in support of his reasoning that parliament's amendment power was not unbridled as there might be certain 'basic features' of the Constitution which parliament may not violate through the exercise of its amendment power under article 368.[24] Chief Justice Gajendragadkar pronounced the majority opinion. Justice Mudholkar partially agreed with the Chief Justice's view that parliament had the power to amend the constitution even if it were to lead to the violation of fundamental rights. However, he disagreed that the power could take away all fundamental rights or alter the Constitution's basic features.[25] Justice Mudholkar noted as follows:

> If upon a literal interpretation of this provision an amendment even of the basic feature of the Constitution would be possible it will be a question of consideration as to how to harmonize the duty of allegiance to the Constitution with the power to make an amendment to it. Could the two be harmonized by excluding from the procedure for amendment, alteration of a basic feature of the Constitution? It would be of interest to mention that the Supreme Court of Pakistan has, in *Fazlul Quader Chowdhry v. Mohd. Abdul Haque, 1963 PLD 483 (SC),* held that franchise and form of government are fundamental features of a

23 AIR 1965 SC 845.
24 Thiruvengadam (n 8) 223.
25 ibid.

> Constitution and the power conferred upon the President by the Constitution of Pakistan to remove difficulties does not extend to making an alteration in a fundamental feature of the Constitution.[26]

Arguably, Justice Mudholkar's dissenting voice in *Sajjan Singh* had a critical influence on the majority court's view in *Kesavananda* (7:6). In *Kesavananda,* the majority court cited Mudholkar J's views in *Sajjan Singh,*[27] butdid not mention *Abdul Haque* of the Supreme Court of Pakistan or the then Dacca High Court.

As such, Dr. Hossain's claim that *Abdul Haque's Case* from the Dacca High Court sowed the seeds of the basic-structure doctrine in South Asia is an empirical one. Before this decision, the Indian Supreme Court passingly mentioned 'basic features' of the Constitution in *Re Berubari Union Reference* (1960),[28] but did not say anything about the parliament's amending power. As noted, Mudholkar J in *Sajjan Singh* was the first judge to question parliament's untrammeled power to amend basic features. As such, *Abdul Haque* can be considered the first judicial reference to the concept of unamendability of basic features of the constitution.[29]

One might wonder how the *Abdul Haque's Case* can be regarded as the origin of the basic-structure doctrine in South Asia given that the case did not concern a constitutional challenge. The answer lies, *inter alia*, in the arguments of Mr. AK Brohi and Dr.

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26 AIR 1965 SC 845, 867. Scholars consider Justice Mudholkar's citation of *Abdul Haque* 'to be the first reference to the "basic structure" in Indian judicial history'. See Faizan Mustafa, 'Learning from a neighbour' *The Indian Express* (New Delhi, 12 February 2018),<https://indianexpress.com/article/opinion/columns/learning-from-a-neighbour-mashal-khan-lynching-5061357/> accessed 31 July 2021.

27 See *Kesavananda* (n 6) [681].

28 AIR 1960 SC 845.

29 See Haque (n 3) 124 ('it appears that ultimately in Fazlul Qader Chowdhury case the concept of basic structure was recognized').

Kamal Hossain as quoted above, where they showed that the impugned Order destroyed a basic structure of the then 1962 Constitution, namely the separation of executive and legislative power in a presidential form of government. It is true that the President's Order No. 34 was not an amendment in itself, but the Court clearly held that it effectively amended art. 104. Moreover, in this case, both courts annulled article 6 of the President's Order which (though not specifically challenged) "deprived the courts of the power to judge the validity of the Order".[30] By this, the two courts unanimously established the higher normativity of the principle of judicial review, and thus established the inalterability of judicial review. Lastly, the Court itself used phrases such as "vital" or "fundamental" provisions or features of the Constitution, thereby indicating their inalterability.

IV. THE 8TH AMENDMENT CASE (1989)

A. Facts and the Judgment

In its epoch-making decision in *Anwar Hossain Chowdhury v Bangladesh (1989)*,[31] the Appellate Division entrenched the doctrine of basic-structure when it declared part of the 8th Amendment "unconstitutional". The 8th Amendment established seven permanent benches of the High Court Division (HCD) that was (according to the original article 100) an integrated division of the Supreme Court. The Appellate Division held that parliament's amending power under art. 142 of the Constitution was 'limited' (being a 'derivative' as opposed to an 'original' constituent power) and hence could not be exercised to alter 'basic structures' of the Constitution.[32]

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30 Ralph Braibanti, "Pakistan: Constitutional Issues in 1964" (1965) 5(2) Asian Survey 79.

31 (1989) BLD (AD) (Special) 1.

32 ibid [143] (Shahabuddin Ahmed J).

A brief narration of the facts would aid in better appreciating the associated legal arguments. After assuming power in 1982, the second military regime, through various martial law regulations, diffused the HCD into seven permanent benches (each composed of three judges), six being outside of Dhaka. Later, this change was codified by amending original art. 100 via the Constitution (Eighth Amendment) Act 1988. As a result, instead of one integrated HCD, there emerged 7 permanent benches with administratively defined territories, with pending cases having been transferred to the relevant regional permanent bench.

In the present case, the Commissioner of Affidavit refused to allow the appellant, Mr. Anwar Hossain Chowdhury, to affirm a counter-affidavit because the concerned writ petition stood transferred to the Sylhet Bench of the court pursuant to the Rules framed by the Chief Justice under art. 100(6) as amended by the 8th Amendment. Mr. Chowdhury then filed a writ petition (No. 1252 of 1988) challenging the vires of the 8th Amendment and the said Rules, arguing that the Amendment materially altered the basic-structure of the Constitution and hence was beyond the parliament's amendment power. The High Court Division, Dhaka Bench, summarily rejected his petition on 15 August 1988, against which Mr. Chowdhury appealed to the Appellate Division.

Dr. Kamal Hossain was engaged as the lead counsel of Mr. Chowdhury's appeal. There were two other proceedings seeking similar remedies, of which one was an appeal[33] and the other a civil petition for leave to appeal.[34] These two proceedings were heard jointly with Mr. Chowdhury's.

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33 *Jalaluddin v Bangladesh*, C.A. No. 43 of 1988.

34 *Ibrahim Sheik v Bangladesh*, C.P.S.L.A. No. 3 of 1989.

In a 3:1 majority, the Appellate Division adopted the basic-structure doctrine and declared as unconstitutional the 8th Amendment for breaching the unitary character of the Supreme Court, a basic feature of the Constitution. The Court accepted Dr. Hossain's lead arguments that (i) the HCD's plenary judicial power over the whole Republic was a part of the unamendable basic structure of the Constitution[35] and that (ii) a parliament with unlimited amending power would be incompatible with the notion of constitutional supremacy, another basic pillar of the Constitution. Even the lone dissenting judge, Justice A.T.M. Afzal, agreed that parliament cannot "destroy" the character of the Constitution in the name of amendment.[36] For Afzal J, a destruction by an amendment would occur if any of the three organs of the State ("structural pillars") were "destroyed" or "emasculated […] in such a manner as would make the Constitution unworkable".[37]

B. Arguments of Dr. Hossain

When the basic-structure doctrine theorises the unconstitutionality of a constitutional amendment, it points at two types of unconstitutionality, procedural and substantive. When any amendment breaches the amendment rules, it can be said to be procedurally unconstitutional. By contrast, an amendment that is procedurally constitution-compatible can yet be substantively unconstitutional when any basic constitutional feature or fundamental core is demolished. In his arguments,[38] Dr. Hossain captured both prongs of the doctrine.

First, on the procedural front, Dr. Hossain argued that the 8th Amendment did not comply with the amendment rule of the

35 Chowdhury, Ahmed and Rahman JJ [83], [156]–[157], & [174].

36 *Anwar Hossain Chowdhury* (n 32) [212]-[213].

37 ibid. See further Haque (n 3) [136].

38 *Anwar Hossain Chowdhury* (n 32) 23-28. Also summarized as an eight-point argument in the opinion of Justice BH Chowdhury at [47]-[48].

Constitution contained in art. 142, as the long title of the amendment bill did not set out the specific articles that were to be amended. It was argued that this requirement was a vital condition for the exercise of the amending power in the first place. As such, while amending art. 100, parliament by implication amended (or derogated from) several other articles and thus committed a *fraud on the Constitution*. This later argument was a mix of substantive and procedural unamendability arguments.

On the point of substantive unconstitutionality, the core of Dr. Hossain's arguments was that parliament's amending power is inherently limited. To press his point on the concept of implied limits on amendment power, it was submitted as follows:

> The amending power is a power within and under the Constitution and not a power beyond and above the Constitution. It does not empower Parliament to undermine or destroy any fundamental feature or 'structural pillar' of the Constitution. […]
>
> Any power of amendment under the Constitution is subject to limitations inherent in the Constitution. The structural pillars or basic structures of the Constitution established by framers of the Constitution cannot be altered by the simple exercise of amending power. The [notion of] Parliament's unlimited power of amendment is inconsistent with the concept of supremacy of the Constitution which is expressly embodied in the Preamble and Art. 7 of the Constitution and is undoubtedly a fundamental feature of the Constitution.[39]

Dr. Hossain then went on to focus on specific basic features of the Constitution, which he argued were irreparably damaged by

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[39] *Anwar Hossain Chowdhury* (n 32) [24].

the impugned amended article 100. First, Dr. Hossain submitted that the unitary character of the Republic was derogated from. Second, he argued that the independence of the judiciary as a basic feature was dismantled. He further argued that the provision of executive notifications under clause (5) of the amended art. 100 as well as the power of the Chief Justice to enact Rules under clause (6), both affecting the "structure, status, jurisdiction, independence and effectiveness of the High Court Division", were tantamount to the delegation of constituent power to the administration and the Chief Justice, and hence incompatible with the basic structure of the Constitution.[40] On the point of destruction of judicial independence, he argued as follows:

> Introduction of transferability of Judges underlines the inconsistency of the amendment with the concept of the integrated Supreme Court and violates the provision of Art. 147(2) which provides that terms and conditions of service of Judges of the Supreme Court cannot be altered to their disadvantage during their tenure of office.[41]

One cannot but marvel at the craftsmanship of Dr. Hossain's above arguments, through which he projected the independence of the judicial organ generally, and the structural integrity of the Supreme Court in particular. The learned counsel also profitably relied on several constitutional provisions. including arts. 44, 94, 101, 102, 107, 108, 109, 110 and 111, to buttress his arguments.

Before proceeding to the next discussion, another aspect of Dr. Hossain's advocacy in *the 8th Amendment* case merits attention. This is the use of comparative constitutional law to help consolidate and entrench the basic-structure doctrine. As can be gleaned from his

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40 ibid [25].
41 ibid [26].

submission, he referred to 23 foreign judicial decisions, 2 Pakistan Supreme Court cases (of 1963 and 1968) and 8 scholarly writings. In order to substantiate his argument that parliament's amending power was impliedly limited by the Constitution itself, Dr. Hossain cited a 1978 piece by Professor Upendra Baxi on "the nature of constituent power" and a book by constitutionalist Walter F. Murphy titled *Constitutions, constitutionalism, and democracy* (1988). At a time when the validity of a constitutional amendment was being adjudicated for the first time in Bangladesh, not only was the basic-structure doctrine a relatively more controversial and nebulous idea than it is today, but it was also a daunting challenge for the court to extend its judicial review to a constitutional amendment, given the country's remarkably underdeveloped constitutional jurisprudence. Therefore, reliance on comparative constitutional material, especially the Indian doctrine of limited amending power of parliament, seemed a strategically profitable method. Although Dr. Hossain relied on the Constitution of Bangladesh in earnest, the borrowing of constitutional reasoning from comparative sources greatly helped him in his efforts to convince the judges to adopt the doctrine.

V. THE 13TH AMENDMENT CASE (2011)

A. The Judgment and its Consequences

In *Abdul Mannan Khan v Bangladesh*(2012),[42] the Appellate Division by split decision (4 to 3) in May 2011 prospectively invalidated the Constitution (Thirteenth Amendment) Act 1996 that introduced the neutral and apolitical interim Caretaker Government (CtG) system. The CtG was to be in power during the interregnum between two elected governments (i.e., ninety days), principally to oversee a free and fair national election. Before the system was abolished in 2011, national elections were held under the CtG on

42 (2012) 64 DLR (AD) 1.

three occasions (1996, 2001 and 2009). In striking down the 13th Amendment, the Court reasoned that the institution of CtG, being an unelected government and involving retired chief justices in the system, was against "democracy" and "judicial independence," two elements of the basic structure of the Constitution.

Abdul Mannan Khan was an appeal against the HCD's decision in *M Saleem Ullah v Bangladesh* (2004).[43] This case was filed as a public interest litigation by a lawyer on grounds that the CtG was incompatible with the Constitution's basic structures. Dismissing the challenge, the HCD held that the CtG system, instead of destroying the democratic character of the polity, helped democracy to consolidate. In regard to the constitutionality of engaging a retired chief justice as head of the CtG, the Court preferred not to interfere with political wisdom, leaving it for parliament to seek a better option. The legality of the CtG had been challenged earlier in another judicial review petition, but the challenge was rejected summarily (25 July 1996) as the Court found "no unconstitutional action" on the part of the "legislature" in enacting the impugned Amendment to provide for the CtG system for a "limited period".[44]

These rationales of the HCD, underpinned by a trait of judicial restraint over structural or political/policy issues, were brushed aside by the Appellate Division. I had earlier argued that the plurality Court misapplied the basic-structure doctrine in this case. The misapplication of the doctrine resulted from a merely textual interpretation of the Constitution, to the exclusion of the local socio-political context.[45] Further, the majority court implausibly turned

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43 (2005) 57 DLR (HCD) 171 (4 August 2004).

44 *Syed Muhammad Mashiur Rahman vPresident of Bangladesh* (1997) 17 BLD (HCD) [55], [57].

45 Ridwanul Hoque, 'Judicialization of Politics in Bangladesh: Pragmatism, Legitimacy, and Consequences' in Mark Tushnet and Madhav Khosla (eds.),

down the arguments of six out of eight *amici curiae* including Dr. Kamal Hossain, who urged the Court to consider the validity of the Amendment in the compelling context of the then political crisis followed by consensus that culminated in the caretaker government formula.

It is not surprising that the Appellate Division's *13th Amendment* decision had serious political implications. The decision effectively sharpened the then political crisis over the CtG issue. The Awami League government that assumed power following the 2009 elections earlier indicated that it would discard the CtG system. Within two months of the Court's "short order" on 10 May 2011, the government enacted the Constitution (Fifteenth Amendment) Act 2011 to eliminate the CtG system. This exclusion of the CtG was done without the concurrence of major political parties, including the main opposition party (the Bangladesh Nationalist Party). The opposition demanded the restoration of the CtG system, ultimately boycotting the January 2014 general election. Ironically, the unilateral and whimsical exclusion of the CtG system on the plea of its being "undemocratic" resulted in a distorted and illiberal democracy,[46] since the tenth parliament was a product of effectively a one-party election, with the Awami League once again in power but without any real opposition in parliament. Moreover, candidates in 153 constituencies (out of 300 general seats) were declared "elected" without contestation.[47] It has therefore been a

Unstable Constitutionalism: Law and Politics in South Asia (Cambridge: CUP 2015) 261.

46 Hoque, 'Judicialization of Politics' (n 46) 281; Ridwanul Hoque, 'Deconstructing Public Participation and Deliberation in Constitutional Amendment in Bangladesh', (2021) 21(2) Australian Journal of Asian Law 7, 13-14.

47 Hoque, 'Judicialization of Politics' (n 46) 289, esp fn 109.

widely held view that the 2014 elections were deficient in constitutional legitimacy.[48]

B. Arguments of Dr. Hossain

In this case, Dr. Kamal Hossain appeared as an *amicus curiae*. His written submission, a copy of which I was kindly presented with, represents a classic essay in the law of judicial review of constitutional amendments. Dr. Hossain argued that the 13th Amendment or the system of an election-time caretaker government was not incompatible with the Constitution. His major points can be summarized as below:

(i) The 13th Amendment was a result of a political consensus and hence not unconstitutional;

(ii) It was not destructive of democracy, a basic feature of the Constitution, but an aiding mechanism to help democracy entrench itself and prosper; and

(iii) The CtG system did not breach the independence of judiciary, as the appointment of a retired Chief Justice as the Chief Adviser was not the only option.

First, Dr. Hossain saw the Constitution as a political process that evolves along the life, experience, and the needs of a society. He aligned this functional/social concept of a constitution with the ability of the court to determine the legality of any amendment. For him, the validity of a constitutional amendment, "which was made based on consensus of major political parties (and sections [of the

[48] See Ali Riaz 'Shifting Tides in South Asia: Bangladesh's Failed Election', (2014) 25(2) Journal of Democracy119; Ali Riaz 'The Legislature as a Tool, Executives' Power Grab, and Civilian Authoritarianism: The Bangladesh Case', in Irina Khmelko, Rick Stapenhurst, and Michael L Mezey (eds), *Legislative Decline in the 21st Century: A Comparative Perspective* (New York and London: Routledge 2020) (commenting that since the 2014 exclusionary elections, the legislature has used as a tool in Bangladesh for transitioning from democracy to civilian authoritarianism).

public] including civil society) and had been acted upon by them in each of the successive elections, should not be the subject matter of a challenge going to the root of its constitutionality". "On a close analysis", he continued, "it appears that the grievances [of the litigants] are in fact about the manner in which the provision has been applied in specific cases/events, in particular, the mode/manner in which the Chief Adviser discharged his responsibility in 2001, and the manner in which the Chief Adviser was appointed and a number of actions taken by him in 2006 have raised questions about his role [sic]".[49]

Dr. Hossain drew from the historical evolution of the CtG system, demonstrating how inevitable it was in the context of the tendency in Bangladeshi politics of manipulation and engineering of elections by the party in power. The 13th Amendment was an important constitutional device, since it fulfilled the political demands for a caretaker government to ensure free and fair elections for the sake of the constitutionally mandated democratic political order.

Secondly, he asked the Court to adopt an approach of purposive or harmonious constitutional interpretation when defining democracy or adjudicating the *vires* of a constitutional amendment. Citing Mahmudul Islam's *Constitutional Law of Bangladesh,*[50] Dr. Hossain argued that every "constitution is founded on some social and political values and legal rules are incorporated to build a structure of political institutions aimed to realize and effectuate those values. Therefore, the legal rules incorporated in the body of a constitution cannot be interpreted in isolation from those social and political values and the purpose which emerges from the scheme of

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49 From the written submission of Dr. Hossain (para. 1.3) to the Court in the *13th Amendment Case*, a copy of which was sent to me by his Chambers.

50 Mahmudul Islam, *Constitutional Law of Bangladesh* (Dhaka: Mullick Brothers 2012) (citing p. 29).

the constitution".[51] The approach of the apex court thus ought "to recognize that the Thirteenth Amendment was made in the context of the situation created in 1996".[52]

In the face of the argument that the CtG system was undemocratic, Dr. Hossain contended that the alleged constitutional inconsistency of the Amendment was misconceived. The foundation of democracy, he went on to say, is article 7 of the Constitution, that provides for popular sovereignty and constitutional supremacy. "The Thirteenth Amendment by seeking to supplement the Election Commission to ensure free and fair elections, thus, contributes to strengthening the electoral/democratic process". To substantiate his argument Dr. Hossain quoted the following from Amartya Sen's *TheArgumentative Indian*:

> Public reasoning includes the opportunity for citizens to participate in political discussions and to influence public choice. Balloting can be seen as only one of the ways – albeit a very important way – to make public discussions effective, when the opportunity to vote is combined with the opportunity to speak and listen, without fear. The reach – and effectiveness – of voting depend critically on the opportunity for open public discussion.[53]

To overcome the arguments of the petitioners that the CtG system, by involving the retired chief justices, breached the principle of independence of judiciary, Dr. Hossain made certain innovative and society-specific arguments. The maintenance of rule of law called for a truly independent judiciary, for which there needed to be a democratic government established by a fair and free election. Thus,

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51 Dr. Hossain's submission (n 52) [1.4].

52 Dr. Hossain's submission (n 52) [1.5].

53 Amartya Sen, *The Argumentative Indian: Writings on Indian History, Culture and Identity* (London: Penguin Books 2006), citing p. 14.

the consensus about the retired Chief Justices' involvement in an election-time government ought not to be considered a breach of the principle of judicial independence. Further, it was argued that the "[i]ndependence of the judiciary itself has to provide checks on the Caretaker Government to ensure that [that] independence is not infringed". Relying on the famous *Masdar Hossain Case* (2000), in which the Appellate Division observed that they found "no provision in the Constitution which curtail[ed], diminishe[d] or otherwise abridge[d] this independence",[54] Dr. Hossain argued that the Court by implication accepted the constitutionality of provisions of the CtG. Another opposing argument was that the incumbent government may seek to appoint and promote judges with the pre-determined objective of gaining undue advantage during elections from any judge so appointed. Dr. Hossain submitted that that would only depend on the integrity and inner strength of the judge concerned.

These arguments portray certain standards which a Court should adhere to when deciding a complex yet purely society-specific constitutional amendment. The most attractive of his arguments is that a constitutional amendment that reflects an overwhelming public demand and is based on sheer political consensus (reflected not necessarily in the voting in parliament) must not be seen as unconstitutional by mundanely looking at certain texts of the Constitution. I take this as having portrayed a 'limited doctrine' of basic-structure. In other words, Dr. Hossain's arguments can also be interpreted as having shown the dangers of abuse of the doctrine. The plurality court in the *13th Amendment Case* did not, however, accept his arguments, and the nation has already witnessed unwholesome political consequences of this unwise refusal, as elections in

54 *Secretary, Ministry of Finance v Md. Masdar Hossain* (2000) 52 DLR (AD) 82, 103.

Bangladesh have turned into a ploy at the hands of the incumbent government in power, leading to the boycott of the 2014 elections by all major political parties.[55]

Undeniably, however, Dr. Hossain's arguments achieved remarkable success as three out of seven Justices accepted them. In his powerful dissent, Justice Muhammad Imman Ali, for example, reasoned that "the Thirteenth Amendment was neither illegal nor *ultra vires* the Constitution and does not destroy any basic structures of the Constitution."[56] For Justice Ali, the republican and democratic character of the State was no more infringed on or after this Amendment than it had been before the care-taker government system was introduced. Ali, J further reasoned that in the aftermath of the 1996 political quagmire, the people chose the CtG system as a solution. Accordingly, the solution to the current crisis must come from the representatives of the people and ought to be worked out through dialogue in parliament. The other two dissenting judges, Justice Abdul Wahhab Mia and Madam Justice Nazmun Ara Sultana, also preferred to defer the issue to the people or the future.[57]

VI. THE 16TH AMENDMENT CASE (2017)

A. Background and the Judgment

On 3 July 2017, the Appellate Division in *BangladeshvAsaduzzaman Siddiqui* (2017)[58] invalidated the Sixteenth Amendment of 2014 that restored an original constitutional scheme regarding the parliamentary removal of Supreme Court judges. By this, the Court endorsed the HCD's 2:1 decision in *Asaduzzaman*

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55 See Ridwanul Hoque, 'Deconstructing Public Participation and Deliberation' (n 47) 13.

56 *Abdul Mannan Khan* (n 44) 472.

57 On this strategy of judicial deference to the future, see Rosalind Dixon and Samuel Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) Wisconsin Law Review 683.

58 (2017) CLR (AD) (Spl) 1.

Siddiqui v Bangladesh (2016).[59] Dr. Hossain appeared as an amicus curiae before both divisions of the Supreme Court, arguing that the Amendment was unconstitutional as it breached the principle of independence of judiciary.

I have argued elsewhere that the Appellate Division's decision was an inappropriate application of the basic-structure doctrine in as much as the 16th Amendment in effect restored an original constitutional system that the constituent people (by virtue of original constituent power) enacted in their 1972 Constitution.[60] I have also argued that the 16th Amendment was not a breach of judicial independence, as there remained an option, under clause (3) of art. 96, to introduce by law a peer-review process within the system of parliamentary removal of judges.[61] In this paper, however, I focus on the innovativeness of Dr. Hossain's arguments by which he successfully persuaded the Court that the 16th Amendment was unconstitutional in light of the changed political scenario in the country reflected in, among other things, the lack of independence of members of parliament and absolute parliamentary majoritarianism.

Bangladesh's original Constitution (1972) provided, in art. 96(2), for the removal of a Supreme Court judge by an order of the President, pursuant to a resolution of parliament passed by a two-thirds majority, but only on the ground of proven misbehaviour or incapacity of the judge. Before this provision was ever tested, the Fourth Amendment (1975) had completely done away with it, by providing for the removal of judges merely by an order of the

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59 WP No. 9989 of 2014 (HCD, 5 May 2016).

60 See Ridwanul Hoque, 'On Law, Politics and Judicialization: Sixteenth Amendment Judgment in Context', an unpublished paper present in BILIA Symposium on Law, Politics and Judicialization, Dhaka, August 2017. See also Ridwanul Hoque, 'Can the Court Invalidate an Original Provision of the Constitution?' (2016) 2 University of Asia Pacific J Law & Policy 13.

61 Ridwanul Hoque, 'Can the Court invalidate an original provision of the Constitution?' (n 60).

President. In August 1975, the Constitution itself was thwarted and a lingering period of extra-constitutional regimes installed. The first military regime extra-constitutionally amended the judicial removal clause to introduce a peer-driven removal process called the *Supreme Judicial Council* (hereafter 'SJC') composed of the Chief Justice and two other most senior judges.[62] The system (art. 96) provided that a judge could be removed by order of the President, if the SJC upon a hearing and inquiry recommended his or her removal. This judiciary-led process of SJC was later affirmed by the Fifth Amendment (1979), which was struck down by the Appellate Division in 2010.[63] The *5th Amendment* decision of the Appellate Division, however, validated the SJC.

There was indeed no serious opposition to the system of SJC. Rather, the Supreme Court approved and appreciated the SJC. The government nevertheless replaced the SJC with the original scheme of parliamentary removal of Supreme Court judges. At first sight, the 16th Amendment's purpose seems to be honest insofar as it restored the original scheme. If one were to dig deeper into the background, however, the Amendment reveals itself as a product of a predatory and dominating politics. A couple of years before this Amendment was passed, senior ruling party leaders threatened in parliament to restore the power of parliament to remove judges of the Supreme Court. There emerged a tug of war between a particular judge of the HCD and the Speaker of the House of the Nation when the latter commented in the House that the judges were quite prompt in issuing decisions that concerned their own stake. The case centred around a decision of the HCD that involved the release of a

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62 By virtue of the Second Proclamation (Tenth Amendment) Order 1977 (martial law proclamation), later internalised into the Constitution via the Fifth Amendment of 1979.

63 *Khondker Delwar Hossain v Bangladesh Italian Marble Works Ltd.* (2010) 62 DLR (AD) 298.

government-owned property in favour of the Supreme Court. The leading judge in the concerned decision countered the Speaker's comments and warned that it might be regarded as seditious. This sparked a fierce debate in parliament regarding the alleged breach of the Constitution by the judge in question, and following further judicial and parliamentary exchanges, the issue seemingly faded away. It is in this background that the 16th Amendment was enacted.

B. Arguments of Dr. Hossain

As indicated above, given the nature of originality of the provisions reinstated through the 16th Amendment and the fact that Dr. Hossain was the Chairman of the Constitution Drafting Committee, it was not an easy task for him to develop an argument that the 16th Amendment was unconstitutional. In successfully arguing that the removal of judges by parliament was unconstitutional, Dr. Hossain employed contextual and purposive theories of constitutional interpretation. Based on the ground that the independence of judiciary was an unalterable core, he submitted that the impugned unconstitutionality had to be judged in light of the preamble and, among others, arts. 7B, 94(4), 96, 116A and 147. Of these articles, art. 7B was enacted into the Constitution via the 15th Amendment, to provide that certain basic provisions of the Constitution could not be amended. Dr. Hossain's arguments were that the 16th Amendment created an atmosphere of arbitrary exercise of parliament's power to remove a judge. For him, the constitutional principle of independence of judiciary precludes any kind of partisan exercise of power by the legislature in relation to the judiciary, in particular the power to remove judges of the Supreme Court. As regards the originality of the reinstated art. 96, Dr. Hossain argued as follows:

> In the original 1972 Constitution, removal of judges by impeachment was based on certain assumptions, which in the light of subsequent amendment[s] would appear to be difficult to sustain. The impeachment power was vested in the Parliament on the premise that the Parliament being constituted by elected representatives of the citizens would […] exercise[e] their power conscientiously and independently, free from any party directive.[64]

In other words, in the context of present-day politics in Bangladesh, the removal of judges through a peer-driven process, as was the case with the Supreme Judicial Council, became an unalterable basic structure of the Constitution, and hence unamendable under art. 7B that was introduced in 2011. This claim represents the crux of his arguments which the Appellate Division accepted as a forceful or meritorious argument.

Dr. Hossain also argued that the 16th Amendment made the judges "vulnerable" to political force or vengeance and made their tenure "insecure". Hence, the argument went, the Amendment was unconstitutional.

VII. CONCLUSION

As this paper has shown, Dr. Kamal Hossain's contribution to the emergence and consolidation of the basic-structure doctrine in Bangladesh is truly unique. The establishment of the doctrine during an undemocratic era was no ordinary task. It was due to Dr. Hossain's indomitable and extraordinarily appealing arguments, among other things, that the Supreme Court could incorporate the doctrine into its constitutional jurisprudence. What underpinned the doctrine, in fact, was the future of the Constitution of Bangladesh. I

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64 From the written submission of Dr. Hossain (para. 1.3) to the Appellate Division in the *16th Amendment Case*, a copy of which was sent to me by his Chambers.

continue to regard the *8th Amendment* decision adopting the doctrine as the boldest ever instance of judicial activism in defence of constitutionalism. Although one may disagree with one or more of the decisions in which the basic-structure doctrine was invoked, the doctrine on its own merits remains a powerful weapon against the destruction of constitutional identity. In that context, Dr. Hossain's contribution to Bangladesh's Constitution and constitutional politics should be valued and seen through the lens of his role in the establishment of the doctrine of basic structure.

In the *8th Amendment Case*, Dr. Hossain argued for the establishment of the doctrine, to preserve the "Constitution" or its identity. In the *13th Amendment Case*, he arguably developed a limited model of the doctrine when he submitted that a constitutional scheme, arising from a political consensus during a national crisis and aimed at strengthening democracy, can never be seen as unconstitutional. As mentioned, this author differs with him as regards the unconstitutionality of the 16th Amendment. It is, however, evident that his arguments in this case were truly innovative, as he invoked the teleological approach to constitutional interpretation, expounding an original provision in the light of existing political realities and specificities. A petition by the government for review of the *16th Amendmentdecision* is pending before the Appellate Division. If the review-petition is dismissed, Dr. Hossain's arguments would then authoritatively lead to a new theory of unconstitutional constitutional amendments inasmuch as he explained, in that case, how original provisions reinstated into the Constitution after many years of their deletion can turn out to be unconstitutional in the particular context of exploitative parliamentary majoritarianism.

PROPORTIONALITY AND BURDEN OF PROOF: CONSTITUTIONAL REVIEW IN INDIA

Shruti Bedi[*]

Abstract

The proportionality test after originating in German administrative law and in Canada, has received enormous success the world over in the area of constitutional rights adjudication. Burden of proof, is an important aspect of any area of law, as it has a decisive effect on the outcome of cases. Under constitutional law, as a part of the proportionality principle, it impacts the protection of constitutional rights. This paper seeks to examine the role of the principle of proportionality both in doctrinal discussion and in sceptical accounts of the Supreme Court of India's emphasis on the principle specifically from the perspective of burden of proof. I scrutinize Justice Barak's analysis of burden of proof as a part of the necessity stage of the proportionality test, and then illustrate the divergence in court practice in India. I conclude that although the Supreme Court recognises proportionality as the new standard of review, the inconsistency in its application, specifically on burden of proof, and the attitude of deference to the State, results in insufficient protection against rights violations.

I. INTRODUCTION

Fritz Fleiner, while summarising the law of proportionality in 1982, rightly advised, 'you should never use a cannon to kill a sparrow'.[1] The use of certain means should fit the purpose. If the purpose can be served by the use of less limiting means, it should be

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1 Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) 179.

done. After all, there is no sense in using a hammer when all you need is a nutcracker.[2] The proportionality test after originating in German administrative law and in Canada (in its post-Charter jurisprudence)[3], has received enormous success the world over in the area of constitutional rights adjudication.[4] It has been adopted and adapted by domestic courts in 'Europe, South Africa, Israel, New Zealand',[5] as well as India[6]. From being categorised as the 'gold standard for adjudicating the validity of limitations on fundamental rights'[7] to the global move towards an 'age of proportionality'[8], the scholars of law have willingly 'embraced proportionality, as a principle or doctrine in their constitutional jurisprudence'.[9]

Burden of proof is an important aspect of any area of law since it has a decisive effect on the outcome of all cases. Under constitutional law, it impacts the protection of constitutional rights as

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2 W. van Gerven, 'The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999) 37, 61.

3 Vicki C. Jackson & Mark Tushnet 'Introduction' in Vicki C. Jackson & Mark Tushnet (eds), Proportionality: New Frontiers, New Challenges (CUP 2017) 1.

4 There is substantial evidence of the usage of the proportionality test across the world. Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002); D. Beatty, *The Ultimate Rule of Law* (OUP 2004); G. Webber, *The Negotiable Constitution* (CUP 2009); Barak (n 1); M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (OUP 2012); M. Cohen-Eliya and I. Porat, *Proportionality and Constitutional Culture* (CUP 2013). A. Stone Sweet and J. Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72.

5 Dimitrios Kyritsis, 'Whatever Works: Proportionality as a Constitutional Doctrine' (2014) 34(2) OJLS 395, 396.

6 Aparna Chandra, 'Proportionality in India: A Bridge to Nowhere?' (2020) 3(2) University of Oxford Human Rights Hub Journal 55.

7 Sweet and Mathews (n 4) 161; Beatty (n 4) 159-88; David Law, 'Generic Constitutional Law' (2005) 89 Minnesota Law Review 652.

8 Vicki Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 Yale Law Journal 3094.

9 Jacco Bomhoff, 'Beyond Proportionality: Thinking Comparatively about Constitutional Review and Punitiveness' in Jackson & Tushnet (n 3) 148.

a part of the proportionality principle. This paper seeks to examine the role of the principle of proportionality both in doctrinal discussion and in sceptical accounts of the Supreme Court of India's emphasis on the principle, specifically from the perspective of burden of proof. I scrutinize Justice Barak's analysis of burden of proof as a part of the *necessity* stage of the proportionality test, and then illustrate the divergence in court practice in India. I conclude that although the Supreme Court recognises proportionality as the new standard of review, the inconsistency in its application, specifically with regards to burden of proof, and the attitude of deference to the State, results in insufficient protection against rights violations.

II. PROPORTIONALITY: EXAMINING THE VALIDITY OF LIMITATIONS ON FUNDAMENTAL RIGHTS

The courts in India can declare statutes that *improperly limit* fundamental rights guaranteed under the Constitution of India, as unconstitutional.[10] While he constitution does not provide for a general limitation clause, there are specific limitations provided under different fundamental rights, which contain the grounds on which reasonable restrictions may be imposed.[11] Though the Supreme court did not mention the word 'proportionality', it had concluded very early on after the commencement of the constitution that factors similar to proportionality would be considered to determine the validity of the limitations.[12] In the late 1990s, the Supreme Court

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10 Constitution of India, 1950, art. *13(1).*

11 *See* ibid Part III (arts. 12–35). Specifically, restrictions are provided under art. 19(2) to (6).

12 In *Chintaman Rao v State of MP,* AIR 1951 SC 118 [6], the Supreme Court held that, '[T]he 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. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the

specifically provided that the constitutionality of administrative action limiting a fundamental right shall be viewed through the lens of proportionality.[13] More recently, a constitution bench of the Supreme Court in *Modern Dental College and Research Centre v. State of Madhya Pradesh* held the doctrine to be an inherent part of Art.19.[14]

It is primarily the responsibility of the legislature to enact laws that are compatible with rights, and of the executive to implement those laws in accordance with the constitutional scheme of values.[15] The courts must oversee this process as guardians of fundamental rights, where any rights violation is taken seriously. Proportionality as a test, allows the courts to determine whether a measure limiting rights was legitimate, suitable, necessary and balanced. Where the courts routinely apply the proportionality analysis against rights' infringements, the State is constrained to work within its boundaries.[16]

III. The Structure of Proportionality Analysis

Robert Alexy, a major proponent of the proportionality principle, perceives fundamental rights as principles and the proportionality principle as a consequence of the principled quality of fundamental rights.[17] Consequently, fundamental rights express

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freedom guaranteed in article 19 (1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality.'
In *V.G. Row v State of Madras,* AIR 1952 SC 196 [15], the Court held that, 'in examining the reasonableness of restrictions on fundamental rights [t]he nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict.'

13 *Union of India v. G. Ganayutham*, AIR 1997 SC 3387.

14 (2016) 7 SCC 353.

15 Julian Rivers, 'The Presumption of Proportionality' (2014) 77(3) MLR 409, 410.

16 Sweet and Mathews (n 4) 112-113.

17 Robert Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 International Journal of Constitutional Law 572.

values and require optimization of the values they express. In the process, sometimes fundamental rights battle with other fundamental rights[18] and sometimes they struggle with the principles that guide the State in pursuing its objectives. The effort is to find the optimum balance in the process.

Since most fundamental rights are relative, there exists a justification for not realising their full extent.[19] According to Justice Barak, the criterion for measuring the justification for the limitation on the constitutional right which determines the extent of its protection or realisation, is that of proportionality.[20] Consequently, 'proportionality can be defined as a set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right by a law to be constitutionally permissible'.[21] The constitution bench in *Modern Dental College* explained the proportionality doctrine as,

> [T]hus, while examining as to whether the impugned provisions of the statute and rules amount to reasonable restrictions and are brought out in the interest of the general public, the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the

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18 This conflict is visible in the *Aadhaar* case where the right to privacy is in conflict with the right to development, an aspect of right to dignity. The State's endeavour to promote different welfare and economic benefit schemes, which strive to provide a dignified life to a citizen, intrudes into certain aspects of personal autonomy of the same citizen.

19 As far as constitutional rights are concerned, it is more or less accepted that there are no absolute constitutional rights. Though some experts still claim that there are certain rights, albeit very few, which can still be treated as "absolute" like right to human dignity; right not to be subjected to torture or to inhuman or degrading treatment or punishment. However, even in respect of these rights, it is thought, that in the larger public interest, the extent of their protection can be restricted. See *Modern Dental College* (n 14).

20 Barak (n 1) 131.

21 A.K. Sikri, 'Proportionality as a Tool for Advancing Rule of Law' (2019) 3 SCC J-1, J-14.

one hand and the restrictions imposed on the other hand. This is what is known as "*doctrine of proportionality*".[22]

While delivering the majority judgment, Justice Sikri relied on the test given by Justice Aharon Barak of Israel and the Canadian test as laid down by Dickson, C.J. of Canada in *R* v *Oakes*[23]. The *Oakes* case, and the proportionality test articulated by it, have been cited around the world, and has had a profound impact on comparative constitutional law.[24] According to Justice Barak, proportionality is made up of four components: 'proper purpose, rational connection, necessary means, and a proper relation between the benefit gained by realizing the proper purpose and the harm caused to the constitutional right (the last component is also called "proportionality *stricto sensu*" (balancing)'.[25] According to the four sub-components of proportionality, a limitation of a constitutional right will be constitutionally permissible if

(i) it is designated for a proper purpose (*legitimacy*);

(ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose (*rationality*);

(iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation (*necessity*); and

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22 *Modern Dental College* (n 14) [60].

23 *R.* v. *Oakes,* 1986 SCC OnLine Can SC 6. There exist differences in doctrinal terms and applications among different countries in the structure of the proportionality principle. The test is articulated and applied differently in Israel and Canada.

24 As per S. Choudhry, courts in Australia, Fiji, Hong Kong, Ireland, Israel, Jamaica, Namibia, South Africa, the UK, Vanuatu and Antigua have all cited the case. S. Choudhry, 'So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 34 S.C.L.R. (2d) 501, 502.

25 Barak (n 1) 131.

(iv) there needs to be a proper relation ("proportionality *stricto sensu*") between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right (*balancing*).[26]

Whenever limitations are imposed on rights, courts must be satisfied on the balance of probabilities by sufficient and cogent reasons provided by the State that each stage of the proportionality analysis is satisfied.[27]

IV. The Necessity Test: "Heart and Soul" of Proportionality

Out of the four prongs of the proportionality analysis, the *necessity* test in the third stage, is considered to be the most significant one, particularly under the Canadian jurisprudence. As Peter Hogg notes, 'The requirement of least drastic means has turned out to be the heart and soul of Section 1 justification'.[28] Given the several alternate means, the necessity test chooses that measure which least limits the fundamental right. It requires the legislator to choose from amongst the available measures, the one that would cause the least infringement of a constitutional right. Accordingly, judicial discretion in such matters is limited. The court's responsibility is to examine the existence of an alternative which would satisfy the legislative purpose to the same extent, albeit one that is less likely to limit the constitutional right.[29] Although there exist differences in application of the proportionality doctrine in different jurisdictions, the paper focuses on the necessity test and the consequent question of burden of proof as analysed extensively by Justice Barak. I will now examine

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26 ibid [3].

27 Rivers (n 15) 410.

28 Hogg makes this statement in the context of the Canadian Charter of Rights and Freedoms. P. W. Hogg, *Constitutional Law of Canada,* (5th ed., vol. II, Carswell 2007) 146.

29 Barak (n 1) 412.

the specific question, on whom does the burden of proof lie, to produce the 'least restrictive measure'.

V. BURDEN OF PROOF: CONSTITUTIONAL FOUNDATIONS

The problem of burden of proof in proportionality has so far received scant attention. This may be on account of the thought that the whole purpose of protection of fundamental rights, 'is to create a presumption of non-interference and a duty of justification on public authorities'.[30] However, each time a statute places a limitation on a constitutional right, it requires a justification. The question therefore arises, on whom does the burden of proof of such justification fall. Who bears the burden of proving that a constitutional right was disproportionally limited by law?[31]

Burden of proof is an extremely important element with respect to the standard of review, as it has the potential to decide the outcome of any given case, and reflects the default constitutional balance between protecting rights and favouring the interests of the State.[32] Placing the burden of proof on the intrusive or restrictive agency of the State strengthens fundamental rights and freedoms.[33] However this is relatively a minor problem as compared to when the legislature intrudes or restricts a fundamental right. Schlink questions the justification of placing the burden of proof on both the legislature and the citizen. After all, should the legislature, 'subject only to the constitution and legitimised by election', not enjoy a certain margin of appreciation or discretion in deciding whether a statute is a necessary means to a legitimate end?[34] On the other hand, asking the

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30 ibid [411].

31 ibid [435].

32 David Kenny, 'Proportionality, The Burden of Proof, and some Signs of Reconsideration' (2014) 52 Irish Jurist [141], [147].

33 Bernhard Schlink, 'Proportionality (1)' in Michel Rosenfeld & Andras Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2013) 733.

34 ibid.

citizen to justify his exercise of the freedom goes against the very basis of the freedom. In certain jurisdictions, it is thought that establishing the law's lack of justification is a tougher ordeal for the citizens if the burden rested on them.[35] Justice Barak comes up with a solution to this confusion through an extremely nuanced argument that the burden should lie on both the citizen and the State.[36]

VI. Burden of Persuasion and Burden of Producing Evidence

Justice Barak divides the 'burden of proof' or the 'onus of proof' into two separate burdens: the burden of persuasion and the burden of producing evidence. Whereas the burden of persuasion is the onus on a party to prove a claim to a right against the other party, the burden of producing evidence may shift from one to the other party during the judicial process. The burden of persuasion is where one party has to persuade the court that they are entitled to a right against the other party on the presentation of certain facts. In contrast, the burden of producing evidence may shift; "this is the burden of producing the facts and presenting them to the court."[37] In other words, at the initial stage, the burden of proof lies with the party arguing that a limitation has been placed on the constitutional right. In the second stage of such constitutional examination, the burden is shifted onto the party who says that there is a justification for the limitation, i.e., that such a limitation is proportional.[38]

VII. Constitutional Review: First Stage

In the first stage, the limitation on the constitutional right is examined. The question is, whether the enacted law has limited a constitutional right? Has the owner of the right been unable to exercise his right to the fullest extent? The burden of proof in the

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35 Kenny (n 32) 147.
36 Barak (n 1), Chapter 16.
37 ibid [437].
38 ibid [435], [437].

first stage lies with the party claiming the occurrence of a limitation on his right. Justice Ackerman, of the South African Constitutional Court, notes, 'the task of interpreting… fundamental rights rests, of course, with the courts, but it is for the applicants to prove the facts upon which they rely for their claim of infringement of a particular right in question'.[39] This is based on the *presumption* that the legislative provision is constitutional. The principle of presumption of constitutionality applies to laws enacted in India.[40] Such presumption places the burden of proof on the party arguing that the limitation of their constitutional right exists.

VIII. Constitutional Review: Second Stage

The second stage requires the examination of the *justification for the limitation* on the constitutional right [Emphasis added]. The limitation of a right may be constitutional only if it has a legal justification. The legal justification lies in the rules of proportionality. Consequently, the question is, who bears the burden of proving the different components of proportionality. Justice Barak asserts that the burden of proof (both the burden of persuasion and the burden of producing evidence) lies with the party arguing for the justification.[41] He arrives at this conclusion after a comparative analysis of various jurisdictions, with the focus being on Canada.

In Canada, a petitioner is required to prove that his or her rights have been infringed in the first instance. Once that is

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39 CCT 23/95 *Ferreira v. LevinNO*, 1996 (1) SA 984 (CC). See M. Chaskalson, G. Marcus, and M. Bishop, 'Constitutional Litigation' in S. Woolman, M. Bishop, and J. Brickhill (eds), *Constitutional Law of South Africa* (Juta Law Publishers 2002) 3–7.

40 The principle of Presumption of Constitutionality was enunciated by a constitution bench in *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar,* 1958 AIR 538, 'That there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.'

41 Barak (n 1) 439.

established, the burden of proving that the infringement was justified rests entirely on the State.[42] Dickson C.J. in the *Oakes* case stated that the entire weight of this test would be put on the State. Citing the term "demonstrably justified" in S.1, he held:

> [T]he onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s.1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited.[43]

This statement rests the burden on the State which is to be met with clear evidence, 'Where evidence is required in order to prove the constituent elements of a S. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit'.[44] The same approach is followed in New Zealand[45] and South Africa.[46] Even British scholars, commenting on the Human Rights

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42 Kenny (n 32) 141.

43 *Oakes* (n 23) [66].

44 ibid [68].

45 *Police v. Curran* [1992] 3 NZLR 260 (CA); *Minister of Transport v. Noort* [1992] 3 NZLR 260, 283 (CA); P. Rishworth, G. Huscrot, S. Optican and R. Mahoney, *The New Zealand Bill of Rights* (OUP 2003) 68; A. S. Butler, 'Limiting Rights' (2002) 33 Victoria U. Wellington L. Rev. 113, 116.

46 *S. v. Makwanyane*, 1995 (3) SA 391 [102]: '[I]t is for the legislature, or the party relying on the legislation, to establish this justification, and not for the party challenging it to show that it was not justified'.

Act 1998, have asserted that the burden of justifying limitations of rights rests on the public authority.[47]

Burden of Persuasion

On whom does the burden of persuasion lie with respect to the justification of a limitation of constitutional rights? The key factor in this decision is the concept of 'protection of fundamental rights', as democracies are designed to protect these rights.[48] It is the function of a constitution to ensure the protection of fundamental rights. The manner to ensure such protection is to impose the burden of persuasion of justifying the limitation of a constitutional right on the party proposing the justification. Consequently, when the scales are balanced both for and against a justification, the ruling should be against the limitation of the constitutional right and not in its favour.

Burden of Producing Evidence

During the second stage of constitutional review, there is no need of separating the burden of persuasion from the burden of producing evidence as both burdens lie with the same party. This is on account of the fact that fundamental or constitutional rights enjoy a central status under the constitution and also because the State has the advantage of access to empirical and factual data. Cora Chan also endorses Justice Barak's view when she says that imposing a burden on the claimant does not take sufficient account of the '*superior intelligence-gathering abilities'* of the State especially when it comes to

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47 R. Clayton and H. Tomlinson, *The Law of Human Rights* (2nd ed., OUP 2009) 6.187 - 6.190.

48 Barak points out that the 'notion of democracy' has many meanings. Every constitution provides the notion of democracy with a meaning that best captures its purpose as appearing in that legal system. Most constitutions are based upon the fundamental concept of free democracy which are the democratic values of human dignity, equality, and freedom. Barak (n 1) 218-219.

evaluating alternative measures.[49] Therefore, it is the State which should bear the burden of proof in the *necessity* stage.

The third prong of the proportionality review i.e. the *necessity test*is a fact-based test as the court has to examine the various alternative measures that can be adopted to achieve the intended goal of the state. Upon such examination, it falls upon the courts to determine the *least restrictive* measure to achieve the intended goal of the State.[50] Justice Barak, here, advocates distinguishing between the *burden to make a claim* (the burden of pleading) and the *burden to produce evidence* to validate the claim.[51] Therefore, the party claiming the existence of a particular alternative, should point out specific and viable alternatives. However, the burden of producing the evidence against the alternative measures must lie with the party arguing that such alternative measures do not advance the purpose to the same extent. This consequently falls on the State as it has already examined the validity of alternatives, at the times of enactment of the legislation.[52] Further in public law disputes, since the State owes to its citizens a general duty of fairness (or a higher level of good faith)[53], the burden to justify the limitation, by producing adequate evidence, falls on the State.

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49 Cora Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33(1) Legal Studies 1, 14.

50 Ankush Rai, 'Proportionality in Application-An Analysis if the "Least restrictive Measure"' in Gautam Bhatia, (*Indian Constitutional Law and Philosophy Blog,* 8 May, 2020) <https://indconlawphil.wordpress.com/2020/05/08/guest-post-proportionality-in-application-an-analysis-of-the-least-restrictive-measure/> accessed 10 January 2021 (emphasis added). Every court does not require the 'less restrictive measure' to be equally efficacious, especially not the Canadian courts.

51 Barak (n 1) 449 (emphasis added). Also *see* F. James, 'Burdens of Proof' (1961) 47 Vanderbilt Law Review 51, 59; R. Belton, 'Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice' (1981) 34 Vanderbilt Law Review 1205.

52 Barak (n 1) 449.

53 ibid [450]-[451].

IX. BURDEN OF PROOF: THE INDIAN EXPERIENCE

The proportionality test as applied by the courts in India to assess fundamental rights and limitations, has been reviewed by different authors. With the objective of examining the question, on whom does the burden of proof lie, I will now scrutinize four important judgments of the Supreme Court of India on this issue.

X. *K.S. Puttaswamy v. Union of India (II)* [The Aadhaar Judgment]

The majority of the five-judge bench in *K.S. Puttaswamy v. Union of India (II),*[54] held that the provisions of the Aadhaar Act, 2016 must be tested on the touchstone of proportionality, basing their application of the proportionality standard on David Bilchitz's formulation of the 'necessity' stage of the proportionality test.[55] In the present case, the object of enacting the Aadhaar Actwas to provide for a unique identity for purposes of delivery of benefits, subsidies and services to the eligible beneficiaries and to ward off misappropriation of benefits and subsidies, and deprivation of eligible beneficiaries. According to the State, the failure to establish the identity of beneficiaries of various welfare programmes was leading to a lot of leakage and corruption, and was causing a hindrance to their successful implementation.[56] To this end, Section 7 of the Aadhaar Act required that any individual wanting to avail subsidies, benefits or services, had to produce their Aadhaar number.[57] Section 8 made Aadhaar based authentication of identity mandatory for the availing such subsidies, benefits or services.[58]

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54 (2019) 1 SCC 1.

55 David Bilchitz, *Necessity and Proportionality: Towards a Balanced Approach?* (Hart Publishing 2016). Also see ibid [318].

56 ibid [207].

57 ibid [211].

58 ibid [211]-[212].

The petitioners fulfilled the burden of proof by establishing that the State had made providing Aadhaar details (biometric information) *de jure* or *de facto* mandatory for availing various services from the State or from private entities, which was violative of the fundamental right to privacy under Article 21. Further, the petitioners suggested certain less intrusive alternative measures as required under the necessity stage of the proportionality test, such as smart cards etc., which were borne out by the written submissions of Mr. K.V. Viswanathan:[59]

> [I]t is the State's burden to show that Aadhaar is both necessary and proportionate, i.e. there exist no other alternatives that could have achieved their stated goals, using a less intrusive method [See Peck v UK, (2003) ECHR 44, ¶¶76-87 and Modern Dental College & Research Centre v State of MP, (2016) 7 SCC 353, ¶¶60-65]. As a matter of fact, there exist less-invasive alternatives such as Smart Cards and social audits that have been included in sec. 12 of the NFSA and can help reduce diversion/leakages. In fact, these Smart Cards (using hologram, RFID chip, or OTP) have helped eliminate barriers of distance or location to avail entitlements, such as in Chhattisgarh. Other alternatives such as food coupons, digitisation of records, doorstep delivery, SMS alerts, social audits, and toll-free helplines have also helped… The very fact that the State has not examined such alternatives itself is enough to show that they have not discharged their burden under Art. 21.

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59 Written submissions on behalf of Mr. K. V. Viswanathan, Sr. Advocate <https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/63/Written_Submission_of_KVV.pdf> accessed 12 January, 2020.

Surprisingly, despite the suggestions made by the petitioners, the majority in the case observed that the petitioners had in fact, failed to suggest alternatives,

> [T]he manner in which malpractices have been committed in the past leaves us to hold that apart from the system of unique identity in Aadhaar and authentication of the real beneficiaries, there is no alternative measure with lesser degree of limitation which can achieve the same purpose. In fact, on repeated query by this Court, *even the petitioners could not suggest any such method.*[60]

On the other hand, Justice Bhushan, acknowledged the alternatives suggested by the petitioners, but refused to examine them,

> [A]t this juncture, we may also notice one submission raised by the petitioners that the Aadhaar Act could have devised a less intrusive measure/means. It was suggested that for identity purpose, the Government could have devised issuance of a smart card, which may have contained a biometric information and retain it in the card itself, which would not have begged the question of sharing or transfer of the data. We have to examine the Aadhaar Act as it exists. *It is not the Court's arena to enter into the issue as to debate on any alternative mechanism, which according to the petitioners would have been better.*[61]

The concept of burden of proof is lost in the confusion between the difference in the opinions in the judgment. The court both denies that alternatives have been proposed and also refuses to discuss them. The majority makes no mention of where the burden

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60 *Puttaswamy (II)* (n 54) [334] (emphasis added).

61 ibid [715] (emphasis added).

of proof lies.[62] In the entire discussion, there is no mention of the evidentiary burden of the State except in Justice Chandrachud's dissent, who states that because it is the State that is infringing rights, the State bears the burden of showing that the alternatives do not satisfy the State's goal.[63]

In the analysis of the necessity test, the court places the burden on the petitioners to suggest alternative measures. However, it does not thereafter place the evidentiary burden on the State to justify the imposed limitations on the fundamental right, but simply accepts the government's stance when it states that it has rejected the idea of 'smart cards' and other alternative models after 'due deliberations'.[64] There is no engagement whatsoever by the Court on the issue of the State's onus of proof to justify the effectiveness of the alternative measures or the impact of Aadhar on the right to privacy. Therefore while the State is able to persuade the court that it is entitled to implement the Aadhar Act (burden of persuasion), it does not satisfy the burden of evidence.

XI. Anuradha Bhasin v. Union of India [Kashmir Internet Ban case]

The case of *Anuradha Bhasin v. Union of India,*[65] concerned the internet and movement restrictions imposed in Jammu and Kashmir on 4th Aug., 2019, to allegedly protect public order. The court while deciding the matter on 10th Jan. 2020, did not lift the restrictions on the internet, but directed the government to review the shutdown

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62 Gautam Bhatia, 'The Aadhaar Judgment and the Constitution-I: Doctrinal Inconsistencies and a Constitutionalism of Convenience' (*Indian Constitutional Law and Philosophy Blog,* 28 Sept., 2018) <https://indconlawphil.wordpress.com/2018/09/28/the-aadhaar-judgment-and-the-constitution-i-doctrinal-inconsistencies-and-a-constitutionalism-of-convenience/> accessed 14 January 2020.

63 *Puttaswamy (II)* (n 54) [1382].

64 ibid [295]. Also see Chandra (n 6) [78]-[79].

65 (2020) 3 SCC 637.

orders against the tests highlighted in the judgment. In the two-part judgment, the Supreme Court held that accessing information through the internet was a fundamental right. Drawing on past domestic and foreign jurisprudence, the Court endorsed the proportionality standard to be the appropriate standard of review of communication shutdown orders. It reiterated its stance that the government while imposing restrictions on the fundamental rights to freedom of speech and expression and freedom to carry on business, trade etc. should adopt the 'least restrictive' method, supported by sufficient material,

> [H]owever, before settling on the aforesaid measure, the authorities must assess the existence of any alternative mechanism in furtherance of the aforesaid goal. The appropriateness of such a measure depends on its implication upon the fundamental rights and the necessity of such measure. It is undeniable from the aforesaid holding that *only the least restrictive measure can be resorted to by the State*, taking into consideration the facts and circumstances..[66]

On behalf of the petitioners, Mr. Kapil Sibal suggested the use of less restrictive measures like restricting selective websites as opposed to a complete ban,

> [T]herefore, a less restrictive measure, such as *restricting only social media websites* like Facebook and WhatsApp, should and could have been passed, as has been done in India while prohibiting human trafficking and child pornography websites. The learned Senior Counsel pointed to orders passed in Bihar, and in Jammu and Kashmir in 2017,

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66 ibid [78] (emphasis added).

> restricting only social media websites, and submitted that the same could have been followed in this case as well.[67]

However, without analysing the alternate measures as suggested, the court simply accepted the State's argument that it couldn't selectively block websites because of lack of technology. The court merely ordered that 'any order suspending internet issued under the Suspension Rules, must adhere to the principle of proportionality and must not extend beyond necessary duration'.[68]

The petitioners satisfied the components of burden of proof, that the internet ban was a violation of their fundamental right to freedom of expression. However, the State could only persuade the court that they were justified in imposing such ban (burden of persuasion), but failed to satisfy the evidentiary burden. The order failed to conform to the *necessity* test, that the objective could not be achieved through less restrictive means. The State could have resorted to blocking certain specific websites, if the intention was to prevent incitement of violence.[69] Moreover the evidentiary burden of analysing the less restrictive measures, was not imposed by the court on the State. In fact, subsequently, the State passed orders[70] allowing

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67 ibid [10.8] (emphasis added).

68 ibid [160.4].

69 Suhrith Parthasarathy, 'The Kashmir Internet Ban - What's at Stake?' in Gautam Bhatia (*Indian Constitutional Law and Philosophy Blog,* 25 December, 2019) <https://indconlawphil.wordpress.com/2019/12/25/guest-post-the-kashmir-internet-ban-whats-at-stake/> accessed 14 January, 2020.

70 On 14th Jan. 2020, the government directed, *inter alia*, for provisions of broadband services to institutions providing essential services, 2G mobile connectivity in certain districts, and the installation of internet firewalls and a set of "white-listed websites" that could be accessed by internet users [Govt. Order No.-Home 03(TSTS) of 2020: <http://jkhome.nic.in/03(TSTS)%202020.pdf> accessed 14 January, 2020]. On 18th Jan. 2020, second order was passed under the exercise of review powers under the Telecom Suspension Rules. This order directed restoration of Voice and SMS facilities on pre-paid SIMS, and extended 2G internet to a few more districts. In addition, it provided a specific list of 153 "white-listed" websites, from Blue Dart to Zomato to Amazon Prime – which could be

for selective access to the internet by indulging in selective white-listing and black-listing of websites, which proves the existence of less restrictive measures.[71] However, this analysis of the evidentiary burden on the State under the *necessity* stage of the proportionalitytest was never explored in *Anuradha Bhasin*.

XII. Internet and Mobile Association of India (IMAI) v. Reserve Bank of India [The Cryptocurrency case]

In *Anuradha Bhasin*, the Supreme Court invoked the doctrine of proportionality, but failed to apply it to the facts of the case. In *Internet and Mobile Association of India v. Reserve Bank of India*[72], the court went beyond simply talking about proportionality, and placed the burden on the Reserve Bank of India (RBI) to examine the 'least restrictive measure'. Although the RBI had been issuing warnings since 2013 regarding the potential risk in the use of cryptocurrencies, their use had never been banned. In April 2018, RBI issued a circular banning regulated financial institutions from providing services to businesses dealing in exchange/trading of cryptocurrencies. This created a turmoil in the entire Indian cryptocurrency trading industry and the validity of the circular was challenged and struck down by the Supreme Court.

According to the petitioners, the circular had resulted in the choking of exchange of virtual currencies (VC), which infringed their right to carry on any occupation, trade or business under Article 19(1)(g). Although the court invoked the doctrine of proportionality,

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accessed [Govt. Order No.-Home 04(TSTS) of 2020: <http://jkhome.nic.in/Temporary%20suspension%20of%20Telecom%20services_0001.pdf> accessed 14 January, 2020].

71 *See* Gautam Bhatia, 'The Kashmir Internet Ban: "Restoration", White-Listing and Proportionality' (*Indian Constitutional Law and Philosophy Blog,* 25 January, 2020) <https://indconlawphil.wordpress.com/2020/01/25/the-kashmir-internet-ban-restoration-white-listing-and-proportionality/> accessed 14 January, 2020.

72 (2020) 10 SCC 274.

it did not examine the four stages of the doctrine separately, and whether they were met by the RBI circular. It, however, relied on the UK Supreme Court's decision in *Bank Mellat v. HM Treasury (No. 2)*.[73] This concerned an order issued by the Treasury under the Counter Terrorism Act of 2008, wherein persons operating in the UK's financial sector were directed to discontinue any transaction or business relationship with the Bank, with immediate effect. The order was struck down as it was arbitrary, disproportionate and irrational. Lord Sumption found that the order did not arise out of a matter of necessity when there were less drastic measures in existence.[74]

In the *IMAI* case the court examined the circular, not on the basis of the four stages of proportionality, but whether the RBI had considered alternative and less intrusive measures. The petitioners dispensed with the obligation of proving a violation of the fundamental right under Article 19(1)(g) and also the onus of suggesting various alternate and less restrictive measures including the suggestion made by the EU Parliament: a report that examined an outright ban on cryptocurrencies, recommended that no such ban was necessary as long as safeguards were in place:

> [W]e are not in favour of general bans on cryptocurrencies or barring the interaction between cryptocurrency business and the formal financial sector as a whole, such as is the case in China for example. That would go too far in our opinion. As long as good safeguards are in place protecting the formal financial sector and more in general society as a whole, such as rules combating money-laundering, terrorist financing, tax evasion and maybe a more comprehensive set of rules aiming at protecting legitimate

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73 *Bank Mellat v. HM Treasury (No. 2),* (2013) UKSC 39: (2013) 3 WLR 179.
74 *IMAI* (n 73) [211].

users (such as ordinary consumers and investors), that should be sufficient.[75]

The court held that the RBI had failed to consider such alternatives prior to issuing the circular. However, it did so later on, in the rebuttals to the contentions raised by the petitioners. Accordingly, the court noted that the RBI had applied its mind to such measures and there was no further need to examine them, 'While exercising the power of judicial review we may not scan the response of RBI in greater detail to find out if the response to the additional safeguards suggested by the petitioners was just imaginary'.[76]

The court which initially started with the aim of examining less intrusive measures, however, left the job unfinished. By not insisting that the State should satisfy the evidentiary burden of examining the alternate and less intrusive measures, it left this requirement of the *necessity* stage, as emphasised by Justice Barak, unfulfilled. The State should have been asked to prove that the eventual measure adopted for regulating VC was in fact the least restrictive one. Here again the State did not satisfy the evidentiary burden of being able to justify the imposition of limitation on the fundamental right.

XIII. Gujarat Mazdoor Sabha v. State of Gujarat

A three-judge bench of the Supreme Court in *Gujarat Mazdoor Sabha v. State of Gujarat*,[77] quashed two notifications of the Gujarat government issued during the pandemic lockdown, under S.5, Factories Act, 1948 which sought to exempt factories in Gujarat from following the worker's rights guaranteed under the Act. The effect of the notification was to increase the upper limit of working

75 ibid [214].
76 ibid [217].
77 (2020) 10 SCC 459.

hours from nine to twelve per day and forty-eight to seventy-two per week, shorten rest intervals, and halve overtime pay.

The court discussed the need to protect the worker, due to the unequal bargaining power between him and his employer which has been recognised by the Directive Principles under the Constitution. Accordingly, the court held the denial of 'humane working conditions and overtime wages provided by law' as a violation of the 'worker's right to life and right against forced labour' secured by Articles 21 and 23 of the Constitution.[78] Noting that any restriction on the fundamental right would have to pass the test of proportionality, the court concluded that the doctrine of proportionality had been violated,

> [T]he impugned notifications do not serve any purpose, apart from reducing the overhead costs of all factories in the State, without regard to the nature of their manufactured products. … However, a blanket notification of exemption to all factories, irrespective of the manufactured product, while denying overtime to the workers, is indicative of the intention to capitalise on the pandemic to force an already worn-down class of society, into the chains of servitude.[79]

The petitioners were able to prove a violation of their fundamental rights, but it did not burden either the petitioners or the State for any alternate measures, nor did it enter into an examination of discovering the 'least restrictive measure' in the situation. Though the court found that the State action failed to meet the test of proportionality, it did so without applying the four prongs of the test and without specifically placing the burden of proof on the State. The

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78 ibid [48].
79 ibid [38].

resulting determination was the outcome of the court's own understanding of the situation.

Hence, in the *Aadhaar* case, although the court entered into an examination of the four prongs of the proportionality test, it refuses to acknowledge the alternatives suggested by the petitioners. Thereafter, it does not impose the burden of proof on the State, to examine whether the limitation imposed on the right to privacy is the 'least restrictive measure'. In *Anuradha Bhasin*, the court again does not enter into an examination of the alternate measures suggested by the petitioners, and simply defers to the State's stand that it cannot selectively block websites. Interestingly, the State proceeds to selectively block websites immediately after the judgment, which proves that the court's lack of insistence on the State's evidentiary burden, can lead to an anomalous judgment. In the *IMAI* case, the court examines the less intrusive measures suggested by the petitioners, however, it leaves the job unfinished by not burdening the State to produce evidence that the eventual measure adopted is the 'least restrictive' one. Lastly, in the *Gujarat Mazdoor* case, though the court reaches the correct decision and it believes that the notifications issued by the government should satisfy the proportionality test, but it does not attempt to hold the State responsible for satisfying the requirements of burden of proof.

Clearly, even though the Supreme Court relies on Justice Barak's formulation of the proportionality test, it does so half-heartedly, thereby missing the utility of such an exercise and an opportunity to clarify the confused state of law. In none of the cases examined above, has the evidentiary burden of proof been imposed on the State in the manner suggested by Justice Barak. Ankush Rai while reviewing cases decided by the Supreme Court, from the angle of burden of proof, reaches a conclusion that the court keeps shifting

the burden between the petitioner and the State.[80] However, as analysed above, it is clear that though the court understands that the burden of suggesting less restrictive measures lies with the petitioner, but it fails to critically engage with the evidentiary burden of the State in the second stage of the constitutional review.

XIV. CONCLUSION

Julian Rivers in his article on *The Presumption of Proportionality* has challenged the assumption that the burden of demonstrating that a limitation of a fundamental right is proportionate rests on the public authority.[81] Since the government faces practical difficulties in proving that a measure is no more than necessary and overall balanced, Rivers believes that the court should recognise a presumption of proportionality in certain circumstances. This presumption transfers the burden of proof in respect of the final two stages of proportionality analysis back to the claimant.[82] However, Cora Chan, defends the position that the State should always bear the burden of proving that a prima facie limitation of right passes all stages of the proportionality enquiry.[83] Basing her argument on the shift in culture, from authority to justification, Chan states that 'legitimacy for the state's coercive actions must be earned rather than presumed'.[84] The burden of proof rule as proposed by Justice Barak is the best tool to avoid any inconsistency in the *necessity* stage of the proportionality test.

Evidently, the Supreme Court of India follows a relaxed intensity of review, wherein sometimes it bypasses certain stages of the proportionality test and sometimes it merges all stages of the

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80 Rai (n 50).
81 Rivers (n 15).
82 Rivers (n 15) 412.
83 Cora Chan, 'The Burden of Proof under the Human Rights Act' (2014) 19 Judicial Review 46.
84 ibid [48].

enquiry into one general question of whether the measure is reasonable or justified. The court's deferential attitude towards the State means that it does not place adequate evidential burdens on it, which 'severely restricts the ability of the doctrine to re-shape legal culture'.[85] Simply paying lip service to the doctrine of proportionality, will not lead to a better rights review standard. It is the responsibility of the courts as the guardian of fundamental rights, to check that a *prima facie* limitation of qualified rights passes the four-stage proportionality test. The courts must insist on following the rule of burden of proof along with the substantive proportionality standard for effectively supervising a democracy based on rights.

The courts' deference to the State's policies is sometimes sought to be justified on the basic conception of a democracy and the rule of the majority. However, this longstanding concern that judges declare laws unconstitutional that were enacted by legislators who represent the will of the majority is unfounded. Dworkin's defence of the independence and the role of judges is validated by his belief that, 'when constitutions declare limits on the majority's power, this democratic assumption is displaced: decisions are not supposed to reflect the will of the majority then'.[86] But this is an issue for another day.

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85 Chandra (n 6) 86.

86 Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28 Alberta Law Review 324, 325.

DISCRIMINATION AND THE COURT: SAME SEX RELATIONS IN INDIA, BOTSWANA AND KENYA

Thulasi K.Raj[*]

Abstract

In recent years, the demand to decriminalise same-sex relations has met with some significant success across the world. In the past 20 years, over 30 countries have decriminalised homosexuality.While the Indian and Botswanan courts declared that same-sex relations are no longer criminal, the High Court of Kenya repelled a similar challenge. In this comment, I will focus on decriminalisation and its interaction with anti-discrimination law. I will examine two obstacles faced by the petitioners in all three cases towards an anti-discrimination argument. The first is that sexual orientation is not a protected ground. The second is that the criminal law provisions are facially neutral and not discriminatory (even if sexual orientation was a protected ground). I discuss how these arguments were responded to by the courtsand arguethat the Kenyan court's approach was incorrect.

I. Introduction

In recent years, the demand to decriminalise same-sex relations has met with some significant success across the world. It is reported that in the past 20 years, over 30 countries have decriminalised homosexuality..[1] Courts have stepped in to strike down laws criminalising homosexuality as unconstitutional. In this

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[1] Juneau Gary and Neal S. Rubin 'Are LGBT rights human rights? Recent developments at the United Nations', (*American Psychological Association*, June 2012) <https://www.apa.org/international/pi/2012/06/un-matters> accessed 12 July 2020.

note, I will look at the judicial developments in three comparable jurisdictions of Botswana, India and Kenya.[2]

In 2016, Letsweletse Motshidiemang, a gay person approached the High Court of Botswana challenging the provisions criminalising same-sex relations. In this case, the LEGABIBO (Lesbians, Gays and Bisexuals of Botswana) was admitted as an amicus curiae at the court. The Court in 2003 in *Kanane v. the State* had upheld the constitutionality of these provisions, by holding that "... the time has not yet arrived to decriminalise homosexual practices even between consenting adult males in private."[3]

The Indian Supreme Court in 2013 had repelled the challenge against the penal provision criminalising 'unnatural offences.'[4] However, in 2016, another writ petition was filed by a different set of petitioners challenging the constitutionality of the law. In Kenya, the challenge was made by the National Gay and Lesbian Human Rights Commission.

The penal provisions of all three countries are similarly worded and share their colonial origin and history. As noted by the Botswana court, "*S377 of the Indian Penal Code was copied in a large number of British territories, including Botswana.*"[5] Even though the United Kingdom decriminalised same-sex relations in 1967, several colonial countries retained their Penal Codes enacted decades ago. Studies have shown that "former British colonies are much more likely to

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2 Throughout the analysis, I use the term 'gay' to mean male or female persons attracted to the same sex.

3 [2003] (2) BLR 67 (CA).

4 *Suresh Kumar Koushal & Anr. v. Naz Foundation & Others*, (2014) 1 SCC 1.

5 *LM v. Attorney General*, 11 June 2019 [55], <https://africanlii.org/article/20190612/botswana-criminalisation-consensual-gay-sex-unconstitutional> accessed 12 October 2020.

have laws that criminalize homosexual conduct than other former colonies or other states in general."[6]

In June 2019, the High Court of Botswana held sections 164 and 165 of its Penal Code to be unconstitutional and violative of fundamental rights.[7] In September 2018, the Indian Supreme Court declared that same-sex relations are no longer criminal. In *Navtej Singh Johar*,[8] the court held Section 377 of the Indian Penal Code to be unconstitutional to the extent to which it criminalises consensual sexual intercourse between same-sex persons. The High Court of Kenya however, dismissed a similar challenge, holding that sections 162(a), 162(c) and 165[9] of its Penal Code do not suffer from unconstitutionality.[10]

All three judgments are worth studying, in the context of the rights to equality, privacy and personal autonomy. In this comment, I

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6 Enze Han & Joseph O'Mahoney, 'British colonialism and the criminalization of homosexuality' (2014) 27(2) Cambridge Review of International Affairs 268.

7 *LM v. Attorney General* (n 5).

8 *Navtej Singh Johar and Others v. Union of India*, (2018) 10 SCC 1. (hereinafter '*Navtej*.').

9 The relevant parts of s. 162 read as follows: "Unnatural offences Any person who:

a) Has carnal knowledge of any person against the order of nature; or

c) Permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years. Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if— i. the offence was committed without the consent of the person who was carnally known; or ii. the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act."

S. 165 reads: "Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years."

10 *Eric Gitari v. Attorney General*, 24 May 2019, <http://kenyalaw.org/caselaw/cases/view/173946/> accessed 12 October 2020.

will focus on the decriminalisation of homosexuality and its interaction with anti-discrimination law. The petitioners had two obstacles an equality argument. The first is that sexual orientation is not a constitutionally protected ground. The second is that the criminal law provisions under challenge (collectively 'the penal provisions') are in some sense, facially neutral and hence not discriminatory even if sexual orientation was a protected ground. By discussing how these arguments were responded to by the courts, I argue that the Kenyan court's approach was incorrect.

II. SEX AND SEXUAL ORIENTATION

The first problem which the petitioners faced in all three cases is one based on the text of the constitution. It is centred around how the constitutional provision on anti-discrimination is formulated. As familiar to us, our Constitution has a list of grounds under Article 15 on which discrimination is prohibited.[11] The Constitution of Botswana guarantees the right of non-discrimination through Section 15.[12] It was argued that the discrimination provisions of both constitutions have a 'closed' list of grounds.

Now, if the constitutions had explicit reference to sexual orientation, this problem would be moot. But none of the three constitutions had 'sexual orientation' written into them. The Kenyan constitution notably did not have a 'closed' list and provided for an inclusive definition holding that the state shall not discriminate on grounds *including* race, sex, marital status etc, revealing a broader

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11 "15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

12 "15. Protection from discrimination on the grounds of race, etc.
(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

approach to anti-discrimination.[13] Even then, in the court, the argument that the court should rely on a South African precedent was resisted saying that the South African Constitution mentions sexual orientation, while the Kenyan one does not.[14]

There are two ways of making the argument that discrimination based on sexual orientation is constitutionally prohibited. I will call them reductionist and non-reductionist. A reductionist argument is one where one argues that sex includes sexual orientation. Non-reductionism would mean asserting that sexual orientation is analogous to sex, and therefore deserves protection.

A. Sex Includes Orientation

This argument says that sex includes sexual orientation, either by arguing that sexual orientation discrimination is a type of sex discrimination or by resorting to an interpretation of the word based on the contemporary meaning and social context.

The US Supreme Court in *Bostock*[15] resorted to the former method. The court held that: "*it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.*"[16] To put it simply, when one

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13 Constitution of Kenya Article 27(4): "The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

14 *Eric Gitari v. Attorney General* (n 10) [202].

15 *Bostock v. Clayton County* 590 U.S. ___ (2020).

16 ibid.

discriminates based on sexual orientation, she is discriminating based on sex.

The Botswana Court takes the latter view.[17] The court was open to generously interpreting the word 'sex'. To strengthen this argument, the court referred to employment legislation that mentioned sexual orientation and gender.[18] The court seemed to have appealed to the sentiment that 'sex' in the contemporary social context, takes in sexual orientation. The Indian court, although engaged a somewhat similar view,[19] went farther and expressly adopted an argument based on analogous grounds.

B. Orientation Analogous to Sex.

The second approach is one of analogous grounds. Grounds that are analogous or comparable to the existing ones of grounds under the anti-discrimination law can be said to be covered. As we can imagine, this can have radical ramifications by bringing new grounds under the ambit of the law which was never mentioned. Are constitutions containing exhaustive protected grounds to be read as limiting protection on only those grounds? (Loosely the 'narrow reading'). It could follow from a narrow reading that since political belief is not mentioned in Article 15(1) of our constitution, the provision cannot be interpreted to protect discrimination based on political belief.[20] Or can constitutions, containing an enumerated list of grounds be read to include something more than the plain linguistic text? (Loosely the 'broad reading).

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17 "It is henceforth determined that 'sex', as used in Section 3 of the Constitution includes "sexual orientation", *LM v. Attorney General* (n 5) [159]. There are others also who acknowledge this. For example, see United Nations Human Rights Committee, *Toonen v. Australia*, UN Doc. CCPR/C/50/D/488/1992 (4 April 1994).

18 ibid.

19 Per Justice Indu Malhotra, *Navtej* (n 8) [638.2].

20 I will keep the question of whether Article 14 is violated distinct.

The objection against a broad reading is this: the constitution is meant to be read as its original text. The argument is that certain protected grounds are specified in the text precisely because the protection is limited to those groups and grounds such as sex, race or religion. If we extend it to other groups, the provision will eventually be redundant, having no salience attached to it. Only constitutional amendments can add anything to these provisions if one has to even slightly deviate from the linguistic text.[21]

But this raises the question of why certain groups are protected in the first place. Why does the constitution extend protection to few groups and not to others? If a particular trait is sufficient to allow constitutional protection, why aren't left-handers a protected group? Or people with green eyes or red hair? What distinguishes them from those belonging to a particular religion or race?

Perhaps, we must look at the nature and scope of the grounds which already stand protected. This is the principle behind analogous grounds. As soon as we identify whether there are unifying features for the provisions which tie them together, we can find analogous grounds of protection. The Indian court was impressed with this argument. It went on to determine what these unifying features are.

One of such principles is historic and social discrimination.[22] Certain grounds are afforded recognition because they are the most

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21 This argument was made by an intervener in I.A. No. 76790 of 2018 in *Navtej*. Please see paragraph 69, *Navtej*. "Further, the applicant has contended that Section 377 IPC is not violative of Article 15 of the Constitution as the said Article prohibits discrimination on the grounds of only religion, race, caste, sex, place of birth or any of them but not sexual orientation. The word sexual orientation ', as per the applicant, is alien to our Constitution and the same cannot be imported within it for testing the constitutional validity of a provision or legislation. As per the applicant, if the word 'sex' has to be replaced by 'sexual orientation', it would require a constitutional amendment."

22 Deborah Hellman, *When Is Discrimination Wrong?* (HUP, 2008) chapter 1.

visible and prevalent forms of discrimination. Sex discrimination, for instance, is a universally acknowledged ground of discrimination as evidenced by most constitutions. The historical exclusion of 'lower' castes in India led to Article 15 prohibiting caste-based discrimination, while it is absent in other constitutions where caste does not pervade society. This account helps the case of the petitioners since historic (often through non-recognition) and social discrimination of gay persons could be demonstrated. The historical, social and political discrimination suffered by gay persons was acknowledged by the court.[23] In this context, it also becomes clearer why red-haired people are not afforded protection analogous to gay persons and what makes the distinction morally relevant.

Another answer is based on immutable status and fundamental choice.[24] A trait that is a matter of personal autonomy deserves to be protected because liberal constitutions must not allow discrimination based on personal choice. Immutability is understood as status over which you have no control over, which is impossible or very burdensome to alter.

The Indian court had no hesitation to hold these two features unify the constitutional provision of anti-discrimination and that sexual orientation is both a matter of choice and status. The so-called 'closed list' of grounds in the constitution, the court said nevertheless had an underlying commonality. The court accepted that "homosexuality and bisexuality are natural variants of human sexuality. LGBT persons have little or no choice over their sexual orientation."[25]"Race, caste, sex, and place of birth are aspects over which a person has no control, ergo they are immutable."[26] Since

23 *Navtej* (n 8) [378], [438.1], [638.1], [147].
24 See John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 OJLS 167.
25 Per Indu Malhotra J., *Navtej* (n 8) [640.2.4].
26 Per Indu Malhotra J., *Navtej* (n 8) [638.3].

sexual orientation is immutable, it deserves to be protected. Therefore, despite an arguably 'closed' list of groups, the Indian and Botswanan courts acknowledged the interpretive potential of their constitutions.

In the Kenyan court, the arguments of the petitioners extended across these aspects of historic and social discrimination, fundamental choice and immutability. Sexual orientation must be treated as a protected ground. The special nature of the Kenyan anti-discrimination provision which is explicitly 'inclusive' easily facilitated this argument.[27] However, the court did not accept the claims persuading it to read 'sexual orientation' as a protected ground under the Constitution. Instead, it relied on the Constitution itself to reject them.

Peculiarly, Article 45(2) of the Kenyan Constitution recognises the right of adults to marry persons of the opposite sex. The court said: "decriminalizing same-sex on grounds that it is consensual and is done in private between adults, would contradict the express provisions of Article 45 (2)." The reliance on comparative judgments was rejected by sole reference to this provision, noting other constitutions did not have an equivalent provision.

But this reasoning is flawed. Even if the court's argument that the constitution only recognises marriage between the members of the opposite sex was correct, the court was concerned not with recognition of same-sex marriages, but decriminalisation of homosexuality. These issues are distinct. Further, the court said that "if allowed, it will lead to same-sex persons living together as couples.

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27 *Gitari* (n 14) [131]. "Counsel argued that the Respondent having acknowledged that the Constitution protects everyone from discrimination based on among others sexual orientation, they cannot turn around and argue that Article 27 of the Constitution is exhaustive on prohibited grounds of discrimination. Further, that Article 27(4) uses the word "including" which is defined in Article 259(4) to mean, "Includes, but is not limited to."

Such relationships, whether in private or not, formal or not would violate the tenor and spirit of the Constitution." According to the court, in a case where the validity of the same-sex marriage was not in question, same-sex relationships in themselves would violate the spirit of the constitution. But this is a non-sequitur. Merely because the constitution recognises 'X, it does not follow that it prohibits 'Y.' In this context, non-recognition of the right of marriage of homosexual persons has no impact on their right to engage in consensual sex. Non-recognition also does not imply prohibition. By conflating decriminalisation and recognition, the court erred in rejecting the arguments of the petitioners.

III. FORM OR EFFECT?

The second problem faced by the petitioners was grounded in the distinction between discrimination based on the form of the effect of the law. The former is generally referred to as direct discrimination. An employer who advertises a job and adds 'women need not apply' discriminates against women by disallowing them to apply. Under indirect discrimination, on the other hand, we look at the discriminatory impact of a facially neutral law. A law that refuses to hire persons wearing a headscarf might be indirectly discriminating against Muslim women.

The penal provisions presented this issue: they did not specifically refer to gay persons. It did not address them in plain text. This is to say that by their nature, they were facially neutral provisions criminalising, broadly, 'carnal intercourse against the order of nature,' irrespective of the sexual orientation of the persons engaging in it. Both Kenyan and Indian laws used words like 'any person' and 'whoever' and avoid referring to gay persons.[28]

[28] While S. 165 of the Kenyan constitution prohibited indecent practices between males, I will not discuss it in this analysis.

On this strength of this, the state argued that there is no direct discrimination while supporting the constitutional validity of the penal provisions.[29] In the Kenyan case, the respondent argued that they "only apply to homosexuals but also heterosexuals hence they are not discriminatory."[30] Similar arguments were made in others that all kinds of oral and anal sex, among homosexual and heterosexual couples, are penalised.[31]

This argument was vigorously resisted by the courts of India and Botswana. They readily embraced the indirect discrimination route.[32] They said that facially neutral legislation, having a disparate impact over some groups or persons are bad for that reason. They recognised that what matters in discrimination cases often, is the effect of the law on the victim. The argument that for a gay person, "the provisions are discriminatory in effect, by denying him sexual expression and gratification, in the only way available to him, even if that way is denied to all" was accepted.[33] The petitioners in Botswana were also strengthened by a unique constitutional provision, which

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29 Unlike the other two cases where the state supported the law, in *Navtej*, the state counsel seems to have left the matter to the court. This is noted in para 9, Chandrachud J, *Navtej* (n 8).

30 *Gitari* (n 14) [178].

31 *LMv. Attorney General* (n 5) [131]. "137. It is the respondent's position that Sections 164 (a) and (c) are not discriminatory as they are of equal application to all sexual preferences, and that Section 15 of the Constitution provides limitations on the enjoyment of fundamental rights."
"The intervenors argue that (i) Section 377 criminalizes acts and not people; (ii) It is not discriminatory because the prohibition on anal and oral sex applies equally to both heterosexual and homosexual couples", para 33, *Navtej*. Further, *Suresh Kumar Koushal* 2014 (1) SCC 1 as per *Navtej*: "Section 377 does not criminalise particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct, regardless of gender identity and orientation."

32 *Navtej* (n 8) [428], [440], [445], [453], [643.6].

33 *LM v. Attorney General* (n 5) [156].

expressly brought in indirect discrimination within its ambit.[34] It is the effect that matters, not the form.

The Kenyan court, on the other hand, readily accepted the facial neutrality defence of the state. It said that every differentiation does not amount to discrimination, in the very little discussion it had.[35] According to the court, the usage of 'any person in the legislation is sufficient to make it clear that the legislation does not target gays. The court said that only certain acts are prohibited, whether done by heterosexual persons or homosexual persons.[36] Further, "a natural and literal construction" of the words 'any person "leaves us with no doubt that the section does not target any particular group of persons."[37]

Two responses can be made. First, the argument that the law applies to all persons misses the point altogether.[38] What is the complaint of same-sex persons? Precisely that the law picks them out and holds their sexual acts to be criminal. Of course, the law applies to heterosexual couples as well, to the extent to which they engage in 'prohibited' sexual acts. The court completely disregarded the fact that its constitution had indirect discrimination written into its text. Therefore, the court was required to look at the impact of the impugned law on the aggrieved persons. For gay persons, it is the case that all sexual acts are prohibited, while heterosexuals still have many sexual acts open to them. So, it deprives gay persons of sex altogether while only limiting it somewhat for heterosexuals. The law

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34 Section 15(1) says that "…no law shall make any provision that is discriminatory either of itself or in its effect."

35 *Gitari* (n 14) [293].

36 *Gitari* (n 14) [296], [297].

37 *Gitari* (n 14) [296].

38 Since I argued in (1) that sexual orientation is protected, I am going to stipulate that here.

impacts them unequally than others and is discriminatory.[39] By refusing to acknowledge this, the court simply erased the constitutional recognition of indirect discrimination, at least as far as this case was concerned.

It might be true that the law does not expressly mention gay persons and the court relies strongly upon this absence.[40] But from this, it does not follow that it does not choose to apply to them. The state argues that the law criminalises several acts, whether or not done by gay persons. It is only incidental that it has an impact on gay persons – but this seems inadequate and is nothing beyond a wordplay. To say that law targets a group, one cannot insist that the law must target *only* that one group. A fascist regime might target communists, Jews and many others. But we do not hesitate to say that the regime targets certain groups or persons, *merely because* it targets other acts or persons as well. We will all agree that the law targets *all* gay persons, and that is sufficient.

Secondly, if the court used the idea of targeting to mean legislative intent, i.e. to say that it is not the intention of the lawmaker to discriminate against gay persons, that is insufficient. Should we pay more attention to intent? Should we examine what the subjective intention of the legislator who drafted the penal law is? This intention is not often possible to determine. If an employer requires all employees to work and makes no provision for maternity leave badly impacting women employees, we do not let the discriminator pass even if he says in good faith that he did not intend that result and this

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39 There are two streams of thought on conceptualising indirect discrimination. When some argue for the need to identify a separate category of indirect discrimination, some others argue that this distinction has no real significance. Eidelson, for instance has argued that all concerns of indirect discrimination are either direct discrimination or of redistribution. Benjamin Eidelson, *Discrimination and Disrespect* (OUP, 2015) 39-59.

40 *Gitari* (n 14) [296].

was an oversight. The intention seems to matter very less for questions of discrimination. As held elsewhere, "the purity of the discriminator's subjective motive, intention or reason for discriminating cannot save the criterion applied from the objective taint of discrimination..."[41] Therefore, placing an undue weightage on the intention of the lawmaker might be a mistake.

IV. CONCLUSION

The *Gitari* case presented a momentous opportunity for the Kenyan court to correctly determine the scope of the constitutional prohibition on discrimination. The court had the benefits of a constitution which both recognised 'inclusive' grounds of protection and indirect discrimination. An earlier judgment by the Court of Appeal which expressly held that sexual orientation stands covered under the constitutional guarantee of non-discrimination were also invoked by the petitioners.[42] I have argued that by holding that sexual orientation discrimination is not constitutionally prohibited, the Kenyan court made a mistake. One can only hope that the court will correct itself like our Supreme Court remedied the error of *Koushal*.

41 *Lord Bridge of Harwich, James v Eastleigh Borough Council* [1990] 2 AC 751.

42 Gitari v. Non-Governmental Organisations Co-ordination Board, Petition No. 440 of 2013 <Available at: https://globalfreedomofexpression.columbia.edu/cases/gitari-v-non-governmental-organisations-co-ordination-board/> accessed 12 October 2020.

GOVERNMENT COPYRIGHT IN SCHOOL TEXTBOOKS AND THE FUNDAMENTAL RIGHT TO EDUCATION

Anupriya Dhonchak and Rahul Bajaj[*]

Abstract

Foregrounded against the exacerbation of the problem of differential education access by the COVID-19 pandemic, this paper explores the question of the government's copyright ownership in State Board textbooks, and its consequences for access to information and education. Firstly, the existing basis for vesting copyright ownership for school textbooks in the government is examined. This is followed by highlighting the extent, possibilities, and limitations of user rights under the Indian Copyright Act, particularly for the purposes of making learning materials more accessible in the context of the pandemic. Based on this, the manner in which the copyright regulations of certain state governments, which restrict the content of school textbooks, hinder, rather than ease access to education, is emphasised. Particular attention is devoted to the restrictive licensing conditions in these policies, due to which effective access to and use of government-owned copyrighted material is impeded. The attention then shifts to providing a rights-based framework for a solution to the highlighted challenges. This is accomplished through analysing Indian case law defining the parameters of the Right to Education, which serves as the foundation for the argument that the state must adhere to its ongoing commitments under the RtE. Thus, it is

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concluded that textbooks for which the government owns the copyright should be made available under Creative Commons Licenses that permit commercial and non-commercial re-use while preserving the integrity of the work, ultimately achieving the goal of broader public dissemination in order to ensure the practical and meaningful implementation of the RTE.

I. Introduction

The pandemic has compelled us to undertake many activities online and education has been no exception. There is no gainsaying the fact that education has the potential to be a significant means to counteract inequalities. And yet, the manner in which online education has been delivered in recent times has brought into stark relief, and further exacerbated, the digital divide and widening socio-economic inequalities in the country. Only around a quarter of Indian families have access to the internet, according to estimates.[1] This percentage reduces to 15% in rural homes. As usual marginalised, rural, and destitute communities have been hit the hardest. There have even been multiple reported cases of suicides by students in the country on account of lack of access to education during the ongoing pandemic.[2]

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1 Sam Pitroda, 'Digital India Is Not Prepared for Digital Education' *The Indian Express* (3 September 2020) <https://indianexpress.com/article/opinion/columns/digital-education-online-classes-learning-coronavirus-national-education-policy-6580744/> accessed 2 January 2022.

2 Abdul Latheef Naha, 'Kerala Class X Girl Ends Life Allegedly over Lack of Access to Online Classes' *The Hindu* (Malappuram, 2 June 2020) <https://www.thehindu.com/news/national/kerala/kerala-class-x-girl-ends-life-allegedly-over-lack-of-access-to-online-classes/article31728470.ece> accessed 2 January 2022; Sukrita Baruah, 'LSR Student Suicide: No Laptop to Hostel Stay, Key Concerns Were Flagged to College Admin by Students' *The Indian Express* (10 November 2020) <https://indianexpress.com/article/cities/delhi/lsr-student-suicide-no-laptop-to-hostel-stay-key-concerns-were-flagged-to-college-admin-by-students-7034481/> accessed 2 January 2022.

There should therefore, be a renewed and urgent emphasis on the need to make education, online or offline, more inclusive. Equitable access to learning material and textbooks for education constitutes a basic requirement for the realisation of this goal. However, access to textbooks in India has been riddled with distribution problems at the best of times, and the pandemic has only increased the impact of differential access. Against this backdrop, this paper explores the issue of the government's copyright ownership in State Board textbooks, and its implications on access to knowledge and education.

To this end, in **Part II** of our analysis, we outline the rationale behind vesting copyright ownership with the government for school textbooks. In **Part III**, we highlight the scope, potential and limits of user rights under the Indian Copyright Act, particularly for the purposes of making learning materials available in the context of the pandemic. Based on this, in **Part IV**, we underscore the fashion in which the copyright policies of some state governments, which cover the content of school textbooks, impede, as opposed to facilitating, access to education. In particular, we analyse how restrictive licensing conditions in these policies, which gatekeep government owned copyrighted material, serve as fetters to ensuring meaningful access to these materials. After having clearly identified the problems at hand, our focus will switch to offering a blueprint for a solution to these problems that is grounded in a rights-based framework. In this regard, in **part V**, we will analyse Indian case law that outlines the contours of the Right to Education ["RtE"]. This analysis will lay the groundwork for a discussion on the fashion in which, as the owner of copyright over educational materials, the state must comply with its obligations under the RtE. Thus, we will argue that textbooks in which copyright is owned by the government

should be made available via Creative Commons (CC) Licenses that allow for commercial and non-commercial re-use while ensuring the integrity of the work, and ultimately fulfilling the goal of wider public dissemination of educational material. We will finally conclude that this approach ensures the practical operationalization of the RtE in a manner that holds the government accountable for complying with the obligations that the right entails.

II. GOVERNMENT'S ROLE AS PUBLISHER AND COPYRIGHT OWNER

India has played a pivotal role in making knowledge available to the public by emphasising the need for broad exceptions for educational access within its copyright law and negotiating for the framing and interpretation of international treaties in a manner that is aligned with the needs of developing countries.[3] The Government's involvement in publishing is historically rooted in increasing accessibility of knowledge for the public,[4] and to some extent, in efforts towards national integration or nation building.[5]

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3 Prashant Reddy T and Sumathi Chandrasekaran, 'New Delhi Challenges the Berne Convention', *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* (OUP 2016); Vishal Rakhecha, 'Works of the Indian Government' *The Internet Archive* (2020) http://archive.org/details/works.of.indian.government accessed 2 January 2022.

4 TS Krishnamurthi 'Promoting book production: Role of the Government of India' (1972) 19(1) Annals of Library and Information Studies 5; Public Accounts Committee, 'National Book Trust: Ministry of Human Resource Development (*Department of Education*)' <http://10.246.16.188:80/handle/123456789/4841> accessed 2 January 2022; National Council of Educational Research and Training, 'Review of Education in India (1947-61): First Year Book of Education' <http://14.139.60.153/handle/123456789/4602> accessed 2 January 2022; Estimates Committee, 'Twelfth Report on All India Radio (1954-55) Pertaining to Ministry of Information and Broadcasting' <http://10.246.16.188:80/handle/123456789/56670> accessed 2 January 2022; Coonoor Kripalani, Building Nationhood through Broadcast Media in Postcolonial India (2017) 22(1) Contemporary Postcolonial Asia 40.

5 Committee, 'Twelfth Report on All India Radio (1954-55) Pertaining to Ministry of Information and Broadcasting' (n 4); Kriplani (n 4).

The National Council of Educational Research and Training (NCERT) was established by the government in 1961. By the late 1960s, all of India's states had established their own (state) textbook boards. The NCERT created model textbooks for schools and for publication and adoption by these state textbook boards. This ushered in a new trend in the country's publishing business, which had previously been dominated by private publishers.

The government's role as a publisher can allow it to set affordable prices and distribute widely. This objective to increase accessibility of education has now been constitutionalised as the Right to Education (RtE), recognised by the Supreme Court[6] and codified by a constitutional amendment.[7]

The publication of textbooks by state governments via state boards[8], and by the Central Government via the NCERT[9] are a part of this endeavour. As pointed out by R.R. Diwakar to Bhopinder Singh Man during the Constituent Assembly Debates, these initiatives were motivated by social interest goals, and hence, they were reliant on government support[10], and designed to only recoup costs for printing and distribution, for their sustenance.[11]

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6 *Miss Mohini Jain v State of Karnataka and Ors*, 1992 AIR 1858.

7 The Constitution of India, 86th Amendment, 2002.

8 National Council of Educational Research and Training, 'Survey of School Textbooks in India 1969-70' (1970) <http://14.139.60.153/handle/123456789/4408> accessed 2 January 2022.

9 National Council of Educational Research and Training (n 4), Objects of the Council, xxxv.

10 Constituent Assembly of India Debates (Legislative), Question and Answers – Part I, Answer by R.R. Diwakar to Bhopinder Singh Man on Publications Division (15 December 1949) <http://10.246.16.188:80/handle/123456789/761566> accessed 2 January 2022.

11 Sahitya Akademi, 'Publication Policy' (Sahitya Akademi Website) <http://www.sahitya-akademi.gov.in/policies/publication_pricing_policy.jsp> accessed 2 January 2022.

Rewarding knowledge production and creative effort through maximising commercial advantage via exclusive rights, is an incentive that does not apply to government works whose primary motivation for creation is public dissemination.[12] In the case of government copyright in school textbooks, the incentivising of production via exclusive rights is not so important given that the government would have published these books even if there were no copyright protection. However, it may be argued that the government boards may need revenue to sustain the activity of knowledge production itself, even though many states have begun policies to make textbooks available for free.[13] Further, the cost of production of a specific work can be easily determined. However, the benefits that accrue via public dissemination of that work are harder to ascertain since they are intangible in nature.[14] Public dissemination of

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12 Anne Fitzgerald, 'Crown Copyright' in B Atkinson and B Fitzgerald (eds.), *Copyright Future Copyright Freedom: Marking the 40th Anniversary of the Commencement of Australia's Copyright Act 1968* (Sydney University Press 2011); Pranesh Prakash, 'Copyrights and Copywrongs Why the Government Should Embrace the Public Domain' *The Centre for Internet and Society* (21 August 2013) <https://cis-india.org/a2k/blogs/yojana-august-2013-pranesh-prakash-copyrights-and-copywrongs-why-the-govt-should-embrace-the-public-domain> accessed 2 January 2022.

13 Manmath Nayak, 'Free Textbooks Will Be Provided to Students From Class 6 to 12, Says Education Minister' *India.com News* (26 February 2021) <https://www.india.com/education/free-textbooks-will-be-provided-to-students-from-class-6-to-12-says-education-minister-4454356/> accessed 2 January 2022; Hepzi Anthony, 'State to Provide Textbooks to Private Aided, Government School Students' *The Hindu* (16 March 2017) <https://www.thehindu.com/news/cities/mumbai/state-to-provide-textbooks-to-private-aided-government-school-students/article17468775.ece> accessed 2 January 2022; 'Process of Free Textbook Distribution among Assam Students Begins' *The Shillong Times* (2 June 2021) <https://theshillongtimes.com/2021/06/02/process-of-free-textbook-distribution-among-assam-students-begins/> accessed 2 January 2022.

14 National Research Council, Public Sector Information, 'The Socioeconomic Effects of Public Sector Information on Digital Networks: Toward a Better Understanding of Different Access and Reuse Policies' (*The National Academies Press*, 2009) <https://www.nap.edu/catalog/12687/the-socioeconomic-

textbooks is no longer a charitable benefit but a prerequisite to the realisation of a fundamental right, the RtE, as we shall indicate in **Part V** of this paper. Further, as we shall subsequently show, the existing jurisprudence on the RtE makes it clear that the government cannot cite financial constraints as an excuse for its failure to secure its enjoyment.[15] Therefore, the need to ensure widespread dissemination of government-owned textbooks has to take precedence over extracting financial returns from such textbooks.

As Vishal Rakhecha notes, even commercial re-use of these textbooks (with the adequate pricing regulations and suitable CC licenses to ensure affordability for students and encourage creativity for creators respectively) would promote the increased interaction between the public and the educational material.[16] Printed copies, adaptations or publications that add to existing material would only widen the dissemination of these works. If local publishers are not charged hefty royalties or licensing fees, they can make these books available at cheaper prices and reduce their distribution costs. Further, scanning and uploading books on repositories like the Internet Archive which permits optical character recognition, allows for better discoverability via search engines as well as greater access for the visually impaired.[17]

Access to textbooks in India has not improved adequately despite increasing access to the internet and smartphones. As per the Annual State of Education Report (ASER) survey findings in September 2020 (covering 52,227 rural households with school age

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effects-of-public-sector-information-on-digital-networks> accessed 2 January 2022.

15 *Avinash Mehrotra v Union of India* (2009) 6 SCC 398 [29]; Also see *State of Bihar and Ors. v The Bihar Secondary Teachers Struggle Committee, Munger & Ors.* (2019) 18 SCC 301 [78].

16 Rakhecha (n 3).

17 Prakash (n 12).

children in 30 States and Union Territories), around 20% of rural children across the country have no textbooks at home.Smartphone ownership levels among rural households with school going children have doubled to 62% in 2020 from 36% in 2018.[18]However, one-third of children with smartphones and two-thirds of children nationwide did not have access to any learning materials.[19]Interestingly, WhatsApp was the most commonly used mode of sending learning materials to students, with 75% of students who received some input, getting it via the app.[20] This reveals the importance of having easily downloadable textbooks and interactive material on the internet as well as copyright policies that do not impede their being transmitted to students electronically. Further, the lack of meaningful access to educational materials cannot be squared with the state's obligations under the RtE. It therefore becomes imperative to use the RtE as the prompt to help reverse this state of affairs, as we shall discuss in **Part V**.

The launch of the Digital Infrastructure for School Education (DIKSHA), the Ministry of Human Resource Development's (MHRD) ambitious digital learning portal, in Tamil Nadu was upgraded via embedding QR codes in textbooks for Grades 1, 6, and 9 (later expanded to cover all grades, and also replicated across other States). Each QR code was linked to a content module hosted on the DIKSHA platform, which contains a video, animation or a quiz to allow students to grasp particular concepts. These QR code enabled textbooks were reported to have helped students in each of the

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18 'Nearly 20% of Rural School Children Had No Textbooks Due to COVID-19 Impact, Finds ASER Survey' *The Hindu* (New Delhi, 28 October 2020) <https://www.thehindu.com/news/national/coronavirus-20-of-rural-school-children-had-no-textbooks-due-to-covid-19-impact-finds-aser-survey/article32966299.ece> accessed 2 January 2022.

19 ibid.

20 ibid.

45,000+ government schools in Tamil Nadu[21] to access digital content as long as they had access to basic internet and a smartphone.[22] This demonstrates that digitising access to textbooks can enhance accessibility. As a result, this was rapidly scaled up across the country, and the MHRD, in a letter in 2020 to the NCERT, asked it to prepare QR code enabled textbooks.[23] E-contents in sign language as well as audio lessons for children with disabilities have also been uploaded on multiple DIKSHA portals.[24] However, the DIKSHA scheme is still at a formative stage in many states. In Assam, for instance, only 37 textbooks have received QR codes so far. Currently, activities are ongoing for modifying 152 textbooks in 2021 in 5 select languages: Assamese, English, Bodo, Bengali and Hindi.[25]

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21 Aparna Ramanujam, 'DIKSHA: The Long-Awaited Antidote to India's Education Crisis?' *The Bastion* (16 December 2019) <https://thebastion.co.in/politics-and/diksha-the-long-awaited-antidote-to-indias-education-crisis/> accessed 2 January 2022.

22 ibid. However, it is also important to note that only 17.9% of the total government schools in Tamil Nadu have an internet facility as per the Unified District Information System for Education (UDISE+) Report for 2019-20. See A. Raghu Raman, 'Less than 20% of Tamil Nadu Govt Schools Have Internet' *The Times of India* (10 July 2021) <https://timesofindia.indiatimes.com/city/chennai/only-20-of-tn-govt-schools-have-internet/articleshow/84278093.cms>.

23 Kritika Sharma, 'NCERT textbooks to turn smarter with QR codes, syllabus set to be revised' *The Print* (27 June, 2020) <https://theprint.in/india/education/ncert-textbooks-to-turn-smarter-with-qr-codes-syllabus-set-to-be-revised/449230/> accessed 2 January 2022.

24 'E-content for children with special needs must be diverse and flexible' *Times of India* (23 June, 2021) <https://timesofindia.indiatimes.com/home/education/news/e-content-for-children-with-special-needs-must-be-diverse-and-flexible/articleshow/83771537.cms?> accessed 2 January 2022.

25 'DIKSHA and Energized Textbooks for Elementary Secondary and Higher Secondary Level' Government of Assam, Elementary Education, *SCERT*<https://scert.assam.gov.in/frontimpotentdata/diksha-and-energized-textbook> accessed 2 January 2022.

Other government initiatives to mitigate device availability and connectivity issues include sharing of videos of classes by instructors over WhatsApp or YouTube so that students can access these at their convenience. After the announcement of the lockdown period in India, commencing March 23, 2020, SWAYAM (Study Webs of Active learning for Young Ambitious Minds), an online learning platform run by the MHRD, has attracted at least 50,000 new subscribers.[26] SWAYAM Prabha DTH channels allow pre-recorded sessions to be aired on television and radio (via All India Radio). SWAYAM's growth can be attributed to the provision of free access to top learning resources.[27] Previously, SWAYAM classes were time-limited and required advance enrolment. Students, parents, and instructors can now utilise these platforms for free to make the most of the lockdown period. Every day, more than 50,000 individuals watch the videos on SWAYAM Prabha DTH TV channels.[28] Similarly, the National Digital Library is now being used by almost 43,000 people each day, which is more than double the usual number of users that accessed it.[29]

However, hosting learning materials over online platforms whose videos are available for free may lead to copyright concerns. Such concerns can arise if the material being taught is from a State Board textbook, the licensing of and copyright in which is aggressively protected. Hence, in the following section we examine the scope and limitations of user rights for education under Indian Copyright law.

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26 'Lockdown Impact: Government's e-learning platforms witness surge in subscribers' *ET Government* (29 March 2020) <https://government.economictimes.indiatimes.com/news/education/lockdown-impact-governments-e-learning-platforms-witness-surge-in-subscribers/74870839> accessed 2 January 2022.

27 ibid.

28 ibid.

29 ibid.

III. USER RIGHTS FOR EDUCATION UNDER INDIAN COPYRIGHT LAW

Section 52(1)(i) allows the reproduction of any work by a teacher or pupil in the course of instruction. J. Endlaw on the Single Bench of the Delhi High Court held in the *DU photocopy* case that rights under S.52 of the Copyright Act are meant to facilitate public access to information.[30] Therefore, they are to be interpreted expansively, instead of narrowly as exceptions toinfringement (S.51).[31]The Division Bench in the case affirmed J. Endlaw's position that S.52(1)(a) which was a general provision would not widen or restrict the scope of S.52(1)(h), S.52(1)(i) and S.52(1)(j) which constitute special provisions covering the field of education/instruction. Without determining whether 'in the course of instruction' was a phrasal verb or noun, the Court held that it should be widely interpreted as the entire process or programme of education as in a semester.[32] It also held that this would include the pre-reading of materials distributed prior to class to enable an interactive learning environment via group discussions etc.[33]

Pertinently, the Court negated the plaintiff's contention that 'course of instruction' was confined to the time and place of instruction, and held that it would include anything that could be justified for the purpose of instruction. This, it held, would include steps commencing at a time prior to lecturing and continuing till after it. It also noted that apart from S.52(1)(a), which provides for the right to a "fair dealing" of any copyrightable work, other

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30 *The Chancellor, Masters & Scholars of the University of Oxford & Ors v Rameshwari Photocopy Services* ("DU Photocopycase") 2016 (68) PTC 386 (Del) [15] (Single Judge Bench). The Single Bench's position in this regard was affirmed by the Division Bench's decision as well.

31 DU Photocopycase (Single Judge Bench) [41].

32 DU Photocopycase 2016 (235) DLT 409 (Division Bench decision) [36].

33 ibid.

rights/purposes enumerated under S.52 would not have to meet the express requirement of fair dealing. Thus, S.52(1)(h) and S.52(1)(i) were recognised as affirmative purposes exempt from infringement. The fairness of use under these Sections can be deemed to be presumed by the legislature as long as it is justified by the purpose specified. Further, there are no quantitative restrictions on the extent of the reproduction.[34]

Importantly, Supreme Court precedents were relied upon by the Division Bench to highlight that statutes must be interpreted as per societal realities.[35] Explanation (d) to S.32 of the Act defines the phrase 'purposes of teaching, research and scholarship' as '(i) purposes of instructional activity at all levels in educational institutions, including Schools, Colleges, Universities and tutorial institutions; and (ii) purposes of all other types of organized educational activity'. Thus, both the Single Judge Bench and the Division Bench held that, notwithstanding the difference in the wordings of Section 52(1) clauses (j) and (i), wherein clause (j) used the term 'educational institution', and clause (i) only used the terms 'teacher' and 'pupil', S.52(1)(i) would apply beyond individualised teacher-pupil interactions to encompass all organized educational activity by teachers, students or institutions.

Given the realities of the pandemic and the shift to organized online teaching, the geography and medium of instruction has changed. However, that does not curtail the expansive nature of permitted uses under S.52(1)(a), S.52(1)(h) and S.52(1)(i). Notably, the Single Bench decision mentioned that most students today scan pages from books that they are required to read, and read them on

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34 ibid [51].

35 ibid [11] relying on *S.P. Gupta v President of India* 1981 Supp SCC 87; *State of Maharashtra v Dr. Praful B. Desai* (2003) 4 SCC 601.

their electronic devices. The Court held that such uses are exempt from infringement.[36]

Section 52(1)(i)'s broad interpretation can potentially allow school libraries to distribute digitised versions of course packs, as well as other library collections to their students.[37]

The mandate for enabling access to, and distributing school textbooks as part of the state's obligations under the Right to Education would particularly be useful here to counter any claims of infringement and allow for easier access via freely available online downloads. Specifically, in light of the state's affirmative obligation to promote educational access that we shall flesh out in **Part V**, it stands to reason that any arguments by the state to curtail the free download of educational content that it owns copyright over are unlikely to find purchase in a court.

Digitisation and distribution/sharing/lending of reading materials by libraries can also arguably constitute 'private or personal use, for research' under S.52(1)(a)(i). The Canadian Supreme Court in *Alberta (Education) v. Canadian Copyright Licensing Agency*[38], held that the notion of 'private study' should not be construed in a way that requires users to "*view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude. By focusing on the geography of classroom instruction rather than on the concept of studying, the Board again artificially separated the teachers' instruction from the students' studying.*" This finding supports the argument that multiple users with copies (offline or online) of the copyrighted textbooks in question working together would still be said to engage in private study. This is because of the personal nature

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36 DU Photocopy case (Single Judge Bench) [78].

37 Divij Joshi, 'The Legality of Digital Libraries in a Lockdown', *SpicyIP* (29 April, 2020) <https://spicyip.com/2020/04/the-legality-of-digital-libraries-in-a-lockdown.html> accessed 2 January 2022.

38 (2012) 2 SCR 345 [27].

of the endeavour of studying and research. Further, in the case of *CCH Canadian v. Law Society of Upper Canada*, the Canadian Supreme Court had noted that the amount of material copied has to be assessed in light of the purpose of use.[39] It held that for purposes such as research and private study, copies of entire academic works may be required to be made.[40]

Alternatives available, the nature of the dealing (commercial or non-commercial) and adverse impact on the market for the materials are some contextual factors that determine fair dealing.

The Division Bench in the *DU Photocopy* case observed that citizens with improved literacy, education and earning potential in the long run expand the market for copyrighted materials.[41] In light of this insight, and the lack of alternatives to access physical educational materials during a pandemic or because of distribution failures in ordinary circumstances, the fair dealing analysis should conclude in favour of permitting distribution of reading and learning materials online for educational purposes.

Currently, the Copyright Act is woefully inadequate in addressing concerns relating to the creation of digital libraries, even in emergency situations such as the pandemic. The 2012 Copyright Amendment Act added Section 52(1)(n), which allows a "non-commercial public library" to store a digital copy of works that it already owns a physical copy of for the purpose of preservation. While this enables the storing of a digital copy, it leaves open the question of whether or not that copy can be distributed or communicated.[42] Aside from issues of digital access,[43] making

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39 2004 SCC 13 [56].

40 ibid.

41 DU Photocopy case (Division Bench decision) [36].

42 Namratha Murugeshan 'CovEducation, Copyright and Fair Use in India' *SpicyIP* (17 April, 2020) <https://spicyip.com/2020/04/coveducation-and-copyright.html> accessed 2 January 2022.

academic resources available to students via the internet, at least in the same way that physical resources should have been available before the pandemic (library borrowing, copying, etc.) is crucial. For example, in an emergency, user rights could be strengthened to allow schools and universities to convert their library catalogues to digital repositories and share online course packs without awaiting permission and licenses from copyright owners. Digitising access can greatly benefit the visually impaired, as they can gain access to digital titles accessible with screen readers and participate more effectively in our knowledge economy.[44]

Uploading recorded videos of classes on platforms such as YouTube for asynchronous access to mitigate the impact of inequalities in access to the internet can also pose a host of issues under the Copyright Act. As per S.3 of the Copyright Act, 'publication' refers to making a work publicly available via copies or communication of the work to the public. Uploading recorded lectures on YouTube and other platforms for public access would fall under the definition of publication, and thereby be subject to S.52(1)(h) which constrains the use of copyrighted works in such publications to two short passages from the work. This is in stark contrast with S.52(1)(i) which does not limit the quantity of the material that can be reproduced.

Sharing materials primarily through WhatsApp and YouTube also entails a high level of dependence on private entities for the provision of an essential service, i.e. education. This makes education subject to the platform's policies, which may not be desirable even if

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43 'Learning Rebooted: Online Education During Covid-19 Lockdown Puts Spotlight on India's Digital Divide' *News18* (03 April, 2020) <https://www.news18.com/news/india/learning-rebooted-online-education-during-covid-19-lockdown-puts-spotlight-on-indias-digital-divide-2563265.html> accessed 2 January 2022.

44 Murugeshan (n 43).

it has emerged as the most convenient option. Even though platforms like YouTube provide Fair Use Protection,[45] anyone can file copyright take down notices. Taking permission from a copyright owner can be especially onerous and time consuming. Further, in March 2020, YouTube notified its regular creators that on account of greater reliance on automated systems instead of human reviewers for determining whether uploaded materials are infringing or not, "users and creators may see increased video removals, includingsome videos that may not violate policies."[46]Online interactions, communication and educational activity, regardless of whether they are commercial or not, can more often than not implicate interactions across physical distances that repurpose and reconstitute the raw materials of others' expressions. Digital environments, therefore present constantly evolving opportunities for educators and students. However, these robustly networked systems also have the capacity to monitor and restrict communication. In this regard, Bob Tarantino and Carys Craig note, "this is particularly pernicious when ostensibly infringing communications are prevented from occurring in the first place, such as when algorithmic filters cut off digital streams thereby denying them any audience at all."[47]

Lastly, even the commercial re-use of textbook materials in interesting online formats should be free and encouraged, because the use of audio-visual content in documentaries, podcasts, videos, movies etc. by independent creators can permit the publication of

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45 'Rules and policies – Copyright' (*YouTube*) <https://www.youtube.com/about/copyright/fair-use/#yt-copyright-protection> accessed 2 January 2022.

46 YouTube 'Protecting our extended workforce and the community' *YouTube Creator Blog* (16 March, 2020) <https://blog.youtube/news-and-events/protecting-our-extended-workforce-and/> accessed 2 January 2022.

47 Carys J. Craig and Bob Tarantino "A Hundred Stories in Ten Days": COVID-19 Lessons for Culture, Learning and Copyright Law' (2020) Joint PIJIP/TLS Research Paper Series 62.

more creative educational works. This can take place even without significant financial capital, thereby increasing overall creativity, accessibility and welfare. This would be particularly helpful because many of the government's online learning initiatives have been met with a dismal response.[48]

The aforementioned analysis makes it clear that the user rights on education contained in Indian copyright law, when purposively interpreted, have significant potential to facilitate access to educational materials in new contexts. Equally, however, they are inadequate to meet the full range of challenges occasioned by the shift to digital learning that is currently underway. It is here that the RtE assumes significance. Specifically, when considered through the lens of the RtE, the richly articulated constitutional obligation of the State would make it imperative to ensure that copyright law does not operate as an impediment, particularly to the State's obligation to fulfil (by taking affirmative measures towards the realisation of the RtE) and respect (by ensuring that its own restrictive copyright policies around State Board textbooks do not hinder the enjoyment of the RtE). More on this is discussed in **Part V** below.

IV. COPYRIGHT POLICIES THAT IMPEDE ACCESS

The States/Union Territories of Andaman and Nicobar Islands, Arunachal Pradesh, Chandigarh, Jharkhand, Delhi, Goa, Haryana, Himachal Pradesh, Bihar, Jammu and Kashmir, Sikkim and Uttarakhand have adopted NCERT textbooks and syllabus.[49]

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48 See, for example, 'Odisha government's online learning initiative receives dismal response' *The New Indian Express* (25 June 2021) <https://www.newindianexpress.com/states/odisha/2021/jun/25/odisha-governments-online-learning-initiative-receives-dismal-response-2321230.html> accessed 2 January 2022.

49 '12 states/UTs adopt NCERT textbooks, syllabus' *The Economic Times* (08 September, 2008) <https://economictimes.indiatimes.com/12-states/uts-adopt-ncert-textbooks-syllabus/articleshow/3460071.cms> accessed 2 January 2022.

NCERT has persistently faced criticism for being unable to fully satisfy the demand for its textbooks.[50] There have also frequently been questions raised in Parliament regarding the 'piracy' of NCERT textbooks.[51] In one of the replies to such questions, Shri M.A.A. Fatmi, former Minister of State in the Ministry of Human Resource Development noted that whenever a report of piracy is received by the NCERT, it is referred to the Economic Offence Wing in Delhi for suitable action, and that copyright of NCERT books is given to States that are desirous of using these books under the State syllabus.[52]

Making NCERT books available online for free under CC licenses would significantly curtail government expenditure in printing and distribution of these books. To be sure, this reduction of expenditure would only be of a limited character, given that online books cannot serve as perfect substitutes for physical ones. This is on account of the sharp digital divide in access to the internet in the country. Crucially, there are no judgments so far pertaining to the

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50 Anantrao Gudhe and Ram Jeevan Singh, Unstarred Question No: 1371, 'Availability of NCERT Text Books' Lok Sabha Number 13, Session IV (01 August 2000) <https://eparlib.nic.in/handle/123456789/464673≥accessed 2 January 2022; Madan Lal Sharma, Unstarred Question No: 838, 'Short Supply of NCERT Books' Lok Sabha Number 14, Session XIII (04 March 2008) <https://eparlib.nic.in/handle/123456789/560375?view_type=search> accessed 2 January 2022; Sushil Kumar Singh, Supriya Sule and Ors., Unstarred Question No: 2869, 'Supply Of NCERT Books' (20 March 2017) <https://eparlib.nic.in/handle/123456789/697748?view_type=search≥accessed 2 January 2022.

51 Shivaji Mane, Question Number: 6656, 'Circulation of Pirated NCERT Books', Lok Sabha, Lok Sabha Number 13, Session III (09 May 2000) <https://eparlib.nic.in/handle/123456789/393177≥ accessed 2 January 2022; Laxminarayan Pandey, Chandramani Tripathi, Unstarred Question Number: 4517, 'Pirated Books of NCERT' (08 May 2007) Lok Sabha 14, Session X <https://eparlib.nic.in/handle/123456789/555592≥accessed 2 January 2022.

52 Laxminarayan Pandey, Chandramani Tripathi (n 52).

infringement of government copyright.[53] This is perhaps because enforcement of government copyright is not very strong. As the copyright policies of many state boards are not easily available online, we will focus here on the copyright policies of a few state boards which have been in the news for strict enforcement.

The copyright policies of some state governments restrict the very access that State Boards publishing textbooks were meant to facilitate. For instance, the copyright policy of the Maharashtra State Bureau of Textbook Production and Curriculum Research (Balbharati) prescribes licenses for limited use of its copyrighted material, while prohibiting authorized users (publishers, educational institutions, tutors etc.) from making audio/visual recordings of its content for production, distribution, sale or otherwise, unless specifically provided for in the Licensing Agreement.[54] [Section 2.1(vii), Balbharati Copyright Policy]

Further, as per the latest version of this policy, Balbharati decided to charge private publishers (new applicants), INR 17,700 for new registrations, while it is charging existing users INR 11,800 for renewal of registration, as opposed to the earlier registration fee of INR 1000. [Section 2.2(iv) and (v), Balbharati Copyright Policy]

This hike in registration fee pushed small publishers out of the market, particularly those who published regional language textbooks since Balbharati only publishes books in Marathi and English.[55] This had a detrimental impact on not just small-scale

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53 Glover Wright, Pranesh Prakash, Sunil Abraham and Nishant Shah, 'Open Government Data Study: India' *Centre for Internet and Society* (20 May 2011) <https://cis-india.org/openness/blog-old/open-government-data-study≥accessed 2 January 2022.

54 Balbharati Copyright Policy (updated 26 October 2020) <https://ebalbharati.in/copyright/pdfs/Revised_Policy_26_Oct_2020.pdf> accessed 2 January 2022.

55 Kranti Vibhute, 'Small-scale publishers to suffer as Balbharati doubles registration charges' *DNA India* (22 October 2018)

regional publishers but also students pursuing their junior college studies in other languages.[56]

Crucially, instead of taking a user rights-based approach, particularly to education, Section 3.4 of the Balbharati Policy prescribes additional responsibilities for teachers and students. This includes limiting photocopying and scanning to legitimate purposes by posting copyright notices near these machines.

Similarly, the Andhra Pradesh State Council of Educational Research and Training (APSCERT) provides prescribed textbooks on its website as e-books with a copyright notice that mentions that all APSCERT e-books for classes to I-XII can be downloaded for reference but their republication is "strictly prohibited."[57] It prohibits any person or agency from making an electronic or print copy of the books for redistribution in any form whatsoever.[58] It also urges readers to notify the State Council of any copyright infringement or commercial exploitation of the e-books.[59] The policy therefore, possibly forbids both commercial and non-commercial copyright infringing uses of the books, notwithstanding the greater access to and creation of content that such uses could facilitate. It provides that, "use of these books as part of digital content packages or digital content packages or software is also strictly prohibited."[60]Further, it notes that even hosting these online e-books on another website is

<https://www.dnaindia.com/mumbai/report-small-scale-publishers-to-suffer-as-balbharati-doubles-registration-charges-2677772> accessed 2 January 2022.

56 ibid.

57 'Online eBooks Section' Andhra Pradesh State Council of Educational Research and Training <https://apscert.gov.in/ebookapp/ebook_page.jsp> accessed 2 January 2022.

58 ibid.

59 ibid.

60 ibid.

prohibited unless links are provided after obtaining due written permission from the APSCERT.[61]

The existence of such overzealously protectionist policies has the potential to create deterrence and exert a chilling effect on the scope of citizens' user rights, creating structural hurdles to mass digitisation programmes, the systematic republication of the content in these books as well as the creation of new educational content using the material in these books. This can occur even if there has been little actual litigation in this regard.

It is important to note here that in light of the ambitiousness of the goal in making the government the owner of copyright over textbooks and the panoply of obligations under the RtE, the current proprietary models of publishing for educational materials are often overly restrictive. The specific educational exceptions in the Copyright Act are narrowly drawn and require a determination of fair dealing based on the unique circumstances of each case. The exceptions thus lend themselves to uncertainty which has the tendency of curtailing user rights, as users are unlikely to deploy these rights, in order to avoid liability. This risk aversion contributes to a clearance and permissions culture where notices and declarations to avoid doing certain acts such as photocopying, may constitute contractual waivers of some part of one's user rights.[62] This practice, as one of us has analysed before, is opposed to public policy.[63] Further, the fuzziness of the user rights can lead to negative externalities, chilling free speech and fair dealing, and ultimately constraining the scope of user rights as people increasingly waive

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61 ibid.

62 James Gibson, 'Risk aversion and rights accretion in intellectual property law' (2006) 116 Yale Law Journal 5, 882.

63 Anupriya Dhonchak, 'Can User Rights under Section 52 of the Indian Copyright Act Be Contractually Waived?' (2019) 13 NALSAR Student Law Review 6.

them. This would make their use without permission less routine and eventually less fair, until it is not considered fair dealing at all due to a doctrinal creep[64] in the understanding of user rights altogether.[65] It is because of the vicissitudes surrounding the exercise of user rights on education that there is a need to locate the promotion of uninhibited access to educational content in the state's constitutional obligations under the RtE. It is only by identifying a constitutional home for the state's obligation on this count that we can create a culture in which access to educational content owned by the state is given the importance that it deserves.

In contrast to the Balbharati Policy, the Karnataka Department of State Educational Research and Training's Karnataka Open Educational Resources initiative[66] makes its material available under the CC BY-SA 4.0 license. Though the website does not host many books, the books hosted are available in full unlike NCERT's National Repository of Open Educational Resources[67] wherein several chapters are missing from the books hosted online.[68]

The website of the Karnataka Textbook Society provides access to all books used by the Karnataka Secondary Education Board.[69] The Copyright Policy is also considerably more liberal than that of NCERT, since it allows the free reproduction of any material

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64 Sara K. Stadler, 'Incentive and Expectation in Copyright' (2007) 58 Hastings Law Journal 3.

65 See Anupriya Dhonchak, 'National Digital Library of India's (NDLI) Copyright Guide (Feedback) – Part II' *SpicyIP* (29 Sept. 2020) <https://spicyip.com/2020/09/national-digital-library-of-india-ndlis-copyright-guidepart-ii.html> accessed 2 January 2022.

66 Karnataka Open Educational Resources <https://karnatakaeducation.org.in/KOER/en/index.php/Main_Page> accessed 2 January 2022.

67 National Repository of Open Educational Resources <https://nroer.gov.in/> accessed 2 January 2022.

68 To see examples of NCERT books uploaded with missing chapters, check the Class 12 Accountancy Book here and the Class 12 Psychology Book here.

69 Karnataka Textbook Society <http://ktbs.kar.nic.in/> accessed 2 January 2022.

in any format without permission, while requiring attribution, accurate reproduction and prohibiting the usage of content in a misleading or derogatory way in case of re-use of the textbooks.

In the case of Assam, we could not find the e-books of all standards available for online download on any government website. An independent online repository, however, called Dev Library provided access to Assam Board textbooks in Assamese from Class 4 to Class 10.[70] We could not find any copyright policy in place for private publishers looking to create more educational content based on whatever material was used in the state board textbooks. The Copyright Policy on the website of the Assam State Textbook Production and Publication Corporation Ltd. provides that "material featured on this website may be reproduced free of charge after taking proper permission by sending a mail to us." Unlike the Karnataka Board and the Nagaland SCERT, in Assam, permission is required. Prior authorization from copyright holders is required by the Nagaland SCERT only when the material is explicitly identified as having been copyrighted by a third party.[71] However, the Nagaland SCERT website does not contain any textbooks or study materials.

Similarly, the material on the Assam State Board website which can be produced freely does not contain the actual textbooks or e-books. Though the government has taken the decision to make textbooks available for free, the website of the Assam State Textbook Production and Publication Corporation Ltd. only provides the list of books prescribed.[72] The Assamese Government

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[70] Dev Library website <https://devlibrary.in/assam-class-4-environment-pdf-book/> accessed 2 January 2022.

[71] Nagaland SCERT Copyright Statement <https://scert.nagaland.gov.in/copyright-statement/≥accessed 2 January 2022.

[72] Assam SCERT List of Textbooks <https://scert.assam.gov.in/portlets/list-of-textbooks> accessed 2 January 2022.

has put in place a Free Text Book (FTB) policy for the academic year 2021, which claims that it will be providing textbooks to 41,48,899 learners in Government/ Provincialised schools under the elementary cycle.[73] This was in fact initiated for the implementation of the RtE to ensure the printing and distribution of textbooks under the FTB scheme. In Madhya Pradesh too, we could not find the copyright policy of state board textbooks. However, in February 2020, there was a move to ensure that government aided and private schools affiliated to the MP Board must not use books by private publishers. This was done with the laudable objective of ensuring that schools do not force parents to buy books by private publishers, which are often considerably more expensive than NCERT books.[74] However, mandating only NCERT books from pre-primary to Class 12, to the absolute exclusion of books by private publishers revealed many problems. Many private school owners complained about NCERT books not being adequately available and timely updated.[75] This restricts the ability of students to receive the latest information on the subjects that they are studying, which would be detrimental, particularly for students preparing for competitive examinations.[76] This also offers arguments in favour of a competitive market of

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73 Governor's Speech, Assam Assembly Parliamentary Session (February 2021) <http://assamassembly.gov.in/governorspeech-eng-febsession-21.pdf≥accessed 2 January 2022.

74 'Non-NCERT books in CBSE schools ruffle feathers' *The Times of India* (10 February 2020) <https://timesofindia.indiatimes.com/city/bhopal/non-ncert-books-in-cbse-schools-ruffle-feathers/articleshow/74050988.cms> accessed 2 January 2022.

75 'MP Board bans private publishers' books, school owners concerned about availability of NCERT ones' *The Times of India* (27 February 2020) <https://timesofindia.indiatimes.com/city/indore/mp-board-bans-private-publishers-books-school-owners-concerned-about-availability-of-ncert ones/articleshow/74344157.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst&pcode=461> accessed 2 January 2022.

76 ibid.

private publishers who can freely use content from the NCERT/state board textbooks to create their own learning materials.

V. CONSTITUTIONAL MANDATE IMPOSED ON THE STATE BY THE RTE:

The preceding analysis demonstrates that the copyright policies of several state governments can inhibit meaningful educational access. While it is not our contention that such policies and restrictive licensing conditions are the only, or even primary, reason for insufficient access to education in general and textbooks in particular, we submit that the above analysis evidences that they are a contributor to the lack of such access. In this section, therefore, we will consider how this problematic state of affairs can be mitigated by using the RtE. Before delving into a discussion on the contours of the RtE, a threshold question must be answered. Why is the RtE the most apposite remedy for the ills of the restrictive copyright policies discussed in the previous part? More broadly, what makes the use of a rights-based framework the appropriate solution in this case?

There are at least three possible answers to this question. First, as the discussion below will show, the RtE [as an unenumerated and explicit right] has been formulated by the Supreme Court in broad and categorical terms. While the precise contours of the right have admittedly not been clearly delineated, it is clear that the right enjoys a high level of relative importance vis-a-vis other fundamental rights. Further, it is the only fundamental right to have been explicitly couched as an affirmative obligation on the state, as the Supreme Court's holding in Anuradha Bhasin, discussed below, makes clear. Consequently, framing the issue of restrictive copyright policies as implicating the RtE will trigger the full panoply of state obligations

encompassed within the right. It will also require any justification for restricting the right to pass constitutional muster.[77]

Second, a body of scholarly opinion suggests that the educational exceptions within Indian copyright law are restrictive and not sufficiently broad to facilitate the dissemination of copyrighted content in the digital world. Illustratively, Lawrence Liang analyses the four educational exceptions within Indian copyright law. He finds that each of these exceptions is deficient from the standpoint of facilitating distance learning and access to educational content in new and innovative ways. Therefore, he proposes the insertion of new exceptions that can facilitate the uninhibited dissemination of copyrighted content in the digital world.[78] Similarly, Sebastian notes that the exceptions contained in Indian copyright law are not sufficiently robust to keep pace with technological developments. In the same vein, Namratha Murugeshan points out that the legal position as to the permissibility of making video recordings of educational content is unclear. This is because none of the fair dealing exceptions in the Copyright Act deal with the same. Creators of such videos might therefore be forced to modulate their videos to ensure that their use is not legally suspect. The extent to which digital copies of educational content can be distributed or communicated is

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77 For a somewhat similar argument in the context of the right to privacy, see Vrinda Bhandari and Karan Lahiri, 'The Surveillance State: Privacy and Criminal Investigation in India: Possible Futures in a Post-Puttaswamy World' (2020) 3(2) University of Oxford Human Rights Hub Journal 15 at 29 arguing, "after Puttaswamy, there is a clearer sense of the impact of surveillance on privacy. After all, a richer articulation of the right to privacy heightens the quality of justification required for its interference."

78 Lawrence Liang, 'Exceptions and Limitations in Indian Copyright Law for Education: An Assessment' *3*(2) The Law and Development Review 27. Shiyana Sebastian, 'Right to Education and Fair Use under Copyright Law in India' Direitos Fundamentais, Tecnologia E Educacao 257, 263. Also see Narayan Prasad and Pravesh Aggarwal, 'Facilitating educational needs in Digital Era: Adequacy of Fair Dealing provisions of Indian Copyright Act in question' (2015) 18 The Journal of World Intellectual Property 3, 157.

also unclear.[79] In a representation made to the Registrar of Copyrights, a group of IP professors, called the'Like-Minded IP Teachers' Working Group on Intellectual Property and Public Interest' has proposed that the Copyright Act needs to be amended in the following 5 areas, in order to meet the educational needs of today:

a. Teaching, learning and examination in all medium including distance learning
b. Preparation and distribution of course materials
c. Performance or communication of the works for educational purposes
d. Online storing of works for educational use
e. Circumventing technological protection measures if necessary to enable educational use.[80]

These views are in line with the analysis on user rights on education conducted in the two preceding parts of this paper. To recap, we had concluded that these user rights are fuzzy and indeterminate, that their deployment in the digital context is a challenging enterprise and that their evolution is contingent on case-by-case adjudication. Therefore, the RtE can serve as a robust legal basis for the widespread dissemination of, and access to, educational content, the copyright over which is governmentally-owned. More concretely, using the obligations imposed upon the state under the RtE, it can be contended that there is a need for the above modulations to the Copyright Act, to ensure the meaningful vindication of the RtE.

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79 Murugeshan (n 43).

80 Like-Minded IP Teachers' Working Group of on IP and Public Interest - [Copyright Amendment 2020-21] - List of recommendations - Google Docs ≤https://docs.google.com/document/d/1fYBArzpmHCGCYjStU55xNgSpMBpSrMhDvTYmn8Yq7gE/edit#heading=h.cwwx6pvsfetg≥accessed 2 January 2022.

Finally, even if existing user rights under copyright law that are exempt from infringement can be used to ensure the modulation of state copyright policies, there is nonetheless value to be derived from relying on the RtE. Specifically, as one of us has previously argued, by viewing copyright exceptions as user rights, we can more clearly establish their linkage with the Constitutional goals, especially those embodied in the fundamental rights chapter, that they seek to promote.[81] This ensures that such rights cannot be contractually waived and also serves to impose an affirmative obligation on copyright owners to ensure the realization of these rights.[82] In support of this argument, a parallel can be drawn with the argument made by Gautam Bhatia in the context of the relationship between free speech and copyright.

Specifically, Bhatia argues that, under Article 19(1)(a) of the Constitution, the Government is not merely prohibited from censoring speech. Rather, he contends that "inequalities of resources acting as barriers to free expression, even though not directly caused by affirmative State action, nonetheless constitute an impediment to the full exercise of the 19(1)(a) right, since they are upheld by State legislation governing property, transfers of goods and, in this case, copyright."[83] On this basis, he contends that unaffordable textbook pricing should be considered a barrier to the enjoyment of Article 19(1)(a) and copyright law should be interpreted in a manner that supports the enjoyment of the fundamental right to free speech.[84]

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81 Dhonchak (n 64) at 123; Pascale Chapdelaine, *Copyright User Rights* (OUP 2017) 48.

82 ibid.

83 Gautam Bhatia, 'Copyright and Free Speech – I' *Indian Constitutional Law and Philosophy* (7 Oct 2013) <https://indconlawphil.wordpress.com/2013/10/07/copyright-and-free-speech-i-constitutional-arguments-againstoup-et-al-in-the-delhi-university-photocopying-lawsuit/> accessed 2 January 2022.

84 Gautam Bhatia, 'Copyright and Free Speech – II' *Indian Constitutional Law and Philosophy* (7 Oct 2013) <https://indconlawphil.wordpress.com/2013/10

This example shows how couching an issue of copyright law in rights-based terms can have positive substantive and symbolic consequences.

The utility of deploying a rights-based framework having now been established, we will turn to a discussion of the contours of the RtE. The story of how the RtE came to acquire a secure constitutional home in Part III of the Indian Constitution is familiar. At the time of the founding of India's Constitutional democracy in 1950, the constitutional obligation on the state as regards the RtE was contained in part 4, delineating the Directive Principles of State Policy. Article 45 stated as follows: "the State *shall endeavour to provide* free and compulsory education for all children under 14 within 10 years." As Fredman notes, the faith that this article reposed in the political process for ensuring free and compulsory education proved 'too optimistic'.[85]

Since this commitment was not fulfilled more than 4 decades after the Constitution came into force, the Supreme Court felt compelled to intervene. It read the RtE as being an implied right under Article 21 of the Constitution in two cases. In the first case, in 1992, *Mohini Jain v. State of Karnataka and Ors.*[86], the Karnataka Government, by enacting a legislation, imposed capitation fees for securing admission in private medical colleges. Through a notification, the Government fixed Rs. 2000/- per year as tuition fee payable by candidates admitted against 'government seats'. Other students had to pay Rs 25,000 per annum and those outside the state Rs. 60,000 per annum. The petitioner, who hailed from Meerut, was asked to pay the capitation fees applicable for non-state residents.

/07/copyright-and-free-speech-ii-constitutional-arguments-against-oup-et-al-in-the-du-photocopying-case/> accessed 2 January 2022.

85 Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 358.

86 (1992) 3 SCC 666.

When her father informed the college management that he was unable to pay the same, she was denied admission. This was challenged by her through an Article 32 petition. The Court, speaking through Justice Kuldeep Singh, held as follows:

"We hold that every citizen has a 'right to education' under the Constitution. The State is under an obligation to establish educational institutions to enable citizens to enjoy the said right. The State may discharge its obligation through State-owned or State-recognised educational institutions."[87]

Further, the Court viewed the RtE as being intrinsic to an individual's dignity as well as a multiplier right – a right that facilitates the enjoyment of other rights.[88] It expounded on the importance of education in the following terms: "It is primarily [sic] the education which brings forth the dignity of a man . . . An individual cannot be assured of human dignity unless his personality is developed and the only way to do that is to educate him."

The categorical enunciation of the RtE was subsequently qualified in the case of *Unni Krishnan, J.P. v. State of Andhra Pradesh*[89] in which it was held that the state's obligation to provide free education only applies to children up to the age of 14. Thereafter, the obligation of the state would be contingent on the availability of capacity.[90] In 1995, the SC reiterated in *State of HP v. HP State Recognised High Schools Managing Committee*[91] that lack of economic or financial capacity cannot be cited as an excuse for denial of access to education to children under the age of 14.

The ratio of these judicial pronouncements was explicitly enumerated in the Constitution, through the 86th Amendment to the

87 ibid [17].
88 Fredman (n 87) 358.
89 AIR [1993] SC 2178.
90 See M P Jain, 'Indian Constitutional Law' Chapter XXVII-A (7th Edition).
91 (1995) 4 SCC 507.

Constitution. The Amendment added Article 21A to the Constitution which reads as follows:

> 21A. The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

This Constitutional obligation has found statutory manifestation through the enactment of the RtE Act, 2009. The SC has upheld the Constitutionality of the law, while making it inapplicable to unaided minority institutions.[92] The obligations imposed on the state to secure the enjoyment of this right can be culled out from the jurisprudence of the SC on the interpretation of Article 21A. Illustratively, in *Avinash Mehrotra v. Union of India*[93], the SC, speaking through Justice Dalveer Bhandari, described the RtE as being much more than a fundamental or human right. It held that the right "places an affirmative burden on all participants in our civil society [for its realization]."[94] It emphasized that the RtE ensures compulsory education for children in the relevant age group, in a manner that is not dependent on cost and government action.[95]

In *Ashoka Kumar Thakur v. Union of India and Ors.*[96], the SC described the RtE as being 'the most important fundamental right'. Emphasizing the role of the right as a multiplier right [as Mohini Jain had done], the Court noted that the central importance of the RtE is

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92 See *Society for Unaided Private Schools of Rajasthan v Union of India* (2012) 6 SCC 1 (Majority opinion); Aishwarya Ayushmaan & Deepthi Bavirisetty, 'Right to Education: Edging Closer to Realisation or Furthering Judicial Conundrum?' (2014) National Law School of India Review 26; Arjun Jayadev and Sudhir Krishnaswamy, 'Healthcare Law in the US and the RTE In India: Steps Towards Universal Provision of Social Goods' (2012) Economic and Political Weekly 31.

93 (2009) 6 SCC 398.

94 ibid [29].

95 ibid.

96 (2008) 6 SCC 1.

the reason why the Court must supervise government spending on free and compulsory education.[97]

The SC has also recognized that the RtE is unique amongst all Part III rights in that it imposes positive obligations on the state to secure its realization. In Anuradha Bhasin v. Union of India and Ors.[98], the SC held that the fundamental rights in Part III of the Constitution are negatively worded. However, the RtE is: "a positive right that requires an active effort by the concerned government to ensure that the right to education is provided to all children up to the age of 16 [sic 14] years."[99] In a recent judgment, the Supreme Court held that the State has an affirmative obligation to facilitate access to education, at all levels.[100]

In a recent order dated 8th October 2021, the SC dealt with a plea by the managements of unaided recognized schools in Delhi that they should not be made to bear the cost of providing equipment as well as internet package to students from economically weaker sections and thereafter seek reimbursement from the state, owing to the shift to online learning occasioned by the COVID-19 pandemic. The state pushed back, arguing that it did not have the requisite resources to directly purchase the equipment and resources. The SC noted that, due to existing stark inequalities in our societies, students from, children belonging to economically weaker sections/ disadvantaged groups may not be able to fully pursue their education. It held: "The State cannot wash its hands of the obligation imposed particularly by Article 21 A of the Constitution." It emphasized that Article 21A of the Constitution has to become a reality and therefore

97 ibid [466].
98 (2020) 3 SCC 637.
99 ibid [20].
100 *Farzana Batool v Union of India and Ors.,*CWP No. 364 of 2021 [9].

the "needs of children from the underprivileged sections to receive adequate access to online education cannot be denied."[101]

Further, the SC has also stressed on the importance of the state ensuring that it provides quality education in the discharge of its constitutional obligation. In *State of Bihar and Ors. v. The Bihar Secondary Teachers Struggle Committee, Munger and Ors.*[102], it was held that the interpretation placed on the right must be one that helps make its realization a reality. The provision's child-centric character and the importance of quality must be kept in mind.[103] In *State of Tamil Nadu and Ors. v. K. Shyam Sunder and Ors.*[104] the SC held: "The right of a child should not be restricted only to free and compulsory education but should be extended to have quality education without any discrimination on economic, social and cultural grounds."[105]

Despite the articulation of this mandate of the State, Indian courts are yet to offer a clear framework for determining the precise contours of these broad and amorphous obligations. Here, the guidance articulated by the Committee on the Covenant on Economic, Social and Cultural Rights [CESCR Committee] would be helpful. India is a signatory to the International Covenant on Economic, Social and Cultural Rights [ICESCR]. Article 13 of the Covenant outlines the contours of the RtE and the obligation of the state to secure its realization.

General Comment 13 of the CESCR Committee outlines the specific contours of the RtE. In a recent judgment, the SC held that this Comment is of persuasive value in Indian Courts. [106] The

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101 *Action Committee Unaided Recognised Private Schools v. Justice For All,* SLP(C) No. 4351/2021 [4].
102 (2019) 18 SCC 301.
103 ibid [78].
104 (2011) 8 SCC 737.
105 ibid [7].
106 Farzana Batool (n 103) [11].

Committee held [in General Comment 13] that the RtE, like all human rights, imposes three sets of obligations on the state. These are the obligations to respect, protect and fulfil. Under the obligation to respect, state parties cannot hinder or prevent the enjoyment of the RtE. Under the obligation to protect, a state is required to take measures that prevent third parties from interfering with the enjoyment of the RtE. The obligation to fulfil has two components. First, states are required to take positive measures to facilitate the enjoyment of the RtE by individuals and communities. Second, states are required to take measures to assist in the enjoyment of the right by those who would otherwise not be able to enjoy the right.[107] The General Comment also requires the state to ensure that education at all levels exhibits four critical features. It must be available, accessible, acceptable and adaptable. [108]

VI. JUSTICIABILITY

Now that the contents of the RtE have been outlined in the above segment, and it has been shown why a rights-based solution to this problem would be appropriate, the question that arises is this. How can the RtE be used as a prompt to ensure the suitable modulation of state copyright policies?

Given that there exist multiple possible avenues for reform, which one should be pursued and why? In this segment, we propose a court-mediated solution to pursue copyright law reform. This is because the need for such reforms is grounded in the RtE, as the absence of such reforms has the consequence of preventing the effective enjoyment of the RtE as regards educational content whose use under existing copyright law is legally suspect. Differently stated, the state's failure to effectuate such reforms will result in the

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107 General Comment 13, CESCR Committee [47].

108 ibid [6].

continued deprivation of the RtE. There is no gainsaying the fact that, in cases evidencing a clear deprivation of Constitutional rights, a court has the mandate to intervene.[109] This, of course, does not preclude the possibility of copyright law reform being pursued through other means, such as legislative amendments. Indeed, the court-mediated process we propose will only facilitate a bounded dialogue that can help usher in the necessary reforms, irrespective of the avenue through which such reforms take place.

The next question that arises is this. Given that the RtE is a right whose enjoyment entails complex questions of resource allocation and priority setting, how can a court, given its institutional constraints, ensure the meaningful operationalization of the right? One possible answer to this conundrum would be the adoption of a dialogic model. Under this approach, the court would enter into a dialogue with the relevant organ of the government, so as to encourage them to adopt a solution that vindicates the right at issue. In cases involving socioeconomic rights, Indian courts have adopted dialogic solutions in the past. Illustratively, the SC entered into a dialogue with the government to ensure implementation of existing food schemes, in the celebrated right to food case.[110] Some High Courts also resorted to this approach in ensuring a more robust governmental response to the challenges posed by COVID-19.[111] In

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109 See Meera Emmanuel, 'The Constitution does not belong solely to lawyers and judges: Justice DY Chandrachud'*Bar and Bench* (26 November 2020) <https://www.barandbench.com/news/constitution-does-not-belong-solely-to-lawyers-judges-justice-dy-chandrachud>accessed 2 January 2022.

110 *PUCL v Union of India* WP (C) No. 196/2001 (Indian SC)

111 Gautam Bhatia, 'Coronavirus and the Constitution –XXVIII: Dialogic Judicial Review in the Gujarat and Karnataka High Courts' *Indian Constitutional Law and Philosophy* (24 May 2020) <https://indconlawphil.wordpress.com/2020/05/24/coronavirus-and-the-constitution-xxviii-dialogic-judicial-review-in-the-gujarat-and-karnataka-high-courts/>accessed 2 January 2022; Aakanksha Saxena, 'Coronavirus and the Constitution –XXXIII: N-95 Masks and the Bombay High Court's Dialogic

a recent judgment concerning the interpretation of a set of provisions in the Insolvency and Bankruptcy Code, the SC endorsed the value of a dialogic approach in the following terms: "It is through the instrumentality of an inter-institutional dialogue that the doctrine of separation of powers can be operationalized in a nuanced fashion. It is in this way that the Court can tread the middle path between abdication and usurpation."[112]

However, the key drawback of the dialogic approach is that it does not offer a framework within which the dialogue must take place – the bounds within which it must be conducted and the goals it should seek to secure.[113] It is here that Sandra Fredman's bounded deliberative approach becomes useful. She recognizes that a court cannot compel the government to opt for the court's chosen policy preferences. However, it can require the government to justify why particular preferences have been made in light of other competing principles and exact accountability.[114] More importantly, the dialogue is bounded by the human rights at stake. The approach accommodates the possibility of reasonable disagreement between the court and the government, as long as the human rights at issue are appropriately vindicated. [115]

Drawing on this approach, the Court can set the contours of the RtE, as described above, as the bounds of the dialogue. It can supplement this analysis with an articulation of possible changes that the government can make to its copyright policies, to ensure that it is

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Judicial Review [Guest Post]' *Indian Constitutional Law and Philosophy* (28 June 2020) <https://indconlawphil.wordpress.com/2020/06/28/coronavirus-and-the-constitution-xxxiii-n-95-masks-and-the-bombay-high-courts-dialogic-judicial-review-guest-post/> accessed 2 January 2022.

112 *Gujarat Urja Vikas Nigam Limited v Amit Gupta*, 2021 SCC OnLine SC 194 [170].

113 Fredman (n 87) 66.

114 Fredman (n 87) 91.

115 Fredman (n 87) 92.

in conformity with the RtE. It can indicate to the government that the issuance of Creative Commons Licenses, for instance, appears to be an efficacious solution. It can also suggest other measures to the government, such as relaxing copyright licensing standards, amending the Copyright Act to bring in exceptions that suitably facilitate digital education and innovative learning or amendments to the RtE Act, to ensure that copyright law should not come in the way of the effective enjoyment of the RtE.

Given a Court's institutional limitations, it cannot conclusively determine what reforms should be pursued to ensure the vindication of the RtE. Equally, given that the need for the attenuation of the copyright barrier is directly traceable to the government's obligation to respect the RtE, the Court can ensure that the government devises and implements ways and means of ensuring the robust enjoyment of the RtE. To this end, the Court can reject any proposals that it feels do not attain this objective.[116]

In the *suo motu* proceedings initiated by the Supreme Court in light of the consequences flowing from the second wave of the pandemic, the Court used the bounded deliberative approach as the structuring framework for its analysis. It held that it was deploying this approach so that the Union and state governments could offer the rationale for their policy choices. It held that the dialogue would be bounded by the right to equality and the right to life.[117] It pertinently held in its order issued on 31st May[118], that the Central Government's decision to substitute the policy of directly providing

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116 Rahul Bajaj, 'Towards Using the Right to health to prevent Constitutionally Intolerable Denial of Access to Patented Drugs' MPhil in Law Thesis (2020) <https://spicyip.com/wp-content/uploads/2021/08/Bajaj-MPhil-in-Law-Thesis.pdf> accessed 2 January 2022.

117 *In Re: Distribution of Essential Supplies and Services during Pandemic*, Suo Motu Writ Petition (Civil) No.3 of 2021, order dated 30.4.2021 [5].

118 ibid, order dated 31.5.2021 [2].

free vaccination to eligible citizens under the first two phases, with a decision to outsource the procurement and distribution of vaccines to state governments under the third phase was *prima facie* irrational and arbitrary. [119] It had also expressed doubts as to the Constitutionality of the Centre's decision to decentralize the task of procuring vaccines to the states and had noted that this could "place severe burdens, particularly on States/UTs suffering from financial distress." [120]

Soon after this order, the Centre decided to centralize the procurement of vaccines and to make them available to all individuals above the age of 18, free of charge. As Gautam Bhatia notes, it is impossible to precisely quantify the extent to which this policy shift was prompted by the Supreme Court's orders. However, it is clear that the Court's three orders of 27th April, 30th April and 31st May played a significant role and"vindicate the Court's bounded-dialogic approach towards the exercise of judicial review over the management of the pandemic." [121] This example powerfully demonstrates the utility of the bounded deliberative model to nudge the executive into acting in a constitutionally compliant fashion.

Further, the landmark Delhi High Court judgment in the *DU photocopy case* represents an excellent example of the way the RtE can be used by a court as a prompt to push for the reorientation of copyright law. As Emmanuel Oke notes, while the Court did not explicitly invoke the right to education, it emphasized the importance of education in the following terms: "education is the foundation on

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119 ibid [20].

120 ibid [30] - [31].

121 Gautam Bhatia, 'Coronavirus and the Constitution – XXXVII: Dialogic Review and the Supreme Court (2)' *Indian Constitutional Law and Philosophy* (3 June 2021) <https://indconlawphil.wordpress.com/2021/06/03/coronavirus-and-the-constitution-xxxvii-dialogic-review-and-the-supreme-court-2/> accessed 2 January 2022.

which a progressive and prosperous society can be built."[122] It stated that there is a need to promote "equitable access to knowledge to all segments of the society, irrespective of their caste, creed and financial position," with: "the more indigent the learner, the greater the responsibility to ensure equitable access."[123] As Oke points out, the Court's approach is "consistent with the incorporation of a right-to-education perspective into the interpretation of copyright law."[124] This, he explains, is because the government is obligated to respect the RtE by ensuring that teachers and students are able to freely make copies of educational content, without any arbitrary restrictions, as long as it is fit for an educational purpose.[125] Ruth Okediji similarly notes with reference to the *DU photocopy case*that, while not explicitly referencing the RtE, "an Indian Court interpreted the Indian Copyright Act in a manner that arguably implements the right to education and the right to participate in cultural life."[126]

In the same vein, students who are unable to access copyrighted content owing to restrictive copyright policies or inappropriately framed educational exceptions can use the RtE to argue that the status quo violates the government's obligation to respect the RtE. The Court can use the RtE and the state's obligations flowing from it as the basis to ask the government to relax its copyright policies and modify existing fair dealing exceptions. Given that all statutes must be compliant with fundamental rights, it can also return a prima facie finding that the fair dealing educational exceptions at present appear inconsistent

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122 DU Photocopy case (Division Bench judgment) (n 33) [30].

123 ibid.

124 Emmanuel Oke, 'The right-to-education responsibilities of book publishing companies' (2018) Indian Journal of Law and Technology 14.

125 ibid.

126 Ruth L. Okediji, 'Does intellectual property need human rights' (2018) 51 NYU Journal of International Law & Politics 54.

with the Supreme Court's understanding of the RtE and therefore merit revisitation.

VII. CONCLUSION

Justice Endlaw in the *DU Photocopy Case*, cited an article[127] to emphasise the similarity of free speech and copyright goals by noting that copyright is meant to foster and not restrict the "*harvest of knowledge, motivate the creative activity of authors and inventors in order to benefit the public.*"[128] This reasoning evidently highlights that the goal of copyright is served insofar as compensation to creators operates as a means for greater public welfare. The exercise of user rights under Section 52 of the Copyright Act serves an important social purpose. Users are entitled to exercise these rights to the extent justified by their stated purpose.[129] User rights were given an extensive interpretation in this case by relying on the German Federal SC in *Re. the Supply of Photocopies of Newspaper Articles by Public Library*[130] to bolster the conclusion that "*the freedom to operate and the reproduction rights of authors were restricted in favour of freedom of information.*" Justice Endlaw noted in this regard that no extraneous limitations could be read into Section 52 by Courts inquiring into whether the rights of the authors were unreasonably prejudiced since the legislature would be presumed to have already determined otherwise by enacting Section 52 and the purposes mentioned therein.

With the shift of at least some educational activities online, copyright claims may need to be restricted in a manner that they do not curtail the very activities that justify the existence of copyright,

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127 Shamnad Basheer, Debanshu Khettry et al. 'Exhausting Copyrights and Promoting Access to Education: An Empirical Take' (2012) 17 Journal of Intellectual Property Rights <http://nopr.niscair.res.in/bitstream/123456789/14461/1/JIPR%2017(4)%20335-347.pdf> accessed 2 January 2022.

128 DU Photocopy case (Single Judge Bench) (n 31) [80].

129 DU Photocopy case (Single Judge Bench) (n 31).

130 (2000) ECC 237.

and which copyright law is ostensibly intended to enable.[131] A purposive approach to substantive technological neutrality entails interrogating the application of the law in a fashion that is in pursuance with the normative objectives and foundational justifications for copyright law in the face of technological changes.[132]

Therefore, if the principal aim of copyright, particularly in the context of government copyright in textbooks, is to maximise the public dissemination of these works in light of the obligations under the RtE, then reduced opportunities for physical access and distribution must be compensated for by increasing avenues for digital distribution. The Supreme Court of Canada, for instance, underscored the importance of substantive technological neutrality in the case of *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.* while noting that "the traditional balance between authors and users should be preserved in the digital environment."[133]

The current realities of access to educational material in India, restrictive copyright policies of various state boards and the host of state obligations under the RtE reveal a need to reconsider traditional proprietary models of publishing that inhibit students, teachers, other content creators and publishers from accessing, sharing and creating learning materials. There is a need to make the content of textbooks published by government boards available under Open Access models.

Currently, there is no consistency in copyright policies across State Boards. The Boards as owners of 'government works' under Sections 2(k) and 17(dd) of the Copyright Act should conduct a

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131 Carys J. Craig, 'Technological Neutrality: Recalibrating Copyright in the Information Age' (2016) 17 Theoretical Inquiries in Law 601.

132 Craig and Tarantino (n 48).

133 2015 S.C.R. 57 (Can.) [147] - [148].

survey of all their works to establish costs of production and revenue.[134] Then keeping their public function in mind, they should ascertain the creative commons license under which they can make their works available. CC licenses can make these books available to the public, particularly as e-books on the internet, permitting the re-use and modification of these works for both non-commercial as well as commercial purposes. The CC licensing suite can ensure integrity of educational materials by requiring re-users to ensure attribution and clarify noticeably that their work constitutes a modified version of the licensor's work.

By entering into a bounded dialogue with the government, consistent with the framework outlined above, the Court can play a constructive role in making the copyright policies of state governments more conducive for greater educational access. In this way, it can be ensured that governmental ownership of copyright over educational content serves the public interest that was the raisond'être for vesting the government with these rights in the first place.

134 Rakhecha (n 4) 26.

RELIGIOUS DISCRIMINATION UNDER THE INDIAN CONSTITUTION: UNPACKING THE CONTENTS OF 'RELIGION'

Dhruva Gandhi[*]

Abstract

Grounds' are effectively the building blocks of discrimination law, both in theory and in practice. Understanding what a 'ground' means helps determine what the scope and efficacy of discrimination law can be. The primary objective of this paper is to answer the question, "What does 'religion' as a ground of discrimination mean?" As this paper argues, this has proven to be a particularly vexed question.

The paper goes about undertaking this enquiry in two stages. The first stage involves a study of cases involving direct religious discrimination, as decided by various High Courts, and the Supreme Court. What emerges from this study is that 'religion' has predominantly been understood to mean the 'religious status' of an individual. While there exists a normative justification for this pattern, I argue that there is a need to dig deeper because the approach does not explain all cases that have been litigated.

The second stage of the enquiry thus identifies and studies uncommon judicial opinions that exist on the periphery, which examine several elements beyond religious status. In these cases, 'religion' has been understood to include several elements that would ordinarily be construed to be a part of 'religious freedom'. This paper then proceeds to unpack the meaning/content of religion in these cases that exist on the periphery by exploring three alternatives. It argues that 'religion' under Articles 14 and 15 of the Constitution must be understood to include sincerely held religious beliefs as well.

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A. INTRODUCTION

Religious discrimination often brings to the fore instances of systemic violence and persecution, be it the genocidal treatment of Jews in Nazi Germany, or the indiscriminate detention of Muslims at Guantanamo Bay in the aftermath of the 9/11 terror attacks. Closer home, the Citizenship (Amendment) Act, 2019 and the potential detention of persons based on the National Register of Citizens too have stoked concerns of religious discrimination.[1]

Religion as a ground of discrimination law is anomalous and complex. For one, it does not fulfil some of the identifying principles proposed to recognise a marker as a 'ground' of discrimination. According to Fredman, these identifying principles may include immutability[2] or a history of disadvantage[3] or a lack of political representation[4]. Religion though does not neatly fit the bill for any of them. Religion is not immutable in the strict sense in that people do have the choice, albeit sometimes difficult to exercise, to opt out of a religion or to convert. This is unlike other markers such as race. Similarly, a history of disadvantage may vary across countries and societies. Dominant religions in one society may have a history of oppression in another. At times, religions also breed intolerance which adds to the complexity. Religious adherents may discriminate against other members of the same religion who are less observant or who espouse a different doctrine.[5] Problems increase when faith is used as a basis to discriminate against people on the basis of sex or

1 Suhrith Parthasarathy, *Why the CAA Violates the Constitution*, THE INDIA FORUM (17th January 2021), available at https://www.theindiaforum.in/article/why-caa-violates-constitution.
2 Sandra Fredman, DISCRIMINATION LAW 131 (2011, 2nd ed.).
3 ibid [138].
4 ibid [134].
5 ibid [74].

sexual orientation, leading to calls for the attenuation of 'religion' as a ground.[6]

What then does 'religion' mean? This seemingly innocuous question too adds to the complexity surrounding religion, and has now troubled several scholars in the area. The reason for this complexity becomes particularly clear when religion is compared to some of the other markers. To consider a few examples — 'citizenship' denotes membership rights granted by a country which brings along with it a set of rights and obligations; 'language' is a mode of communication, and would include braille, sign language and dialects; 'place of birth' is exactly what the phrase says it is and does not extend to the place of domicile. With these definitions, it becomes possible to identify individuals as Indian or Pakistani; Malayalam-speaking or Hindi-speaking, and so on. Religion however is not the same.

Admittedly, religion would include the religious identity of an individual. However, in a country such as India, a person's religiosity may be defined in more ways than one.[7] A person may be a 'Hindu' in the eyes of the law,[8] but a devout follower of the tenets of Jainism in practice. If Hindus were barred from applying for the post of an epigraphist at historical mosques in New Delhi,[9] the individual may be discriminated against for being a Hindu. However, if the Government of the National Capital Territory of Delhi were to refuse any holiday whatsoever during the Paryushan festival, the same

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6 *See* A. McColgan, *Class Wars: Religion and (In) equality in the Workplace*, 38 INDUSTRIAL LAW JOURNAL (2009).

7 This is not to say that this issue does not confront us in some of the other grounds in discrimination law as well. Gender, being one example that comes to mind.

8 Section 2, Hindu Marriage Act, 1955.

9 *See* K.P.A. Nallamohamed v Director, Department of Archaeology, 2011 SCC Online Mad 145 (Madras High Court). The facts in this case were the opposite of what has been hypothesized above.

individual may be discriminated against for following the tenets of Jainism.

Moreover, religion is not only about identity but also about beliefs and practices. Hypothetically, let us presume the Code of Criminal Procedure were amended and a right to observe the facial expressions of a witness were incorporated as a manifestation of the right to a fair trial.[10] In the course of a trial, the witness who is a Muslim woman refuses to lift her niqab for religious reasons. If one were to impugn the law as being discriminatory, one may say that she was treated unfairly because she was a Muslim. The discrimination was on account of her identity as a Muslim. However, it would pedantic to suggest that one could arrive at that conclusion without considering the adverse impact caused by the compulsion to lift the niqab. The discrimination came to be because a religious practice was made more burdensome for a vulnerable group, i.e., Muslim women. Thus, the question that then confronts us is thus — when we talk about 'religion' in discrimination law, are we also concerned about religious practices and rituals?

The difficulty posed by this question becomes clearer when we compare the right against religious discrimination with the right of religious freedom. In several bills of rights, including Part III of the Constitution of India, religious rights are protected not only by a prohibition of discrimination, but also by a protection of the freedom to choose, profess, propagate and practice one's religion. How do the contents of these two rights differ? In the above hypothetical, was the woman discriminated against for being a Muslim, or was her right to practice her religious beliefs freely impeded? The very same question has also arisen in the facts of *Resham v State of Karnataka*,[11]

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10 The facts in this example are an adaptation of the case facts in R v N.S., 2012 SCC 72 (Supreme Court of Canada).

11 W.P. No. 2347/20222 (Karnataka High Court).

(popularly known as the hijab-ban case) where the constitutional validity of the insistence laid by educational institutions on Muslim female students removing the hijab inside their premises has been impugned.[12] Consider another situation,[13] where a law that proscribed the intentional possession of a 'controlled substance' unless it is prescribed by a medical practitioner. Two employees ingest one such substance for sacramental purposes at a ceremony. When their employer learns about this incident, they are discharged. They are also barred from claiming unemployment benefits for having engaged in work-related 'misconduct'. Does the law, in this instance, impose an unreasonable burden on the freedom to follow religious practices? Or, does a neutrally worded law have a disproportionate impact on members of that religious denomination? On the face of it, there appears to be an overlap in the content of 'religion' insofar as these two rights are concerned.

Given these three distinguishing features of religion as a ground of discrimination, which set it apart from other markers of discrimination, the need to unpack its contents does assume significance. Put in other words, what is the meaning of 'religion' in discrimination law. This question assumes significance because of the direct bearing it has on the scope of discrimination law as a discipline. The extent of protection which discrimination law can offer flows not only from how its tools are designed, or how its objectives are framed, but also from how the various 'grounds' or 'markers' along which discrimination occurs are understood. Our understanding of

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12 *Resham v State of Karnataka*, W.P. No. 2347/2022 (Order dt. 10.02.2022) (Karnataka High Court). At the time of finalisation of this article for publication, the Judgement of the Karnataka High Court was still awaited. Hence, it remained to be seen if and how this question was addressed by the High Court.

13 The facts in this example are an adaptation of the case facts in Employment Division, Department of Human Resources, Oregon v Smith, 494 U.S. 872 (1990) (Supreme Court of the United States).

'grounds'/ 'markers' has a direct impact on how we are able to identify wrongs associated with those markers, and on how we structure remedies. An endeavour to unpack the contents of 'religion' is thus part of a larger exercise to understand the contours of discrimination law itself. In this paper, I propose to make precisely this attempt.

There are two stages to my enquiry. The first includes studying our precedent on the issue, wherein I contend that the unpacking exercise has already been done to a large extent. The picture that emerges therefrom is that 'religion' only refers to the 'religious status' of an individual, namely, whether a person is a Hindu or a Muslim or a Christian as a matter of identity. A person does not necessarily need be a devout Hindu or Muslim or Christian. Normatively, Khaitan and Norton[14] offer a sound explanation for the adoption of 'religious status' as a metric. However, I argue that this does not explain the entire picture.

The second stage of my enquiry is concerned with a handful of cases where courts and litigants have understood religion as something more than just 'religious status'. Moreover, I also contend that this trend is only likely to expand in the future, as litigants may be strategically inclined to structure infringement of religious freedom as violations of the protection against indirect discrimination. To unpack the content of 'religion' for these cases that lie at the penumbra, I explore three possible alternatives. By a process of elimination, I arrive at the conclusion that in these few cases 'religion' may have to be understood as every sincerely held religious belief.

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14 *Infra* note 94.

B. THE CONSTITUTIONAL SCHEME

Constitutionally, the right against discrimination on the grounds of religion and the right to freedom of religion are covered by two distinct set of provisions. Whereas Article 14[15] guarantees equality before the law and equal protection of the laws to all persons, Articles 15(1) and (2) of the Constitution state,

> "(1) *The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.*
>
> (2) *No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-*
>
> (a) *access to shops, public restaurants, hotels and places of public entertainment;*
>
> (b) *the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State of funds or dedicated to the use of the general public.*"[16]

On a bare perusal of the text of Articles 15(1) and (2), it appears that there is an absolute right to be protected against discrimination by the State on the grounds of religion. Not only that, there is also an absolute right to this effect against non-State actors insofar as access to shops, public restaurants, hotels, wells, tanks etc. is concerned. More importantly, unlike Article 15(3) which empowers the State to make special provisions in favour of women, or Article 15(4) which empowers it to enact similar provisions for the advancement of socially and educationally backward classes of citizens, there is no provision which enables similar measures qua religious groups.

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15 Article 14, Constitution of India, 1950.

16 Article 15, Constitution of India, 1950.

Article 16 of the Constitution carves out a similar right qua public employment, albeit with one exception. Articles 16(1), (2) and (5) of the Constitution state,

> "(1) *There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.*
>
> (2) *No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.* …
>
> …. (5) *Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination*."[17]

The Constitution thus envisages a scenario wherein a distinction on the grounds of religion may need to be made to maintain the 'religious character' of an institutions, or may be necessary for discharging certain 'religious duties'. Such a distinction would not amount to discrimination. Clause (5) is noteworthy for another reason as well. The absence of a similar provision in Article 15 buttresses the conclusion that, except for the scope carved out in Article 16(5), the protection against direct discrimination on the ground of religion is absolute.

Moreover, following the decision of the Supreme Court in *Lt. Col. Nitisha v Union of India*,[18] the constitutional protection against indirect discrimination has been recognised in India. Unlike direct

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17 Article 16, Constitution of India, 1950.

18 Lt. Col. Nitisha v Union of India, Writ Petition (C) No. 1109/2021 (Judgement dt. 25.03.2021) ("Nitisha").

discrimination,[19] this is rooted in Article 14 of the Constitution. To make out a case of indirect discrimination, a plaintiff would have to show that a neutrally worded measure had a differential effect along the lines of religion, and this in turn reinforced, perpetuated or exacerbated disadvantage.[20] Once the plaintiff has established these elements, the State may attempt to show that the provision, criteria or practice was necessary to attain the proposed objective.[21] According to the Supreme Court, while a judge must accord some deference to the views of the State, whether or not the same objective could be attained by less discriminatory measures would have to be examined.[22] Overall thus, it is plausible to contend that the right against religious discrimination as guaranteed under Articles 14 through 16 of the Constitution is a strong one.

Compare this with the protection offered by Article 25 of the Constitution. While conferring the right to freedom of conscience and the right to freely profess, practice and propagate religion, Article 25 makes exercise of these rights subject to "*public order, morality and health*". Clause 2 of Article 25 further says,

> "*Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—*
>
> *(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;*
>
> *(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus*."[23]

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19 *See* Dhruva Gandhi, *Locating Indirect Discrimination in India: A Case for Rigorous Review under Article 14*, 13(4) NUJS LAW REVIEW (2020).

20 Nitisha, *supra* note 18, at ¶ 69.

21 ibid [¶ 70].

22 ibid.

23 Article 25, Constitution of India, 1950.

Evidently then, the right to religious freedom is subject to a wider set of limitations as compared to the right against religious discrimination. One may thus argue that the former is a comparatively weaker right. More so, because Article 25(1) is also subject to the other provisions of Part III of the Constitution, and thereby to Article 15.

While it may now be settled law that fundamental rights ought not to be understood in silos,[24] it is apparent on a comparison of Articles 15 and 16 on the one hand with Article 25 on the other, that the Constitution offers a distinct set of protections and has carved out two distinct frameworks. Whether one pitches their case under Articles 14 through 16 as opposed to Article 25; the ramifications that might follow may be different. Therefore, in addition to the reasons surveyed in the Introduction of this paper, unpacking the contents of 'religion' in discrimination law is also important to maintain the constitutional scheme. If 'religion' is understood so capaciously that its contents overlap with 'religious freedom', there is a possibility that the distinction between the two sets of rights from becoming blurred. This paper will now turn to the precedent in India under Articles 14 through 16 to unpack the meaning of 'religion'.

Before proceeding to a perusal of the case law though, there is one more noteworthy aspect about the comparison of Articles 15 and 16 with Article 25. Article 25 says, "*all persons are equally entitled to freedom of*….". By using the phrase '*equally entitled*', it would appear that Article 25 too carries a guarantee of non-discrimination.[25] If that were so, there are two distinct guarantees against discrimination that

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24 Maneka Gandhi v Union of India, (1978) 1 SCC 248.

25 *See* Indian Young Lawyers Association v State of Kerala, Writ Petition (C) No. 373/2006 (Judgement Dt. 28th September 2018), Nariman J. ¶ 29; Chandrachud J. ¶ 6. ("Sabarimala").

emerge from the text of Part III of the Constitution insofar as religion is concerned. Given that one is weaker than the other, there is an added reason to unpack the meaning of 'religion' for the purposes of these two fundamental rights.

C. UNPACKING 'RELIGION' IN PRECEDENT

1. A. Religion is Religious 'Status': The Predominant Trend

Religious discrimination, as a tool, has frequently been deployed in constitutional challenges to statutes codifying personal laws. In *Ammini v Union of India*,[26] the constitutional validity of Section 10 of the Indian Divorce Act, 1869 was challenged on the grounds that Christian spouses could not seek divorce on the grounds of cruelty or desertion alone, which were independent grounds for spouses of other religions. Similarly, in *Preman v Union of India*,[27] Section 118 of the Indian Succession Act, 1925 was challenged on the ground that Christians were barred from bequeathing property for religious and charitable purposes. In *P.E. Matthew v Union of India*,[28] Section 17 of the Indian Divorce Act, 1986 was challenged on the ground that it required a confirmation by the High Court of a decree for dissolution of a marriage between Christian spouses.

In *Ammini*, the Kerala High Court held that insofar as cruelty and desertion were not treated as independent grounds of divorce, there was discrimination on the basis of religion and thereby, a violation of Article 15 of the Constitution.[29] Likewise, in *Preman*, the

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26 Ammini v Union of India, 1995 SCC Online Ker 47 (Kerala High Court) ("Ammini").

27 Preman v Union of India, 1998 SCC Online Ker 158 (Kerala High Court) ("Preman").

28 P.E. Matthew v Union of India, 1999 SCC Online Ker 126 (Kerala High Court) ("Matthew").

29 Ammini, *supra* note 26, at ¶ 36.

Court concluded that Section 118 of the Indian Succession Act, 1925 discriminated against Christians vis-à-vis non-Christians.[30] In *Matthew*, even though the Court arrived at the conclusion that there was no justification for continuing with a provision like Section 17 when parallel provisions were not found either in the Hindu Marriage Act, 1955 or in the Special Marriage Act, 1954,[31] it did not strike down the provision on the basis that 'personal laws' were not 'law' for the purposes of Part III of the Constitution.[32]

What is notable for our purposes is that in all three decisions, it was the religious identity of a person which was used as a metric to contest the constitutional validity of the laws. The cause of action in every case was framed as being a deprivation of certain benefits to a group of individuals, which was defined by a common religious identity. The Courts too understood religion under Article 15 as religious status, i.e. as membership to a particular religious group. A similar approach was also seen in *Thakur Sheokaran Singh v Daulatram*,[33] wherein the application of the rule of 'Damdupat'[34] was struck down for being discriminatory on the grounds of religion because its benefit could not be availed by Christian or Muslim debtors, but was confined to Hindus.[35]

Moreover, viewing wrongs pertaining to the religious identity of an individual as violations of a guarantee of non-discrimination as opposed to a violation of religious freedom has not been a trend confined only to cases involving personal laws. Courts have even

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30 Preman, *supra* note 27, at ¶ 43-45.

31 Matthew, *supra* note 28, at ¶ 14.

32 ibid [¶ 12].

33 Thakur Sheokaran Singh v Daulatram, 1955 SCC Online Raj 24 (Rajasthan High Court).

34 Damdupat was a branch of the Hindu Rule of Debts, wherein if the debtor was a Hindu, the amount of interest recoverable could not exceed the principal.

35 Thakur Sheokaran Singh v Daulatram, *supra* note 33, at ¶ 13.

arrived at a finding of a violation of Article 15(1) of the Constitution in cases, where public scholarship programmes have been limited to students of particular religious communities[36] or, where honorariums have only been granted to imams and muazzins of various mosques in a state[37] or, where persons professing Islam were disqualified from working as an epigraphist[38] or, where a sub-quota in reservations was carved out for certain minority religions.[39] In all of these cases, the fact that an individual belonged to, or identified with a particular religion, is what led to them suffering a wrong. Examples like these can be multiplied.[40]

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36 Adam Chaki v Government of India, 2012 SCC Online Guj 5439 (Gujarat High Court). The fact that religion was understood as religious status/identity is evident from one of the concluding passages where the Court observes,
"*We have already pointed out that if the Central Government floated a scheme in favour of the students irrespective of religion, the same could be saved but having restricted its benefit only in favour of students of five specific religions, it cannot escape the rigour of Article 15(1) of the Constitution. In these cases, those poorer and meritorious student of a religion not belonging to those five religions, who are now deprived of the benefit, would be entitled such benefit only if they would have belonged to those five religions. Thus, religion is the only reason for which those students are deprived….*"
The Division Bench thereafter referred the questions before it to a Full Bench of three Judges.

37 Bharatiya Janata Party v State of West Bengal, 2013 SCC Online Cal 15870 (Calcutta High Court). In this case, the Court concluded,
"…The State Government cannot spend any money for the benefit of few individuals of a particular religious community ignoring identically placed individuals of the other religious communities since the State cannot discriminate on the ground of religion in view of the Article 15(1) of the Constitution of India."

38 K.P.A. Nallamohamed v Director, Department of Archaeology, 2011 SCC Online Mad 145 (Madras High Court).

39 R. Krishnaiah v Union of India, 2012 SCC Online AP 113 (Andhra Pradesh High Court).

40 In State of Rajasthan v Thakur Pratap Singh [(1961) 1 SCR 222], the constitutional validity of Section 15 of the Police Act, 1861 was in issue. By this provision, Harijan and Muslim members of the community had been exempted from bearing the cost of the police force maintained in the area. The Court held that this was a clear case of discrimination on the basis of religion or caste.
In N Sreedharan Nair v Mottaipatti Chinna Pallivasal Muslim Jamath, [2003 SCC Online Mad 171], the validity of the Madras City Tenants' Protection (Amendment) Act, 1994 was challenged. By virtue of this amendment, an

2. ExplainingContrary Precedents

Based on this survey, it does follow that courts have arrived at an understanding of what 'religion' means when a challenge of direct discrimination is before them. However, there have been instances when courts have not labelled classifications based on religious identities as discrimination. In *Gogireddy Sambireddy v Gogireddy Jayamma*[41], a Hindu husband had impugned the vires of Sections 11 and 17 of the Hindu Marriage Act, 1955 insofar as it prohibited bigamy. It was contended that these provisions violated Article 15(1) of the Constitution. The court however, upheld the vires of the statute. In doing so, there were two strands to the reasoning adopted by the court. *One*, the Hindu Marriage Act was not applicable only to those individuals who adhered to the Hindu religion. Instead, it was applicable to members following other religions as well. Therefore, the classification could not be said to have been based on religion alone.[42] *Two*, the Hindu Marriage Act while introducing monogamy was undoubtedly a social welfare legislation enacted under Article 25(2) of the Constitution. It would therefore be a travesty to hold a statute intended for the benefit of a certain class as discriminating against them.[43]

On the face of it, the first of these reasons appears to be specious in that on the application of a 'but-for' test —but for a man being a Muslim, he would be liable to be punished for bigamy—

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exemption had been granted to all properties owned by religious institutions from the purview of the parent statute. Insofar as the challenge qua Article 15(1) was concerned, the Court dismissed the challenge on the ground that the amendment did not "*discriminate between citizens on the basis of the religion they belong to*". The exemption was granted *en masse* to all religious institutions. Therefore, the Court once again understood 'religion' as the religious status of citizens.

41 Gogireddy Sambireddy v Gogireddy Jayamma, 1971 SCC Online AP 134 (Andhra Pradesh High Court) ("Sambireddy").

42 ibid [¶ 10].

43 ibid.

discrimination is readily made out. Moreover, while the Hindu Marriage Act is admittedly not limited only to followers of Hinduism, it explicitly spells out the religions (such as Buddhism, Jainism and Sikhism) covered within its ambit. Therefore, preferential treatment in favour of a religion was readily made out, and the identification of 'personal laws' as the basis of classification was farcical.

A similar reluctance is also witnessed in in *Srinivasa Iyer v Saraswathi Ammal*.[44] In that case, the challenge was to the prohibition of bigamy in the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949. While upholding the constitutional validity of the statute, the Madras High Court observed, "… *the essence of that classification is not their religion but that they have all along been preserving their personal laws peculiar to themselves which was derived from the smritis, commentaries, custom and usage, in the same manner in which the Muhammadans are subject to their personal law*."[45] Even the opinion of Chagla C.J. in *State of Bombay v Narasu Appa Mali*,[46] adopts a similar refrain. In that case, the challenge was to the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946. While upholding the constitutional validity of the law, Chagla C.J. observed, "….*Now, it is an historic fact that both Muslims and the Hindus in this country have their own personal laws which are based on their respective religious texts and which embody their own distinctive evolution and which are coloured by their own distinctive backgrounds…… Therefore, what the Legislature has attempted to do by the Hindu Bigamous Marriages Act is to introduce social reform in respect of a particular community having its own personal law*."[47]

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44 Srinivasa Iyer v Saraswathi Ammal, 1951 SCC Online Mad 272 (Madras High Court) ("Srinivasa Iyer").

45 ibid [268]

46 State of Bombay v Narasu Appa Mali, 1951 SCC Online Bom 72 (Bombay High Court) ("Narasu").

47 ibid [¶ 12].

In my opinion, the legal reasoning in these cases was specious and thus, they do not deter us from the conclusion which follows from the cases previously examined. This observation is further strengthened when we consider the decision of the Constitution Bench of the Supreme Court in *Shayara Bano v Union of India*.[48] While adjudicating the practice of triple talaq, Khehar CJI and Nazeer J. in a separate opinion observed, "…*There can be no doubt, that the 'personal law' has been elevated to the stature of a fundamental right in the Constitution…. Because, in accepting the prayer(s), this Court would be denying the rights expressly protected under Article 25*."[49] Joseph J. in a concurring opinion held, "*Except to the above extent, the freedom of religion under the Constitution is absolute and on this point, I am in full agreement with the learned Chief Justice. However, on the statement that triple talaq is an integral part of the religious practice, I respectfully disagree.*"[50] While the decision has been critiqued on this point,[51] what does follow is that three out of the five judges agreed on protection of personal laws under Article 25 of the Constitution. If this were so, and personal laws do share a nexus with religious freedom, a classification based on personal laws could easily have qualified as a classification based on religion in both *Sambireddy* and *Srinivasa Iyer*.[52]

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48 Shayara Bano v Union of India, Writ Petition © No. 118 of 2016 (Judgement dt. 22nd August 2017).

49 ibid [¶ 172] (Khehar CJ. And Nazeer J.).

50 ibid [¶ 24] (Joseph J.)

51 Gautam Bhatia, *The Supreme Court's Triple Talaq Judgement*, INDIANCONSTITUTIONAL LAW & PHILOSOPHY (22nd August 2017), https://indconlawphil.wordpress.com/2017/08/22/the-supreme-courts-triple-talaq-judgment/.

52 The contention advanced in this paragraph deals with the scope of the word 'religion'. However, while we debate the scope of that word, it is equally important to remember that the range of cases to which this debate may be applicable is still conditioned by the decision of the Bombay High Court in *Narasu*. Both Chagla C.J. (¶ 15-16) and Gajendragadkar J. (¶ 23) agreed that the phrase 'laws in force' in Article 13 of the Constitution does not include 'personal laws'. Therefore, although the correctness of this decisions has now

Perhaps, a better reason for the court's decision can be found in the second prong of the rationalisation employed in *Sambireddy*, i.e. a prohibition of bigamy was a social welfare measure adopted under Article 25(2). The court was reluctant to adopt a levelling down approach. Only because a social welfare legislation had been enacted for one religious community, and not for the other, did not entail that the former be struck down. There could also be an external explanation for these two decisions. Commentators have observed that one of the reasons why Muslim personal law was not further codified or amended post-independence, around the same time when Hindu personal law was reformed, was owing to a belief that a traumatised post-partition Muslim minority must not be made subject to the decisions of a Hindu majority legislature.[53] The legislators wanted a call for reform to emanate from within the Muslim community. Moreover, in the aftermath of the partition, there was also a political need for accommodation of different communities.[54] Viewed from this lens, the decisions in *Srinivasa Iyer* and *Sambireddy* can also be explained as conscious attempts to not disturb a delicate social balance.

The reluctance to arrive at a finding of a violation of Article 15(1) in case of a distinction based on religious status is also seen in *Squadron Leader Giri Narayana Raju v Officer Commanding 48 Squadron*[55]. In *Raju*, the constitutional validity of a Circular dated 28th March 1970

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been questioned [Sabarimala, *supra* note 25, at ¶ 375-397] a challenge to several customs and uncodified personal laws on the grounds of religion continues to be constrained by *Narasu*.

53 Mohammed Ayoob, *A just and equal code*, THE HINDU (13th October 2018), https://www.thehindu.com/opinion/op-ed/a-just-and-equal-code/article23944012.ece.

54 Justin Jones, *Towards a Muslim Family Law? Debating Muslim women's rights and the codification of personal laws in India*, 28(1) CONTEMPORARY SOUTH ASIA (2020).

55 Squadron Leader Giri Narayana Raju v Officer Commanding 48 Squadron, 1974 SCC Online All 291 (Allahabad High Court) ("Raju").

issued by the Air Headquarters, New Delhi was impugned. Under this Circular, it was made compulsory for all Air Force Personnel to wear crash helmets. However, it was also clarified that this Circular would not apply to Sikh personnel or to others who wore a turban while riding the vehicles covered by the Circular. It was this exemption which was under challenge for being discriminatory. The petitioner had been caught riding a scooter without a crash helmet, and had been reprimanded by the Air Force Officer Commanding-in-Chief of the Central Air Command.[56]

The Court nullified this challenge by stating that the classification carved out by the exemption was between personnel who wore a turban and those who did not.[57] Wearing a turban would not only minimise the risk of a head injury in case of an accident; wearing a helmet along with a crash helmet would be inconvenient.[58] According to the Court, Sikhs wore a turban because it had religious significance for them and this religious sentiment was widely acknowledged. The inclusion of Sikhs in the exemption then was only clarificatory in nature.[59] Therefore, there was no discrimination.

As to the question of religious discrimination, we only have the Court's observation that, "…*on the face of it, the instruction would apply to Sikh personnel driving such a vehicle without a turban as well. But it is not necessary for me to express any final opinion on that point.*"[60] Therefore, the Court consciously steered away from the question of a distinction based on religious status, i.e. between Sikh and non-Sikh individuals, even though it could have examined it. The Court may have done so because the petitioner in this case had not suffered any harm on account of his religious status. A constitutional challenge on the

56 ibid [¶ 2].
57 ibid [¶ 12].
58 ibid [¶ 12].
59 ibid [¶ 11]-[¶ 12].
60 ibid [¶ 12].

grounds of religion was only an afterthought. In the absence of any conclusive finding on the point of religious discrimination, this decision too does not lead us away from the inference that 'religion' for the purposes of direct discrimination has been understood as religious status.

In this regard, one other decision which may need to be explained is that of the Supreme Court in *John Vallamattom v Union of India*.[61] The issue in this case was identical to the one before the Kerala High Court in *Preman* — the constitutional invalidity of Section 118 of the Indian Succession Act on the ground that it barred Christians from making religious or charitable bequests. The Court concluded that there had been a breach of Article 14 of the Constitution. However, as to Article 15, unlike the Kerala High Court, Khare C.J. in a concurring opinion (with which Sinha J. agreed[62]) observed,

> "*So far as the second argument of the learned counsel for the petitioner is concerned, it is suffice to say that Article 15 of the Constitution of India may not have any application in the instant case as the discrimination forbidden thereby is only such discrimination as is based, inter alia, on the ground that a person belongs to a particular religion…In other words, the right conferred by Article 15 is personal. A statute, which restricts a right of a class of citizens in the matter of testamentary disposition who may belong to a particular religion, would, therefore, not attract the wrath of clause (1) of Article 15 of the Constitution of India*."[63]

It is hard to see how the discrimination perpetuated by Section 118 of the Indian Succession Act is not one based on the

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61 John Vallamattom v Union of India, (2003) 6 SCC 611 (Supreme Court of India) ("John Vallamattom").

62 ibid [¶ 46].

63 ibid [¶ 39].

religious membership of an individual. A testator could not make a charitable bequest because of her Christianity.[64] Moreover, the distinction drawn between citizens and class of citizens also appears to be specious in that even if that distinction were to hold true, discrimination against a class of citizens is discrimination against individual citizens as well. However, leaving aside the incorrect application of the principle to the facts, the point remains that the Supreme Court in *John Vallamattom* too understood religion as religious status.[65]

Overall then, even accounting for the cases where courts have not returned findings of a violation of Article 15(1) where a distinction was made basis the religious status of an individual, it would appear that there has been some consensus as to the content of the word 'religion'. While I will address the normative desirability of this position subsequently, it is noteworthy that most, if not all, of these cases involved a claim of direct discrimination. Insofar as indirect discrimination is concerned, there are few precedents that guide us. However, in the ones there are, it appears that litigants have adopted a more capacious understanding of the word 'religion'.

Moreover, intuitively, it also appears that it would be difficult to pitch the cases surveyed in this Part as violations of Article 25. One reason could be that the harm in many of these cases is comparative in nature. A second could be that while a distinction has

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64 The reasoning of the then Chief Justice appears to be shakier when his findings under Article 14 are considered. He had observed (¶ 29) that there was no reason forthcoming from the State to exclude persons professing Christian faith from the purview of charitable bequests.

65 The only contrary viewpoint in this regard emanates from the concurring opinion of Nariman J in *Sabarimala*. Nariman J observed, "*Where the practice of religion is interfered with by the State, Articles 14, 15(1), 19 and 21 would spring into action. Where the practice of religion is interfered with by non-State actors, Articles 15(2) and Article 17 would spring into action.*" (¶21.8). It would appear that Nariman J. espouses a more expansive view of 'religion'.

been drawn on the basis of religious identity, harm was not done to the ability to choose, profess and practice one's religion. Instead, it was caused to other civil rights. Therefore, some of the work vis-à-vis a demarcation between the two fundamental rights has already been done by the precedent on the issue.

Before proceeding to the next Part, it is worth mentioning that the understanding of 'religion' observed in this Part, may be carried forward in several indirect discrimination challenges as well. If, say, in the constitutional challenge[66] to the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020, the fact that an overwhelming number of persons arrested have been of Muslims[67] is used to make out a case of indirect discrimination, 'religion' would be understood as the religious status of being a Muslim. Similarly, if the exclusion of Muslim minorities in the application of the Citizenship (Amendment) Act, 2019 to the population left out of the National Register of Citizens is considered as an instance of indirect discrimination,[68] the understanding of 'religion' for the purposes of this challenge will once again remain unaltered. Therefore, even while considering the content of 'religion' in a handful of indirect discrimination precedent, it is important to realise that the nub of the controversy that needs resolution is not as

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66 Akshita Saxena, *Breaking- Please in Allahabad High Court Challenges UP Government's Ordinance on Religious Conversions 'in the name of love jihad'*, LIVELAW.IN (11th December 2020), https://www.livelaw.in/top-stories/allahabad-high-court-love-jihad-religious-conversions-right-to-marry-life-up-government-ordinance-constitution-freedom-of-religion-pil-167100.

67 *See*: Omar Rashid, *54 arrested in U.P. under unlawful conversion ordinance so far*, THE HINDU (15th January 2021), https://www.thehindu.com/news/national/other-states/54-arrested-in-up-under-unlawful-conversion-ordinance-so-far/article33582567.ece.

68 *SeeShoot the Traitors: Discrimination against Muslims under India's new Citizenship Policy*, HUMAN RIGHTS WATCH (9th April 2020), https://www.hrw.org/report/2020/04/09/shoot-traitors/discrimination-against-muslims-under-indias-new-citizenship-policy.

broad. Moreover, the difference between direct and indirect discrimination is not relevant for the enquiry in this paper. It is only a matter of coincidence. Such a capacious understanding could equally have been witnessed in direct discrimination challenges.

D. A CAPACIOUS UNDERSTANDING OF 'RELIGION'

3. A re-consideration of Precedent

Unlike the cases studied in Part II, there have also been a few where 'religion' has been understood as being 'something more' than just religious status. In fact, when we re-visit these cases, it appears in hindsight that the rights at issue could also be construed as falling within the domain of Article 25. In *Bombay Mutton Dealer Association v State of Maharashtra*,[69] the petitioners were an association of persons involved in the slaughter of animals and the sale of meat products, who were aggrieved by a closure of meat selling shops and a ban on the sale of meat during the Paryushan festival (an annual holy festival of the Jain community). In hindsight, this could have been construed as infringing upon the autonomy of an individual to adopt and follow religious practices, whether it be the performance of sacrifices or the consumption of meat itself.[70] Alternatively, it may be understood as a neutrally worded rule having a disproportionate impact on the religious practice of a particular group or sect. The court in that case though did not frame the issue as a violation of Article 25, but as being a potential violation of Articles 14 and 15 of the Constitution.[71] Therefore, one may infer that the court adopted the alternate understanding.

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69 Bombay Mutton Dealer Association v State of Maharashtra, 2015 SCC Online Bom 6002 (Bombay High Court) ("Bombay Mutton Dealer Association").

70 Given the binding precedent in *Mohd Hanif Quareshi v State of Bihar* [(1959) SCR 629] where the Supreme Court held that the sacrifice of cows during Bakr-Id was not an essential religious practice under Article 25, the petitioners may not have wanted to frame their case as a violation of religious autonomy.

71 ibid [¶ 21].

Similarly, in *P.P. John v Zonal Manager, South Central Zone*,[72] the petitioner was an office assistant in the Life Insurance Corporation of India, and claimed to be a member of the Worldwide Church of God. One of the essential religious doctrines of this sect was that Saturday ought to be observed as a day of Sabbath. Therefore, the Petitioner would apply for a leave on Saturdays with an undertaking to work on Sunday, or to put in extra hours on other days. While this leave was initially granted on a few occasions, the authorities then initiated disciplinary action against the petitioner for continually being absent on Saturdays.[73] It was this disciplinary action which gave rise to the grievance of the petitioner. As in the case of *Bombay Mutton Dealers Association*, the denial of a leave on every Saturday could be categorised as an infringement of the right to freely follow one's religious tenets. Alternatively, it could have been argued that the neutral practice of denying leave on Saturdays constituted indirect discrimination on the grounds of his religion. In this case, when the petitioner eventually approached the court, he not only contended that Article 25 had been violated, but that Articles 14 and 16 had been infringed as well.[74]

In both of these cases, 'religion' was understood as being something more than just 'religious status'. Put otherwise, the equation of 'religion' with 'religious status' does not always suffice. What also happened on such an understanding was that a neat demarcation between Articles 14 through 16 on the one hand, and Article 25 on the other came to be blurred.[75] There was an overlap

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72 P.P. John v Zonal Manager, South Central Zone, 1995 SCC Online AP 261 (Andhra Pradesh High Court) ("P.P. John").

73 ibid [¶ 2].

74 ibid [¶ 7], [¶ 59].

75 On the flip side, there have also been cases wherein although a violation of Article 25 has been alleged, some of the arguments made have been in the nature of indirect discrimination. For instance, in *Abdul Jalil v State of Uttar*

between the two rights. With the decision of the Supreme Court in *Sabarimala*, this overlap is only likely to increase in the future as it may be strategically preferable for litigants to construct their case as a violation of Article 15, even though it may appear to be a violation of Article 25 at first glance.

4. *Sabarimala* & Future Trends

In Part I of this paper, I observed that the text of Article 25(1) makes it subject to the other provisions of Part III of the Constitution, and thereby, *inter-alia* to Article 15 itself. This observation also finds support in the concurring opinion of Chandrachud J. in the *Sabarimala* case, where it was held, "*The subjection of the individual right to the freedom of religion under Article 25(1) to the other provisions of Part III was not a matter without substantive content.*"[76] There are however two additional aspects of the concurring opinion of Chandrachud J. which entrench a weaker status of the fundamental right protected by Article 25(1).

As observed in Part I, the fundamental right guaranteed by Article 25(1) is also subject to 'morality'. The concurring opinion interpreted this word as follows,

> "…. *In defining the content of morality, did the draftspersons engage with prevailing morality in society? Or does the reference to morality refer to something more fundamental? Morality for the purposes of Articles 25 and 26 cannot have an ephemeral existence. Popular notions about what is moral and what is nor are transient and fleeting….. Hence morality for the purposes of*

Pradesh, [(1984) 2 SCC 138], the petitioners were Sunni Muslims who were aggrieved by a direction which had ordered them to shift their graves. While the cause of action was framed as a violation of Articles 25 and 26 of the Constitution, one of the arguments raised was that the "*impugned direction amounts to disproportionate interference with the religious practice of the Sunnis to respect their dead…*". One therefore notices in this contention semblances of an indirect discrimination action.

76 Sabarimala, *supra* note 25,¶ 7, 13 (Chandrachud J.).

> *Articles 25 and 26 must mean that which is governed by fundamental constitutional principles…..*
>
> *… Constitutional morality must have a value of permanence which is not subject to the fleeting fancies of every time and age. If the vision which the founders of the Constitution adopted has to survive, constitutional morality must have a content which is firmly rooted in the fundamental postulates of human liberty, equality, fraternity and dignity….*"[77]

The concept of equality and non-discrimination was thus read into the restriction of 'morality', and thereby, the hierarchy between Articles 14 through 17 on the one hand and Article 25 on the other was reinforced. A reading of the word 'morality' as 'constitutional morality' also finds support in the concurring opinion of Misra CJ and Khanwilkar J.[78] The other notable aspect of the concurring opinion of Chandrachud J pertained to the understanding of Article 26. Interestingly, while the Constitution carries the phrase "*Subject to… the other provisions of this Part*" in the text of Article 25, it is conspicuous by its absence in the text of Article 26. A question therefore arose as to whether or not the right of freedom guaranteed to every religious denomination to manage its own religious affairs was subject to the other provisions of Part III of the Constitution. Following the opinion of Chandrachud J, this question may now be answered in the affirmative. The learned Judge observed,

> "*…In omitting the additional stipulation in Article 26, the Constitution has consciously not used words that would indicate an intent specifically to make Article 26 subordinate to the other freedoms. This textual interpretation of Article 26, in juxtaposition with Article 25 is good as far as it goes. But does that by itself lend*

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77 Sabarimala, *supra* note 25, ¶ 11, 12 (Chandrachud J.).

78 Sabarimala, *supra* note 25, ¶ 106-111 (Misra CJ and Khanwilkar J.).

credence to the theory that the right of a religious denomination to manage its affairs is a standalone right uncontrolled or unaffected by the other fundamental freedoms? The answer to this must lie in the negative…..

… Thus, the absence of words in Article 26 which would make its provisions subordinate to the other fundamental freedoms neither gives the right conferred upon religious denominations a priority which overrides other freedoms nor does it allow the freedom of a religious denomination to exist in an isolated silo…..

Once Articles 25 and 26 are read in the manner in which they have been interpreted, the distinction between the articles in terms of the presence or absence of a clause of subjection should make little practical significance to the relationship between the freedom of religion with the other freedoms recognized in the fundamental rights. If the Constitution has to have a meaning, is it permissible for religion – either as a matter of individual belief or as an organized structure of religious precepts – to assert an entitlement to do what is derogatory to women? Dignity of the individual is the unwavering premise of the fundamental rights…".[79]

Based on these observations, one may reasonably infer that the hierarchy that exists textually *inter se* Articles 14 through 17 and 25, with the former prevailing over the latter, extends to Article 26 as well. Even if that inference is found to be unacceptable, it may, at the very least, be argued that Article 26 cannot prevail over Articles 14 through 17, and any conflict arising between the two sets of rights must be harmoniously resolved on a case to case basis. This was the proposition emanating from the concurring opinion of Nariman J.[80]

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79 Sabarimala, *supra* note 25, ¶ 13, 14, 15 (Chandrachud J.).

80 Sabarimala, *supra* note 25, Fn. 2, p. 53 (Nariman J.).

What we are concerned with though is the implication of this decision on the legal strategies adopted by litigants. Litigants may increasingly want to frame an infringement of their religious rights as a violation of Article 15 as opposed to Articles 25 and 26. To consider this point, let us suppose for a moment that the case facts of *Islington London Borough Council v Ladele*,[81] arose in India. In this case, the claimant was a registrar of births, deaths and marriages. Following the enactment of the Civil Partnership Act, 2004, she had been required by her employer to conduct civil partnerships between persons belonging to the same sex. She refused to do so on the ground that she considered same sex unions to be contrary to her Christian beliefs. This refusal invited disciplinary action against her on the ground that it violated the local authority's equality and diversity policy. Similar facts arising in India is not beyond the realm of contemplation.

In at least two cases — one before the Delhi High Court[82] and one before the Kerala High Court[83] — same sex couples have been denied a registration/solemnisation of their marriage under the Special Marriage Act, 1954. In both these instances, the constitutional validity of the statute to the extent that it excludes same sex marriages has been impugned. Even if one of these courts were to read down the provisions of the Special Marriage Act, 1954, a similar objection to the one raised in *Ladele* being raised by a marriage officer discharging duties under the Special Marriage Act is not implausible. A marriage officer could contend that registering same sex marriages was contrary to their religious beliefs, and thus, they could not be compelled to do so statutorily.

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81 Islington London Borough Council v Ladele, [2010] 1 WLR 955 (Court of Appeal) ("Ladele").

82 Vaibhav Jain v Union of India, W.P. (C) No. 7657/2020 (Delhi High Court).

83 Nikesh P.P. v Union of India, W.P. (C) No. 2186/2020 (Kerala High Court).

Should such a marriage officer frame her grievance as a violation of Articles 14 and 15, or of Article 25? Ordinarily, one might suppose that the right at play here is covered by Article 25. By being compelled to register a marriage contrary to her religious beliefs, the marriage officer would be prevented from practising her religion, and thus, her right to freedom of religion would be violated. However, as Article 25 is subject to other the provisions of Part III, as also acknowledged by Chandrachud J., this right would be subject to the same sex couple's right against non-discrimination. Moreover, following the decision in *Sabarimala*, the ambit of the right would also be curtailed by constitutional morality, a facet of which is the equality and dignity of all individuals. From a strategic point of view thus, the marriage officer's chances of success under Article 25 would be limited.

She may thus try and frame her cause of action as an infringement of Articles 14 and 15. Under these provisions, she would have two options. She could either contend that 'but for' her religious beliefs no disciplinary action would have been taken against her and therefore, a case of direct discrimination under Article 15 was made out. However, this argument would not pass muster if the local authority had initiated, or was willing to initiate, disciplinary action against all employees refusing to perform same sex unions irrespective of their religion.[84] Alternatively, she could contend that the seemingly neutral policy of requiring all marriage officers to solemnise marriages of all couples under the Special Marriage Act, 1954 had a disproportionate impact on those people whose religious beliefs proscribed same sex unions. This argument does seem plausible. Moreover, as seen previously, after *Nitisha* in cases of indirect discrimination, the State would have to show that no less

84 *See* Opinion of Lord Neuberger in Ladele, *supra* note 81, at ¶ 39.

restrictive alternative was available.[85] Therefore, post-*Sabarimala*, a litigant would in fact want to frame their cause of action as one of indirect religious discrimination so as to increase their chances of success.

In fact, even in cases such as *P.P. John*, a litigant might favour pressing indirect discrimination — the neutral practice of requiring employees to work every Saturday imposing a disproportionate burden on followers of the Worldwide Church of God —as the primary ground of challenge. Similarly, if cases such as *Mohammed Fasi v Superintendent of Police*[86]— a case where Muslim head constable was denied permission to sport a beard in light of Standing Orders requiring a clean shaven face[87] — were to arise today, petitioners might consider framing the issue as one of indirect discrimination for similar reasons. The short point that emerges therefore is that there is a real likelihood of the contents of 'religion' under Articles 25 and 26 being subsumed into 'religion' under Articles 14 through 16, in order to circumvent the weaknesses inhering in the former set of provisions. Moreover, this is especially likely to happen in cases of indirect discrimination.[88] Given a dearth of indirect discrimination claims involving religion though, it is not possible to conduct a descriptive study of instances when 'religion' may have been

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85 Nitisha, *supra* note 18, at ¶ 70.

86 Mohammed Fasi v Superintendent of Police, 1985 SCC Online Ker 26 (Kerala High Court).

87 ibid [¶ 19]-[¶ 21].

88 As argued previously, this issue is less likely to arise in cases of direct discrimination because the wrong meted out in those cases is usually a comparative wrong based on membership to a religious group, or is a wrong caused to other civil rights using religious identity as a marker of differentiation. However, this is not to say that there cannot be cases where religious practices are not used a proxy to distinguish on the basis of religious membership. Even if those cases were to arise, the content of the word 'religion' as unpacked for indirect discrimination, should equally apply for direct discrimination actions as well.

understood more capaciously. This paper will now therefore turn to the scholarly debate on the issue to discern whether an answer can be culled out.

E. SEARCHING FOR AN ANSWER IN SCHOLARSHIP

1. Religion as 'Identity'

In the context of similar decisions by the Court of Justice for the European Union and the European Court of Human Rights,[89] Ronan McCrea observes that if every kind of religious belief were allowed to be protected by indirect discrimination law, the compelling nature of the unique disadvantages protected by that law would be hard to see.[90] While limiting the protection offered by discrimination law to a select category of cases may also be harmful in that several legitimate grievances may remain unaddressed, it would be more detrimental to the objectives of discrimination law if every deeply felt belief were accommodated.[91] According to McCrea, the protection offered by a prohibition of religious discrimination should be limited only to identity-based wrongs. Practically, this might also add to the legitimacy of the relief claimed, and increase the chances of success.[92] The practical dimension in favour of this view is also brought to the fore by Thornton and Luker.[93] On perusing religion as a ground in the Australian context, Thornton and Luker observe that when religion is regarded as a fixed identity, it is more readily recognised as a basis for discriminatory treatment.[94] In other words, it is easier for a judge to 'see' discrimination when religion is

89 Ronan McCrea, *Singing from the Same Hymn Sheet? What the differences between the Strasbourg and Luxembourg Courts tell us about Religious Freedom, Non-Discrimination and the Secular State*, 5(2) Oxford Journal of Law and Religion 1 (2016).

90 ibid [8].

91 ibid.

92 ibid.

93 Margaret Thornton and Trish Luker, *The Spectral Ground: Religious Belief Discrimination*, 9 MACQUARIE LAW JOURNAL 71 (2009).

94 ibid [79].

understood only as a person's religious status. There is greater ambivalence in legal responses when one enters the domain of religious practices.[95]

It appears that McCrea, Thornton and Luker would espouse the standard adopted by Indian courts in discrimination challenges, and contend that it be adopted even in those cases where 'religion' may be understood by litigants as something more than just 'religious status'. In fact, one finds a normative justification of the standard adopted in our precedent in the more recent works of Khaitan and Norton.[96]

Concerned with the theoretical distinction between the right of religious freedom and the right of protection against religious discrimination, they sum up the argument they seek to advance as,

> "*Religious freedom is concerned with protecting an interest in our ability to (not) adhere to our religious commitments. The right against religious discrimination is concerned with a separate interest in ensuring that our religious group does not suffer relative sociocultural, political, or material disabilities in comparison with other religious groups*."[97]

To make this argument, they first examine the notion of religious adherence itself. They contend that from the viewpoint of an (non)adherent, religion has two components. The first is that of 'belief', or what is otherwise referred to as *forum internum*,[98] and the second is the performative side, or *forum externum*.[99] Moreover, Khaitan and Norton are not concerned with every possible religious

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95 ibid.

96 Tarunabh Khaitan and Jane Calderwood Norton, *The right to freedom of religion and the right against religious discrimination: Theoretical distinctions*, 17(4) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1125 (2019).

97 ibid [1145].

98 ibid [1131].

99 ibid [1132].

adherent, but with a committed interest. A committed perspective of religious adherence, they say, helps avoid the pitfalls of (i) the overinclusion of just about any ideology, belief or practice, (ii) an under-inclusion of dissenting and heterodox religions, and (iii) the exclusion of atheism or agnosticism.[100]

After having examined a committed perspective of religious adherence, Khaitan and Norton proceed to analyse what they term as a non-committal perspective. According to them, a non-committal perspective does not focus as much on the adherence to a religion but on the membership to a group. All members of a religion need not necessarily adhere to its tenets.[101] From this perspective, an external, sociological reality defines the religious group.[102] Not only that, this perspective also tracks the social and economic costs that are saddled onto the membership.[103] A good example of the non-committal perspective was seen in the case of *Raju*, when the Allahabad High Court identified that there may be certain Air Force personnel who may be Sikhs (i.e. belong to a religious group), but not wear a turban (i.e. not be religious adherents). In that case, the exemption granted to Sikhs not wearing a turban might have still classified as discrimination on the basis of religion.

Having drawn a conceptual difference between a committal and non-committal perspective, Khaitan and Norton argue that freedom of religion and the right against religious discrimination track different interests. Freedom of religion is valuable because it protects the decisional autonomy in matters of religious adherence.[104]

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100 ibid [1132]-[1133].
101 ibid [1133].
102 ibid [1134].
103 ibid [1135].
104 ibid [1137].

In a companion work,[105] they contend that the scope of the freedom of religion is very broad, and that when deciding whether or not a belief merits protection, a court must only be concerned with whether the belief is plausible and sincere.[106]

As to the right against religious discrimination, they contend that the rationale for this right must be found in the prohibition of discrimination more generally. Since redressing current or historical group disadvantages lies at the heart of discrimination law, the main purpose for regulating religious discrimination cannot be to protect individual religious adherence.[107] Instead, it is non-committal religious group membership that lies at the heart of discrimination law.[108]

Khaitan and Norton's work thus is of immense explanatory value in that they provide a normative justification for the standard adopted in Indian case law. A non-committal perspective helps understand why Indian courts have understood religion as 'religious status' in discrimination challenges. As seen in the cases examined in Part II, the harm suffered by the litigants was often in terms of their civil or non-religious rights — what Khaitan and Norton would define as "*sociocultural, political, or material disabilities*"[109] associated with membership to a religious group. Therefore, to focus only on rights emanating from religious adherence under discrimination law would not capture these harms. However, as observed previously, the realm of controversy though in Indian precedent may lie elsewhere.

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105 Tarunabh Khaitan and Jane Calderwood Norton, *Religion in Human Rights law: A normative restatement*, 18(1) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 111 (2020).

106 ibid [114].

107 Khaitan and Norton, *supra* note 96, at p. 1142.

108 ibid [1143].

109 *Id.*, at p. 1145.

2. Religious 'Membership' does not provide all the answers

The question that comes to the fore in cases such *Bombay Mutton Dealers Association* (the closure of meat-selling shops case) and *P.P. John* (the case where an employee who was not allowed to observe Sabbath on Saturdays), and that might arise if a situation akin to *Ladele* were to confront us, is the very opposite. To what extent should courts accommodate aspects of religious adherence in the content of the word 'religion' under discrimination? Put differently, the question pertains to the extent to which religious practices or manifestations of religious beliefs ought to be protected by discrimination law. It is this question, one which lies at the juncture of the right to religious freedom and the right against religious discrimination, that might pose a challenge to our courts and that needs some resolution. Unfortunately, Khaitan and Norton do not help answer it.

This is so for a couple of reasons. *Firstly*, it is not always possible to pigeonhole the rights violated into religious adherence and religious membership. We can consider the example of the Muslim woman who was asked to remove her niqab. From a committed perspective, it plausible to contend that her decisional autonomy as regards following a religious practice was violated. From a non-committal perspective, she was adversely affected because of her status as a Muslim. Her interest in the membership of the group was affected. *Secondly*, in cases of an overlap it is not always possible to accord primacy to one of the two rights in a given fact scenario. Being able to discern that, "the primary right violated in the facts of this case is X", might help a Judge ascertain the standards to be applied to adjudicate the case at hand. In the same example of the witness wearing a niqab, it is difficult to conclusively assert as to

which of the two wrongs assumes primacy. While the distinction between religious adherence and religious membership explains a substantial portion of the Indian precedent on the issue, it does not take a Judge faced with a petition by a woman asked to remove her niqab much further.

Khaitan and Norton might argue that a petitioner in such case would have to show that the disadvantage was suffered by other members of her religious group as well.[110] If that threshold were cleared, the wrong caused would be in terms of a disability or a cost attached to religious membership and not merely religious adherence. However, following the decision in *Nitisha*, where the Supreme Court has cautioned against an over-reliance on statistical evidence and has consciously avoided laying down a quantitative threshold before indirect discrimination is made out,[111] it is doubtful if courts would require petitioners to prove that harm was suffered by other Muslim women as well. On the contrary, it might be inclined to presume that several other similarly placed Muslim women may face a similar hurdle in complying with their religious tenets. Therefore, at least in India, a quantitative threshold is of little assistance in demarcating instances of religious adherence from religious membership.

In any case, it may now not be apposite to say that primary aim of discrimination law in India is to only redress relative group disadvantage. In *Nitisha*, the Supreme Court has signalled a shift towards substantive equality, as the primary objective of discrimination law.[112] One of the prongs of the substantive equality model, as proposed by Fredman,[113] is the need to accommodate

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110 *Id.*, at p. 1144. While admitting that the bar is high, they say that it is unavoidable in that discrimination law is unavoidable.

111 Nitisha, *supra* note 18, at ¶ 68.

112 *Id.*, at ¶ 44, 45.

113 Sandra Fredman, '*Substantive Equality Revisited*', 14(3) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 712 (2016).

difference and achieve structural change. Accommodating difference necessarily means that individuals who do not conform with a group norm are not left out of the protection offered by discrimination law. With such an objective, it would be even more difficult for a judge to emphasize on the requirement to prove that several other members of the religious group had been adversely affected. Therefore, 'religious membership' does not by itself help resolve cases involving an overlap between religious freedom and religious discrimination.

Having said that, it is important to acknowledge that Khaitan and Norton are themselves cognizant of these shortcomings. They state their primary purpose to be to carve out a distinct normative justification for the right to religious freedom and the right against religious discrimination.[114] Even in a subsequent work, while spelling out that the two rights might overlap, they only contend that the scope of the latter ought to be narrower.[115] They add that in an overlap, if an instance of indirect discrimination is justifiable, an infringement of religious freedom too would stand justified because the former is usually subject to a higher level of judicial scrutiny.[116]

3. Should we protect every religious belief?

A different perspective on the controversy that might exist in Indian discrimination law vis-à-vis the scope of 'religion' is provided by Lucy Vickers.[117] Vickers, while studying religion at the workplace in the United Kingdom, says that the freedom of religion and the protection from discrimination on the grounds of religion are closely linked. For a meaningful enjoyment of autonomy, equality and dignity, protecting both these rights is equally important.[118] For the

114 Khaitan and Norton, *supra* note 96, at p. 1144.
115 Khaitan and Norton, *supra* note 105, at p. 129.
116 ibid [128].
117 Lucy Vickers, RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE (2008).
118 ibid [43].

present paper though, it is Vickers' understanding of indirect discrimination that is of some significance. In the context of workplace discrimination, she says that indirect discrimination tracks the difficulties experienced by some groups in complying with what appear to be neutral requirements on account of their religious beliefs.[119] These beliefs, Vickers says, need not be shared by a minimum number of adherents to be protected. According to her, freedom of religion can be accorded maximum protection if beliefs held by even individual adherents are safeguarded.[120] Courts should focus on whether it would be proportionate to require defendants to accommodate such beliefs rather than on whether the belief merits protection.[121]

Although Vickers' suggestion is attractive in that it (i) helps realise the objective of accommodating difference in a substantive equality model, and (ii) focusses on the difficulties imposed on following religious tenets by neutrally worded rules, it has a few shortcomings. It would blur the difference between Articles 14 through 16 on the one hand, and Article 25 on the other. Even though the Constitution accords greater leeway to the State to restrict religious freedom, the State may have to satisfy a slightly higher threshold to justify its measures in a discrimination challenge. In a case like *Ladele*, in response to a marriage officer's claim, the State could simply have argued that her right to religious freedom was subject to Articles 14 through 16. By understanding religion in discrimination law capaciously, the State may have to justify that there was no less discriminatory alternative available. The State's ability to enact certain types of legislations may be curtailed.

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119 ibid [126]-[127].

120 ibid [130].

121 Lucy Vickers, *Religious Discrimination in the Workplace: An emerging hierarchy*, 12(3) ECCLESIASTICAL LAW JOURNAL 280, 289 (2010).

The other problem is the one that McCrea identifies. Expanding the scope of religion to include 'every' religious belief might dilute the force of discrimination law. The problem is one of moral equivalence. A disproportionate impact of the Freedom of Religion Ordinance, 2020 on Muslims in terms of arrests may differ in its moral colour from a case like *Ladele*. According the same protection to both, might lower the moral force underlying the act of labelling the former as discriminatory. McCrea therefore contends that it is preferable to relegate some cases to the realm of religious freedom, even if at times that means not fulfilling some of the goals of discrimination law.

From a survey of the scholarly debate on the issue, we are thus left with two imperfect solutions. One is to understand religion only as the religious status of an individual, and the other is to understand it so capaciously that it includes every religious belief. However, before commenting on whether one of these solutions ought to be picked, it might be of some importance to consider a third alternative as well.

F. ESSENTIAL RELIGIOUS PRACTICE: IS THIS THE ANSWER?

The 'essential religious practices' ("ERP") test has till date only been confined to challenges under Articles 25 and 26 of the Constitution. In this Part, I consider whether it can provide a viable alternative to unpack the contents of 'religion' in some of the penumbral cases. One of the earlier iterations of the ERP test as we know it today can be traced back to the decision of the Supreme Court in *Durgah Committee, Ajmer v Syed Hussain Ali*.[122] Gajendragadkar J. speaking for a Constitution Bench observed,

[122] Durgah Committee, Ajmer v Syed Hussain Ali, (1962) 1 SCR 383 (Supreme Court of India) ("Durgah Committee").

> "*Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular services which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26*."[123]

The Court therefore stated that it was not enough for a practice to be considered as religious in nature, it must also be an essential and integral part of the religion. In *Tilkayat GovindlaljiMaharaj v State of Rajasthan*,[124] the Court elaborated on how a religious practice could be construed as being essential or integral. It observed,

> "*In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress….. In cases where conflicting evidence is produced in respect of rival contentions as to the competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice in an integral part of its religion, because the community may speak with more than one voice and formula would, therefore, break down. The question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an*

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123 ibid [¶ 33].

124 Tilkayat Govindlalji Maharaj v State of Rajasthan, (1964) 1 SCR 561 (Supreme Court of India).

> *integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and tenets of its religion*".[125]

To sum up, the Constitution only accorded protection to practices that were an essential or integral part of the religion. To determine whether or not a practice was essential, courts would consider the tenets of the religion and the 'conscience of the community'. Subsequently,[126] the Court also clarified 'what' would classify as 'essential. A practice would be essential if the nature of the religion would change without it.[127]

If the apprehension with the approach propounded by Vickers is that it might dilute discrimination law, the ERP test might be an alternative to address this concern. By adopting such a test, a court might be able to strike a balance between accommodating difference and not diluting the moral legitimacy of the law. The 'essentiality' requirement would ensure that discrimination law was only concerned with the core components of a religion, and thus, it was *indeed* the religiosity of an individual which was used to perpetuate disadvantage, stereotypes or harm. However, this is not to say that the ERP test does not raise its fair share of concerns.

Gautam Bhatia has lucidly argued how the ERP test is founded on a misinterpretation of the precedent in *Commissioner, Hindu Religion Endowments v Lakshmindra Thirtha Swamiar of Sri Shirur Matt*[128] and in *Ratilal v State of Bombay*.[129] According to Bhatia, the

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125 ibid [¶ 57].

126 Commissioner of Police v Acharya Jagdishwaranand Avadhuta, (2004) 12 SCC 770 (Supreme Court of India).

127 ibid [¶ 9].

128 Commissioner, Hindu Religion Endowments v Lakshmindra Thirtha Swamiar of Sri Shirur Matt, 1954 SCR 1005.

129 Ratilal v State of Bombay, 1954 SCR 1035.

proposition emanating from these judgements which preceded *Durgah Committee* was that courts should concern themselves with enquiring whether a practice was essentially religious in nature as opposed to being essentially secular. These two decisions did not stand for a test which says that courts should determine whether a practice was an essential part of the religion itself or not.[130] Following Bhatia's critique, one may then argue that 'religion' under Articles 25 and 26 ought to be understood so broadly as to include any religious belief sincerely held. The protection offered by the Constitution should not only be confined to ERP.

The criticism of ERP though, runs deeper. Prof. Faizan Mustafa and Jagteshwar Sohi have contended that the ERP test deprives religious adherents of a constitutionally guaranteed right of freedom of conscience, and leads to the court effectively playing clergy.[131] According to them, the fallout of the ERP has been that even though the Constitution guarantees to each individual the autonomy to follow their conscience and to entertain religious beliefs of their choosing, this autonomy seemingly has no value outside the foundational text.[132]

To illustrate the issues that flow from the court adorning the role of a clergy, they take the example of a case before the Bombay High Court[133] where members of a particular sect claimed that capturing and worshipping cobras during the Naga Panchami festival

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130 *See* Gautam Bhatia, *Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution* (Working Paper, 29th February 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2739235.

131 Faizan Mustafa and JS Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, BYU LAW REVIEW 915, 925 (2017).

132 *Id.*, at 937.

133 Gram Sabha of Village Battis Shirala v Union of India, W.P. (C) No. 8645/2013 (Decided on 15th July 2014) (Bombay High Court).

was an essential part of their religion.[134] While the petitioner relied on a local religious text (Shrinath Lilamrut), the Court considered the general religious texts of Hindus (Dharma Shastras) and concluded that the practice was not essential.[135] A similar trend was also seen in *Fasi*. As mentioned previously, in this case, a police officer had impugned a decision refusing him permission to sport a beard. While the petitioner relied on the Hadiths of Sahih Al Bukhari, the court emphasised on how he had not able to point out any such requirement in the Quran.[136] Interestingly, the State had cited instances of prominent Muslim dignitaries not sporting beards as evidence of its non-essentiality.[137] In both these cases, the court externally defined what counted as religious and this definition was contrary to the beliefs of the petitioners themselves.

Fasi, in fact, is a classic example of a case where a petitioner might want to adopt a capacious understanding of 'religion' and frame the cause of action as indirect discrimination instead of a violation of religious freedom. Therefore, if the ERP test were to be imported into discrimination law, the issues associated with the court playing clergy might plague this jurisprudence as well. Inconsistency and unpredictability in adjudication, and a lack of clarity on what counts as evidence,[138] is only a part of the problem. It is the court externally defining what amounts to 'religious'[139] which may prove to be counter-productive. Our quest to expand the contours of 'religion' beyond 'religious status' is partially motivated by a desire to accommodate difference. If in the process of implementing the ERP

134 ibid [¶ 13].
135 ibid [¶ 14].
136 Fasi (n 86) [¶ 7].
137 ibid [¶ 6].
138 Rajeev Dhavan, *Religious Freedom in India*, 35(1) THE AMERICAN JOURNAL OF COMPARATIVE LAW 209, 223 (1987).
139 Bhatia (n 130).

test, the court substitutes a petitioner's idea of religiosity with what its own understanding the same, it may result in eradicating as opposed to accommodating difference. Not to mention, the autonomy to define one's conscience may itself be denuded.

Overall, then, we are left with three imperfect solutions. The *first* is to emphasize that 'religion' in discrimination only refers to the 'religious status' of an individual. The *second* is to accommodate religious beliefs within the fold of discrimination law, but only those which cross the ERP threshold. The *third* is to accommodate every sincerely held religious beliefs. Each one of these solutions is imperfect, and has its own set of pitfalls. According to me, a choice amongst one of these three choices may boil down to a process of elimination wherein the option which best advances the objectives of discrimination law is selected.

If we were to insist that a petitioner must have suffered a comparative wrong or have been deprived of certain material benefits on account of religious identity, an artificial divide may have to be carved out between religious adherence and religious membership. Given the difficulty in carving out such a distinction and the fact that the case might touch upon the religious beliefs of an individual, the sequitur might be that cases that need courts to make such a distinction are relegated to the realm of religious freedom only. Protection under discrimination law would be barred. This outcome would certainly not advance the objectives of discrimination law. On the other hand, as has been examined previously, emphasizing on an ERP requirement would not only denude the autonomy of an individual to follow their conscience, but also lead to the court substituting an individual's understanding of religion with its own. If one of the objectives of discrimination law were to accommodate difference, an ERP requirement might be counterproductive. Given

that these alternatives mitigate rather than advance the objectives of discrimination law, we would, in my opinion, have to discard them.

Therefore, for the want of a better alternative, courts might have to understand 'religion' capaciously enough in cases lying at the penumbra to include every sincerely held religious belief. Admittedly, this will not stem the strategic circumvention of Article 25 by litigants. It might also blur the distinction, at least in some cases, between Articles 14 through 16 on the one hand, and Article 25 on the other. However, in my opinion, the benefits of expanding the scope of discrimination law might outweigh the costs of these consequences.

G. CONCLUSION

In this paper, I have sought to conduct an enquiry as to the meaning of 'religion' as a ground of discrimination. On studying the precedents on religious discrimination, I concluded that our courts have done this exercise to a large extent. They have understood 'religion' as being the religious identity or status of an individual. They have not confined the scope of protection offered only to religious adherence. Khaitan and Norton provide a sound normative justification for such a choice of standards. Individuals are often saddled with civil, social and political disabilities on the basis of their membership to a religious group. This membership could be by birth or by law. It need not necessarily be contingent on how devoutly one believes in the religion's tenets. While most of our precedents involved direct discrimination claims, I have argued that this understanding would apply to several indirect discrimination challenges as well.

The nub of the controversy in India is instead likely to arise in a few cases where 'religion' is understood as being something more than the 'religious status' of an individual, and is understood to

include 'religious practices' and 'rituals' as well. Moreover, this problem might only balloon in the future, as litigants try to strategically circumvent Article 25, and pitch their case under Articles 14 through 16 of the Constitution. The latter set of articles offer a stronger protection. In this paper, I have thus examined three possible alternatives which might help resolve the problem. My opinion is that none of these alternatives are ideal solutions. However, for the want of a better option, in these penumbral cases, we might, at the moment, have to understand 'religion' so capaciously as to include every sincerely held religious belief. The consequences of such an approach too will have to be accepted as is.

RATIONALITY BY ANY OTHER NAME: COMMON PRINCIPLES FOR AN EVOLVING EQUALITY CODE

Lalit Panda[*]

Abstract

Jurisprudence on the right to equality in India suffers from a specific kind of inconsistency: a tendency to reinvent itself from time to time without accounting for the existing principles articulated under the right or clarifying the nature of the relationship between new and old principles. Ultimately, this creates considerable uncertainty regarding the outcomes of specific cases in which the right is applied, even when the stakes are high and the questions uncomplicated. This article examines the background and developments related to two emerging doctrinal trends in the form of the manifest arbitrariness test and the application of the principle of substantive equality to discrimination law. It finds that the former fails to bring to order the legacy of incoherence underlying the doctrine of arbitrariness and the latter, while along the right lines, remains inadequate and partly under the thrall of textual limitations. The relation between the two is also entirely unclear and, crucially, non-arbitrariness as a rationality-based principle may be incompatible with core aspects of non-discrimination. To resolve these issues, the article attempts to integrate the doctrines into a common set of principles regarding how questions of "relevance" are to be answered in determining the constitutionality of particular classifications and distributions. In doing so, it proposes a broader conception of rationality under equality law than has traditionally been attributed to the term,

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arguing for the mandatory relevance of other constitutional values in applying the right to equality and suggesting interpretative strategies to avoid the textual limitations in the non-discrimination provisions.

I. Introduction: The Trouble with Reinvention

Criticism of and popular resistance against the Citizenship (Amendment) Act, 2019 ("CAA") has generally had one feature in common: heavy reliance on the right to equality under the Indian Constitution. The CAA explicitly differentiates on the basis of religion in offering relaxed eligibility for citizenship by naturalisation. When critics have relied on the principle of secularism to argue against the law's constitutionality, they have relied not so much on the principle's connection to religious freedoms as they have on its equality component.[1] The objections to the law have been firmly rooted in a conception of non-discrimination. And yet Article 15, the specialised protection against discrimination, remains applicable explicitly (and inexplicably, one may add) only to citizens.[2] Whether or not it is considered applicable, proponents of the CAA are quick

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1 See, for example, Farrah Ahmed, 'Arbitrariness, subordination and unequal citizenship' (2020) 4(2) Indian Law Review121, 122 ("The Act denies people their constitutionally-protected entitlement to *equal* freedom of conscience and religion."); Editorial, 'India's citizenship bill puts secularism at risk' *Financial Times* (London, 11 December, 2019), <https://www.ft.com/content/8e5bf5a2-1c34-11ea-97df-cc63de1d73f4> accessed 6 June 2021; Alok Prasanna Kumar, 'Citizenship (Amendment) Act: An unconstitutional Act' *Deccan Herald* (Bangalore, 2021) <https://www.deccanherald.com/specials/sunday-spotlight/citizenship-amendment-act-an-unconstitutional-act-785638.html> accessed 6 June 2021. That this is the understanding of secularism at stake is also clear from the analysis in Abhinav Chandrachud, 'Secularism and the Citizenship Amendment Act' (2020) 4(2) Indian Law Review 138.

2 Chairman, Railway Board v. Chandrima Das (2000) 2 SCC 465, at para.28; Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Additional Collector of Customs, AIR 1964 SC 1140, at para.35.

to point out that merely classifying on the basis of religion doesn't make a law unconstitutional.[3]

The schism underlying opposing views on the CAA is a direct result of the fact that a classification that should be tested under a specialised guarantee against religious discrimination under Article 15 somehow now seems to be subject only to a general equality guarantee under Article 14. This incongruous situation suggests that faith in the Constitution's Equality Code may be misplaced to the extent that India's equality jurisprudence is in disarray. Since some years now, scholarship has been emphasising that Article 14's current protections are weak,[4] and such observations seem to be bolstered by the fact that those who challenge the CAA on Article 14's terms feel compelled to expand upon and extend its principles.[5] Faith placed in the Constitution's promise mingles here with doubt regarding whether the promise will be kept by our courts.

It would be one thing if India's non-discrimination jurisprudence under Articles 15(1), 16(2) and 29(2) was robust enough to be readily extended to Article 14. But it isn't so either: these provisions have long been interpreted in a way that minimises protection from discriminatory state action and maximises the scope for the justification of such action.[6] The peculiar Indian

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3 Harish Salve, 'CAA is necessary: Why the many arguments about its being unconstitutional don't hold water' *The Times of India* (2020), <https://timesofindia.indiatimes.com/blogs/toi-edit-page/caa-is-necessary-why-the-many-arguments-about-its-being-unconstitutional-dont-hold-water/> accessed 6 June 2021.

4 Tarunabh Khaitan, 'Equality: Legislative Review under Article 14' in S. Choudhry et al (eds) *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016); Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins, 2019), Chapter 2.

5 Ahmed (n 1).

6 Shreya Atrey, 'Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15' (2016) 16 The Equal Rights Review 160; Bhatia (n 4), Chapter 1; Shreya Atrey and Gauri Pillai, 'A feminist rewriting of *Air India v. Nergesh Meerza* AIR 1981 SC 1829: proposal

understanding of secularism adds to these troubles: what legal conception of non-discrimination would explain relative hostility towards religious classification on questions of citizenship alongside relative acceptance of such classification in other areas of governance?[7] And does our Constitution's specific commitments towards affirmative action suggest that such action can be extended to communities not specifically named?[8] Can the principle be extended to persecuted minorities in other countries?[9]

The space available here is insufficient to arrive at complete answers to these questions, and while the controversy over the CAA is a bright signal that there is a deeper malaise at play, an appraisal of its constitutionality is also not the objective here. Instead, this article is aimed at a different problem. Indian equality jurisprudence suffers from a peculiar kind of inconsistency: a tendency to reinvent itself by breaking from the past instead of growing out of it. This desire to start from scratch was on display in the formulation of the

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for a test of discrimination under Article 15(1)' (2021) Indian Law Review (forthcoming) (copy on file with the author).

7 Tarunabh Khaitan, 'Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement' (2008) 50(2) Journal of the Indian Law Institute 177, at 178-179, fn.5 and 193 ("[A] powerful article 15 cannot co-exist with religion-based and gender-unjust personal laws."); Donald Eugene Smith, *India as a Secular State* (Princeton University Press, 1963), 116-117 ("While the existence of different personal laws contradicts the principle of non-discrimination by the state contained in article 15(1), the Constitution itself contradicts this principle in dealing with the problems connected with the caste system."). See, generally, Ronojoy Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court* (Oxford University Press, 2019).

8 Bhatia (n 4) at 103-107. `

9 V. Muraleedharan, Minister of State in the Ministry of External Affairs, Answer to Unstarred Question No. 2925 (March 19, 2020), <https://mea.gov.in/rajya-sabha.htm?dtl/32576/QUESTION+NO2925+CONCERNS+OVER+CITIZENSHIP+AMENDMENT+ACT> accessed 6 June 2021 ("Interlocutors also understand the Indian position that the Citizenship Amendment Act 2019 is an affirmative action meant to address the long standing predicament of the vulnerable sections living in India …").

arbitrariness doctrine in *E.P. Royappa*[10] as well as subsequent iterations of the doctrine. Decades later, *Shayara Bano*[11] may have attempted a consolidation of precedents, but it ultimately fails to bring to order the incoherence that it grapples with and opens the door to further disorder. A promising but inchoate strand of jurisprudence on substantive equality does better on this front,[12] but questions remain unanswered and interpretative strategies unexplored. This article focusses on the arbitrariness doctrine and substantive equality because each constitutes an ongoing attempt to reimagine the right to equality as a more "substantive" protection. These two principles stand at the forefront of the evolution of India's right to equality. And yet, it isn't clear how they relate to each other. Do they operate in different spheres or have common elements? Does one subsume the other? Could they be viewed as identical?

The central argument of this article is that Indian equality jurisprudence would significantly benefit today from a systematic attempt to bring consistency and stability to its doctrinal evolution. The lack of these features is the source of our anxieties regarding the right. Pursuing this doesn't require a return to formalistic interpretations of equality and non-discrimination, but an acknowledgment of how formal and substantive visions of equality do not stand in isolation from each other. An approach that leverages prior precedent and existing doctrinal tools can reconceptualise seemingly static principles like rationality and relevance to build a

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10 *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

11 *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

12 *Anuj Garg v. Hotel Association of India* (2008) 3 SCC 1; *Naz Foundation v. Government of N.C.T. of Delhi* (2009) 160 DLT 277; *National Legal Services Authority v. Union of India* (2014) 5 SCC 438; *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1; *Joseph Shine v. Union of India* (2019) 3 SCC 39; *Secretary, Ministry of Defence v. Babita Puniya* (2020) 7 SCC 469; *Union of India v. Lt. Cdr. Annie Nagaraja* (2020) 13 SCC 1; Lt. *Col. Nitisha v. Union of India* 2021 SCC OnLine SC 261.

stronger and more coherent substantive guarantee. At the same time, this may also serve to persuade any deferential and recalcitrant members of the judicial community who may be wedded to outmoded interpretative techniques.

To this end, Part 2 of this paper focusses on the development and current status of the two doctrines under the right to equality undergoing marked evolution today: manifest arbitrariness and substantive equality. It finds that the manifest arbitrariness test under Article 14 has been adopted despite stark inconsistencies in the *Shayara Bano* judgment. Even if it were consistent with previous case-law, the structure of the test itself is problematic because it is overbroad and ambiguous to the point of incoherence. When it comes to Article 15 and its siblings, recent attempts to develop robust non-discrimination jurisprudence by applying the principle of substantive equality have proved inadequate not just because of the lack of consensus between judges in key opinions but also because discrimination has only been addressed in a piecemeal fashion without accounting for the variety of listed and unlisted grounds in which it occurs. Courts have failed to develop adequately broad underlying principles or tests for different kinds of discrimination. They have also prominently failed to engage with the textual limitations in the texts of relevant provisions. Following this negative project, Part 3 offers a limited constructive account regarding the minimum conditions for the emergence of a coherent substantive protection under the right to equality. It rehabilitates the concepts of rationality and relevance to outline a relevance-based test that is broad enough to meet the demands of constitutional democracy while constraining the overbroad terms of the arbitrariness doctrine. The conclusion raises certain issues with the proposals made while also suggesting potential avenues for their resolution.

II. A TALE OF TWO "SUBSTANTIVE" RIGHTS

Arbitrariness and substantive equality stand at the forefront of the evolution of the Constitution's equality guarantee, and while both have some vintage, they have also recently yielded new manifestations. However, it remains unclear what each doctrine has to do with the other because, despite instances of their simultaneous application in cases like *Navtej Singh Johar*[13] and *Joseph Shine*,[14] their relationship is not discussed. This has largely been because the arbitrariness doctrine was a loose cannon at birth[15] and has become an even looser one with time.[16] Substantive equality, on the other hand, has a much better argument going for it, but the recent headway it has made in relation with non-discrimination remains an inchoate development. Because it borrows from other jurisdictions, reconciliation with existing Indian jurisprudence requires some interpretative work.

a. ARBITRARINESS: HALF A CENTURY OF AMBIGUITY

Over almost half a century now, the arbitrariness doctrine has travelled a long and bumpy road to get to where it is today. And yet it doesn't seem to have gotten any nearer to providing a systematic account of what it has to do with equality. If anything, it seems to have gotten further away from its origins in Article 14. Its claim to being a value underlying the Equality Code as a whole is contradicted by its incoherence and consequent failure to account for or explain specific provisions on non-discrimination and affirmative action. While MacKinnon once remarked that non-arbitrariness had opened

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13 *Navtej Singh Johar* (n 12).

14 *Joseph Shine* (n 12).

15 H.M. Seervai, *Constitutional Law of India*, Vol I (4th Edition, 2015) 436-441.

16 Alok Prasanna Kumar, 'Arbitrary Arbitrariness: A Critique of the Supreme Court's Judgment in *Shayara Bano v. Union of India,*' (2019) 8 Indian Journal of Constitutional Law 87.

the doors to substantive equality in India,[17] it has instead veered towards a different kind of substantiveness: the American concept of "substantive due process". Coming to grips with the directions it might veer to next requires that we account for the places it has been.

Prior Formulations

The story is an old one, but starts in 1973 with *E.P. Royappa*. Previous judgments had indicated that non-arbitrariness was related to equality, but the idea that it is the principle underlying equality as a whole was *Royappa*'s invention. In the case, a senior government officer complained that he had been reduced in rank discriminatorily. The traditional test under Article 14 (the reasonable classification test) merely required the differentiating criteria for any legal classification to have a rational connection with the objective of the relevant law or measure. In *Royappa*, a majority on the bench formulated and applied a new test, holding that the right to equality was meant to prevent arbitrariness in State action.[18] The formulation for this test required State action to be based on "valid relevant principles applicable to all similarly situate" and to exclude "extraneous or irrelevant considerations".[19] This employed a standard of *relevance*. In referring to the applicability of the standard "to all similarly situate", it also seemed to require the standard to be *comparative* in the formalistic sense of "treating like cases alike". How then did it deviate from the traditional reasonable classification test? The most prominent difference seems to be that relevance was no more required to be assessed against the *object* of the legislation. While earlier, courts were bound by the reasonable classification test's complete deference to the policy choices and prioritisations implicit

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17 Catherine A. MacKinnon, 'Sex Equality under the Constitution of India: Problems, prospects, and "personal laws"', (2006) 4(2) International Journal of Constitutional Law 181, 188.

18 E.P. Royappa (n 10)[85].

19 ibid.

in a government's selection of governance objectives, the arbitrariness test seemed to allow courts to consider the question on the basis of additional relevant considerations.

The decision in *Royappa* illustrated this liberal attitude towards the identification of relevant considerations. The Court was dealing with a case of alleged reduction in rank and it touched upon a variety of considerations that it deemed relevant.[20] The Court implied that the facts of the case had to be viewed in light of a wide range of relevant factors (not just the objective proposed by the government) and it chose not to emphasise the limited comparison it undertook with those "similarly situate[d]". As it happens, this same lack of emphasis on the comparative element of equality may be seen in a range of early arbitrariness cases (alongside variable concern for the government's selection of objectives). For example, *R.D. Shetty,*[21] *Ajay Hasia,*[22] and *Nergesh Meerza*[23] involved comparative elements that the Court did not concern itself with, while *K. Nagaraj*[24] and *Kumari Srilekha Vidyarthi*[25] did not involve comparisons because they were

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20 ibid, [82]-[84], [87]-[93] (considering the relative competence of the government in determining the nature and responsibilities of posts, fixity in the status of posts, the political neutrality of civil servants, the confidence of ministers in senior bureaucrats, administrative exigencies, and equivalence in pay, and further finding that extraneous reasons like hostility and *mala fides* were unproven).

21 *R.D. Shetty v. International Airport Authority of India* (1979) 3 SCC 489.

22 *Ajay Hasia v. Khalid Mujib Sehravardi* (1981) 1 SCC 722.

23 *Air India v. Nergesh Meerza* (1981) 4 SCC 335 [82-83], [97-101]; See also, Atrey and Pillai (n 6).

24 *K. Nagaraj v. State of Andhra Pradesh* (1985) 1 SCC 523. The judgment requires that a government's premise for adopting a measure should be one that "has been accepted as fair and reasonable in comparable situations" (at para.8). Given the facts of the case, this may be read to impliedly permit comparisons with hypothetical groups where no similarly situated groups exist at the time of adjudication.

25 *Kumari Shrilekha Vidyarthi v. State of Uttar Pradesh* (1991) 1 SCC 212. While remaining non-comparative, the case does assess the exercise of the power to appoint counsel on the standard of the objective for which the power has been conferred on the government (at para 44).

concerned with measures affecting all members of a seemingly incomparable class.[26]

Courts then considered the applicability of the doctrine to forms of state action other than administrative action. The Court in *Indian Express* found that "a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution", and it differentiated such failures from ordinary unreasonableness.[27] *Khoday Distilleries (II)* assessed subordinate legislation on the basis of whether it was "manifestly arbitrary or wholly unreasonable" i.e. where there was "self-evident disproportionality" between the object to be achieved and the rules under review.[28] These judgments constrained the ordinary free-flowing standard of "relevance" or reasonableness under the doctrine and required that subordinate legislation be invalidated only if it failed to account for especially sensitive or significant interests ("very vital facts") or if its unreasonableness was obvious and incontrovertible ("manifest" and "self-evident"). *Om Kumar* similarly distinguished between the situations when different tests should be employed: it found that the reasonable classification test was applicable where fundamental rights were involved and the arbitrariness test in other instances.[29] It also equated the former with

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26 Khaitan (n 4) (noting this non-comparative element to the arbitrariness doctrine in labelling it "non-comparative unreasonableness"). The permissibility of such non-comparative analysis has been stated in so many words in *A.L. Kalra v. Project and Equipment Corp.*, (1984) 3 SCC 316 [19] ("One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment.") (Cited approvingly in *Shayara Bano* (n11) [69]).

27 *Indian Express Newspapers v. Union of India* (1985) 1 SCC 641 [78].

28 *Khoday Distilleries v. State of Karnataka* (1996) 10 SCC 304 [19].

29 *Om Kumar v. Union of India* (2001) 2 SCC 386, [42-43], [47], [62-64], [66-67].

a test of "proportionality" while it equated the latter with *Wednesbury* unreasonableness.[30]

Eventually, the Supreme Court began to explicitly strike down plenary legislations on the ground of arbitrariness. There appear to be two kinds of cases in which this happened. The first category involves forms of inconsistency between prior and later legal regimes. For example, the acquisition of a horse-racing club in public interest was struck down in *K.R. Lakshmanan* given that the government had maintained a consistent policy prohibiting horse-racing as a form of gambling.[31] The decisions in *K. Shyam Sunder*[32]and *A.P. Dairy Development Corporation Federation*[33] did not turn on similar findings of inconsistency but instead on a kind of hostility towards amendments that withdraw benefits protected under the original unamended laws. In the second category of cases, provisions were struck down seemingly because they imposed unreasonable constraints on certain classes of persons in their relations with distinct, rivalrous classes. In *Malpe Vishwanath Acharya*, the Court struck down outdated rent control provisions that required landlords to impose a standard rent without regard to changes in the value of money and the costs of maintenance over time.[34] In *Mardia Chemicals*, the Court invalidated provisions requiring a borrower to deposit 75% of the sum claimed to be under default before any appeal against a decision made in favour of the creditor.[35] These cases didn't involve equality between persons similarly situated at all, but instead seemed

30 ibid [32], [66]-[67].
31 *K.R. Lakshmanan v. State of Tamil Nadu* (1996) 2 SCC 226.
32 *State of Tamil Nadu v. K Shyam Sunder* (2011) 8 SCC 737.
33 *A.P. Dairy Development Corpn. Federation v. B. Narasimha Reddy* (2011) 9 SCC 286.
34 *Malpe Vishwanath Acharya v. State of Maharashtra* (1998) 2 SCC 1.
35 *Mardia Chemicals Ltd. v. Union of India* (2004) 4 SCC 311.

to involve questions of distributive justice in relation with classes whose interests conflicted.[36]

The Many Contortions of Shayara Bano

One can thus observe that judicial engagement with the arbitrariness test came to revolve around the question of its applicability to subordinate and plenary legislation. The *Shayara Bano* judgment in 2017 sought to confirm that a particular variation of the arbitrariness doctrine would be applicable in the review of plenary legislations. The concept of "manifest arbitrariness" that had earlier been applied to subordinate legislations was extended to plenary legislations. A key passage of Nariman and Lalit, JJ.'s opinion defined manifest arbitrariness by the legislature as acts carried out "capriciously, irrationally and/or without adequate determining principle", as well as acts that were "excessive and disproportionate".[37] However, the judgment is neither persuasive regarding the test's applicability to plenary legislations, nor regarding the logic of its structure and content. Arguably, a fixation with conclusively answering the question of applicability resulted in reduced concern for how the content of the test needed to meaningfully correspond to the nature of the State action and the branch of government taking the action.

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36 *Centre for Public Interest Litigation v. Union of India* (2012) 3 SCC 1and *In re: Natural Resources Allocation, (2012) 10 SCC 1* involved what may be considered a combination of questions related to irrationality and distributive justice. The Court was directly concerned in these cases with the fair distribution of public resources amongst rival claimants and while a classificatory selection process was involved, the Court chose to review the processes against a standard of arbitrariness viewed as a protection against abuse and irrationality. The irrationality here, however, was different from the *K.R. Lakshmanan* variety. *Lakshmanan* raised questions of inconsistency between public reasons, but these cases touched upon a conception of irrationality as *absence* of public reasons (similar to the ruling in *Kumari Srilekha Vidyarthi* (n 25)).

37 Shayara Bano (n 11) [101].

The opinion confronted previous rulings that had held the doctrine to be inapplicable to plenary legislation and traced their provenance back to *McDowell*.[38] It then proceeded to outline how *McDowell* was *per incuriam* because it had failed to account for the judgments in *Ajay Hasia* and *K.R. Lakshmanan*, failed to recognise that substantive due process had been incorporated into Article 14, viewed fundamental rights through the outmoded theory of "watertight compartments", was deferential to parliamentary wisdom even on questions of constitutionality, and considered proportionality-based tests to have doubtful application in India though it supposedly had always been used by Indian courts.[39]

However, these claims suffer from notable infirmities that may each be considered in turn. *Shayara Bano* makes much of a particular passage in *Ajay Hasia* that seems to allow for invalidation under Article 14 "[w]herever … there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12 …".[40] While pouncing on this passing reference to arbitrariness in actions of the legislature, the opinion glosses over the context of the reference. Immediately before referring to the possibility of arbitrariness by legislatures, *Hasia* was quite plainly discussing how the reasonable classification test was actually only a "judicial formula for determining whether the legislative or executive action in question is arbitrary"[41] and, in this

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38 *State of Andhra Pradesh v. McDowell & Co.* (1996) 3 SCC 709.

39 Shayara Bano (n 11) [73-87].

40 Ajay Hasia (n 22) [16]; Shayara Bano (n 11) [70], [73].

41 Ajay Hasia (n 22) [16]. Similarly, *K.R. Lakshmanan* may have struck down a law on the basis of "arbitrariness", but the same paragraph also speaks of the law serving "no public purpose", suggesting that its idea of arbitrariness is linked with a form of review of legislative objects (a form of review not traditionally or explicitly linked to the arbitrariness doctrine) (*K.R. Lakshmanan* (n 31) [46]; *Shayara Bano* (n 11) [71], [73]). It is disingenuous to rely on *Lakshmanan* as an

context, the judgment's reference to arbitrariness in legislative action should have been read as a reference to applications of the reasonable classification test.

McDowell had also rejected the application of the arbitrariness doctrine to actions of legislatures because it would amount to recognising "substantive due process" as a ground of challenge. *Shayara Bano* disputed this by relying on a series of judgments that had derived a conception of substantive due process by applying principles of Article 14 to Article 21 and had torn down the "watertight compartments" theory under which different fundamental rights were treated as mutually exclusive concepts.[42] This understanding of fundamental rights jurisprudence is correct, but all it means is that a more robust conception of reasonableness stands extended from Article 14 to Articles 19 and 21. At best, these would only make substantive due process relevant where fundamental freedoms are at stake and not otherwise.[43] *Shayara Bano* attempted a similar manoeuvre in relation with *McDowell*'s rejection of "proportionality" by relying on *Om Kumar,* a judgmentthat claimed to show that proportionality had always been applied by Indian courts. However, *OmKumar* explicitly characterised the reasonable classification test (and not a distinct arbitrariness test) as the

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authority on the applicability of the doctrine to legislation without accounting for how it was applied.

42 Shayara Bano (n 11) [74-84].

43 The opinion also correctly refutes *McDowell*'s reading of *Mithu v. State of Punjab*, (1983) 2 SCC 277by recognising that the latter accepted a challenge on arbitrariness based on Article 21 along with Article 14, and not 21 alone (paras.77, 79-83). However, *Mithu* doesn't advance Nariman and Lalit JJ.'s distinct conception of arbitrariness given that it turned at best on the logic of reasonable classification, containing comparisons between relevant classes and references to a "valid basis for classifying persons", absence of "rational distinction", and absence of "nexus with the object of the statute" (paras.10 and 13).

proportionality-based test in Article 14.[44] *Shayara Bano* somehow managed to quote this passage while failing to recognise the obvious contradiction with its own ruling on arbitrariness.[45] Finally, *McDowell*'s concerns that an arbitrariness test would involve courts sitting in judgment over legislative wisdom were dismissed by saying that such concerns are immaterial when a question of constitutionality is involved.[46] But this is circular reasoning given that the judgment in *McDowell* clearly had a different view regarding how constitutionality is to be assessed.[47]

McDowell was concerned that certain ways of interpreting Article 14 would altogether subsume every aspect of legislative policymaking within judicial review. If *Shayara Bano* had at all deigned to account for this concern, it would have done far more to formulate a test that distinguished in some meaningful manner between the legislative and judicial functions. Instead, it identified four impossibly broad and vague vices: caprice, irrationality, inadequacy of determining principle, and disproportionality.[48] These words are loose enough that they may be read to cover the entire field of legislative choice, from comparative and non-comparative aspects of legislative provisions to the individual motivations of legislators, from the prioritisations implicit in policy choices to the

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44 Om Kumar (n 29) [32]; *Om Kumar* was also strictly concerned with the review of administrative action and not legislations (paras.32, 58, 66-67).

45 Shayara Bano (n 11) [86].*Om Kumar*'s equivalence of existing fundamental rights adjudication with a conception of "proportionality" is itself highly doubtful given our current technical understanding of proportionality tests. See, Khaitan, n 7, 181 (referring to the equivalence drawn by *Om Kumar* as "simply incorrect"); Aparna Chandra, 'Proportionality in India: A Bridge to Nowhere?', (2020) 3(2) University of Oxford Human Rights Hub Journal 55, at 63-64, fn.41.

46 McDowell (n 38) [43]; Shayara Bano (n 11) [85].

47 ibid [43] ("No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act.").

48 Shayara Bano (n 11) [101].

different modes of principled and instrumental rationality that governments may employ, from the breadth of the governance problem sought to be addressed to the magnitude of the measure chosen to address it. In forwarding this formulation, *Shayara Bano* did not seem to incorporate, elaborate upon, or adapt alternative formulations of "manifest arbitrariness",[49] nor did it note that the formulation chosen by it had been distinguished in another judgment that it had relied on itself.[50] Instead, it sought to bluntly extend a cherry-picked test for the review of subordinate legislation to the review of plenary legislation with the astonishing and entirely unsupported statement that "there is no rational distinction between the two types of legislation when it comes to this ground of challenge."[51] It made such a statement despite the assiduous distinctions drawn between the two kinds of State action in judgments that it relied on itself.[52]

It is difficult to embrace *Shayara Bano* as the resolution to a decades-long controversy that it claims to be.[53] The judgment has by

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49 The formulation seems to owe its content to *Sharma Transport v. Government of Andhra Pradesh*, (2002) 2 SCC 188 [25]and seems to ignore the formulations in *Indian Express* (n 27)and *Khoday Distilleries (II)* (n 28).

50 *A.P. Dairy* (n 33) (indicating that manifest arbitrariness required a form of "substantive unreasonableness" in the statute that went beyond mere caprice, irrationality, inadequacy of determining principle etc. [29]).

51 Shayara Bano (n 11) [101].

52 *Indian Express* (n 27), at para.75 ("A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent Legislature.") (reiterated in *Khoday Distilleries (II)* (n 28) [13]).

53 The application of the manifest arbitrariness test in *Shayara Bano* itself is difficult to follow (paras.102-104). It struck down a law that recognised a husband's right to divorce his wife in a capricious and irrevocable manner. But while the right under scrutiny seemed to permit arbitrary actions by private persons, it did not automatically flow that the right itself was arbitrary because the legislature may not have been capricious in granting the right. Unlike in *Ajay Hasia, R.D. Shetty,* or the 2012 *2G Spectrum Case*, the arbitrary action empowered is private action and not the action of a State body. Some further elaboration on the nature of the interests involved was needed, surely, to

now been confirmed and deployed in a variety of cases that may not be discussed here for a lack of space,[54] except to tentatively note that these cases either employ the reasonable classification test to arrive at findings of arbitrariness, trot out one or more of the four vices listed at paragraph 101 of *Shayara Bano* without elaborating on their meaning, or fail to rely on *Shayara Bano*'s formulation at all. It will soon be 50 years since *E.P. Royappa* was decided. It would not be an exaggeration to say that if we still cannot predict with any certainty when an action would be liable to be struck down as arbitrary, we should seriously ask ourselves what the reason for this uncertainty is and what costs we bear if it is to continue to weigh down our right to equality.

b. SUBSTANTIVE EQUALITY AND THE SEARCH FOR SPECIAL "EFFECTS"

Alongside the manifest arbitrariness test, a second green shoot of equality jurisprudence is the newly invigorated conception of "substantive equality", a vision of equality that emphasises the recognition and material accommodation of disadvantages. This vision operates asymmetrically to target instances of social dominance, subordination and discrimination. While a principle of substantive equality had earlier been emphasised in cases related to affirmative action, the current doctrinal renewal additionally highlights its role in relation with the non-discrimination provisions

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distinguish the matter from other instances where the law permits arbitrary private action (e.g., contract law)?

54 *Independent Thought v. Union of India* (2017) 10 SCC 800; Navtej Singh Johar (n 12); *Nikesh Tarachand Shah v. Union of India* (2018) 11 SCC 1; *Harsh Mander v. Union of India* 2018 SCC OnLine Del 10427; Joseph Shine (n 12); *Hindustan Construction Co. Ltd. v. Union of India* AIR 2020 SC 122; *Swiss Ribbons Pvt. Ltd. v. Union of India* (2019) 4 SCC 17; *Indian Hotel and Restaurant Association (AHAR) v. State of Maharashtra* (2019) 3 SCC 429; *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta* (2020) 8 SCC 531; *Manish Kumar v. Union of India* WP(C) 26 of 2020 (Supreme Court).

of the Constitution, that is to say the provisions prohibiting discrimination on the basis of certain listed grounds (Articles 15(1), 16(2) and 29(2)). The developments under this renewal are outlined and discussed below. This scrutiny is essential in the Indian context because the lack of attention given to non-discrimination has severely impeded the meaningful realisation of substantive equality. The discussion below may appear to be a sharp deviation from the one above, and this is natural given that the general right to equality is distinct in many ways from the right against discrimination. However, proposals subsequently made in Part 3 of this article are aimed at reconciling these differences.

Text as the Enemy of Reality

Since the adoption of the Indian Constitution, its text has forthrightly acknowledged the need to prevent the subordination of members of disadvantaged groups.[55] Initially, the Constitution's sensitivity to the existence of social disadvantages and the need to ameliorate these disadvantages was constrained by its own text, even in the context of reservations. While the law on reservations certainly yielded the earliest instances of recognition of more capacious ideas of substantive equality,[56] the Constitution's recognition of specific instances of these ideas ironically led courts towards a vision of equality in which substantive elements were restricted only to those instances. This is in evidence in the saga regarding whether Articles 15(4) and 16(4) are exceptions or facets of the more general clauses of those provisions.[57] But these dynamics only emphasise the need to clarify the relation between the broader meanings of non-discrimination and substantive equality. The root of the problem lies

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55 Ahmed (n 1), 134-135; Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge, 2012) 13.

56 See, for example, S.2, Constitution (First Amendment) Act, 1951, and *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310.

57 Bhatia (n 4) Chapter 3

not in the interpretation of the affirmative action clauses, but in the interpretation of the general non-discrimination clauses: Articles 15(1), 16(2), and 29(2). And the root of the problem within these clauses lies in a single word, the word "only".

Each non-discrimination clause prohibits discrimination "on grounds only of" religion, race, caste, and other similar characteristics.[58] Much has already been written about the unfortunate role played by the word "only" in these clauses.[59] Generally speaking, courts have read the word to allow governments a very peculiar mode of justification for discriminatory actions. Without the word "only", the prohibition on discrimination would be applicable as soon as a characteristic like religion, race, caste etc. was involved in some meaningful way in a particular government measure. What courts have instead done is to read the word "only" to limit the prohibition to only those instances of discrimination where a listed characteristic was the direct and exclusive motivation of the government for taking the measure. This allows governments to justify even the most gross forms of discrimination by declaring that they were not driven by a motive to discriminate and considerations of religion, race, caste etc., as the case may be, were not the *sole* or *exclusive* considerations.

This has yielded a set of absurd results. In a range of instances where sex discrimination has been alleged and where sex has constituted an *explicit* ground of classification in the text of the impugned measure, discrimination has been excused because of the

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58 The lists of characteristics in Articles 15(1), 16(2), and 29(2) have differences, and a textualist reading of these differences may suggest that they were formulated with special care to consciously exclude certain characteristics in certain contexts. See, for example, *D.P. Doshi v. State of Madhya Bharat* AIR 1955 SC 334 [5]; *Dr. Pradeep Jain v. Union of India* (1984) 3 SCC 654 [6] (in the context of residence not being a ground listed under Article 15(1))

59 Kannabiran (n 55) Chapter 10; Khaitan (n 7) at 192-194; Atrey (n 6); Bhatia (n 4), at 7-13.

involvement of some or the other additional consideration such as property-ownership and financial capacity,[60] the development of separate educational facilities,[61] the dynamics between women and other family members in an Indian household,[62] the hazards of proximity with male criminals,[63] gendered roles in the initiation of sexual relationships,[64] and pre-existing employee categories along with hiring costs in the operation of an airline business.[65] A basic observation to start with is that at least some of these instances of "justification" proceed on the erroneous premise that a charge of sex discrimination can be avoided by instead relying on social conditions attached to gender.[66] Some early judgments were naturally unimpressed by this impoverished understanding of sex discrimination.[67]

The approach employed in relation to sex discrimination has also been applied to other forms of discrimination. Article 16(2) prohibits discrimination on the ground only of descent, and this has been relied on to prohibit hereditary offices.[68] But the Supreme Court has upheld employment granted to dependents of deceased

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60 *Mahadeb Jiew v. Dr B.B. Sen* AIR 1951 Cal 563.

61 *Anjali Roy v. State of West Bengal* AIR 1952 Cal 825.

62 *M.I. Shahdad v. Mohd. Abdullah Mir* AIR 1967 J&K 120.

63 *R.S. Singh v. State of Punjab* AIR 1972 P&H 117.

64 *Yusuf Abdul Aziz v. State of Bombay* AIR 1954 SC 321; *Sowmithri Vishnu v. Union of India* (1985) Supp SCC 137.

65 Nergesh Meerza (n 23). This interpretative approach has also been affirmed in cases that have salutary effects on the position of women, e.g., *Dattatraya Motiram More v. State of Bombay* AIR 1953 Bom 311 and *Government of Andhra Pradesh v. P.B. Vijaykumar* (1995) SCC 4 520.

66 This seems to have been noticed in *Walter Alfred Baid v. Union of India* AIR 1976 Del 302. See also, Indira Jaising, 'Gender Justice and the Supreme Court' in B.N. Kirpal et al (eds), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford India Paperbacks, 2000) 294.

67 *Punjab Province v. Daulat Singh* [1946] FCR 1; *State of Bombay v. Bombay Education Society* AIR 1954 SC 561; *Rani Raj Rajeshwari v. State of Uttar Pradesh* AIR 1954 All 608; *Radha Charan Patnaik v. State of Orissa* AIR 1969 Ori 237.

68 *Gazula Dasaratha Rama Rao v. State of Andhra Pradesh* AIR 1961 SC 564.

employees because such appointments were not simply on the basis of descent but instead on compassionate grounds to meet "well-recognised contingencies" such as the death or medical invalidation of the breadwinner in a family.[69] The Court explicitly relied on the narrow reading of "only" and applied a standard of reasonableness to account for what it considered exceptional circumstances calling for a departure from the prohibition in Article 16(2).[70]

The same interpretation of non-discrimination has also been applied in the context of discrimination on the ground of religion. Key early cases on statutes dealing with personal laws remarked that these did not discriminate "only" on the ground of religion because they were additionally based on differences between the communities in texts, backgrounds, practices and levels of preparedness for social reform.[71] Later, in *R.C. Poudyal*, the Supreme Court was considering the validity of a provision in a constitutional amendment reserving a seat in a legislative body exclusively for a member of a religious institution to be nominated by the institution itself.[72] In adjudicating on a constitutional amendment, the Court was actually determining what aspects of the Constitution's non-discrimination guarantee (under Articles 15(1) and 325) formed part of its basic structure. The majority on the bench upheld the provision, ruling that the religious institution in question (the Buddhist "Sangha") was "not merely a religious institution" and had historically also been a political and social institution in Sikkim.[73] This reasoning did not go unchallenged and the dissenting opinions warned against the threats raised by

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69 *V. Sivamurthy v. State of Andhra Pradesh* (2008) 13 SCC 730 [18].

70 ibid [9]. Similarly, *State of Haryana v. Ankur Gupta*, (2003) 7 SCC 704 [6] refers to such compassionate appointments as "reasonable and permissible".

71 *State of Bombay v. Narasu Appa Mali* AIR 1952 Bom 84 [10-12]; *Srinivasa Iyer v. Saraswathi Ammal* AIR 1952 Mad 193.

72 *R.C. Poudyal v. Union of India* 1994 Supp (1) SCC 324.

73 ibid [37].

separate electorates.[74] Such a mode of interpretation had also previously been rejected in *Thakur Pratap Singh,* where the Court considered an exemption granted tothe Muslim and Harijan inhabitants of certain villages from contributing to the costs of stationing additional police forces there.[75] The government argued that this was not exclusively motivated on religious or caste grounds but on the additional consideration that the exempted communities had not engaged in the conduct necessitating police reinforcements. The Court rejected this justification by emphasising that the innocence or guilt of an entire community could not be presumed without being discriminatory.[76]

The word "only" again plays an interesting role in the context of discrimination in admissions to minority educational institutions. In *St. Stephen's College*, the Court rejected an argument that preference to minority candidates in admissions to minority institutions was not solely on the basis of religion but because of the candidate belonging to a minority community.[77] While it clarified that this amounted to discrimination on the ground of religion and was prohibited under Article 29(2), it sought to balance the prohibition in that provision with the right of minorities to administer their own educational institutions under Article 30(1).[78] In *T.M.A. Pai*, the Court not only departed from *St. Stephen's* on the question of where the appropriate balance lay, but also insisted on the significance of the word "only" in

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74 The dissenting opinions in *Poudyal* were clear about the "true identification" of the religious character of the Sangha, and emphasised the potential for "mischief" and the "adverse impact" on secularism arising from the impugned provision (ibid [29]-[30], [206]-[207]).

75 *State of Rajasthan v. Thakur Pratap Singh* AIR 1960 SC 1208.

76 ibid [7-9]. The breadth of the prohibition on religious discrimination was also recognised (without application) in *Nain Sukh Das v. State of Uttar Pradesh* AIR 1953 SC 384 [4].

77 *St. Stephen's College v. University of Delhi* (1992) 1 SCC 558 [79].

78 ibid [79]-[102].

striking the balance given that preferential admissions were primarily aimed at preserving the minority character of the institution.[79]

Finally, this judicial fixation with what may be called a "pure" theory of discrimination has also made its way into the law on reservations. Despite the existence of specific clauses authorising reservations in favour of backward classes, the prohibition on discrimination on the ground only of caste in Articles 15(1), 16(2) and 29(2) has been understood to prevent the identification of backward classes solely on the basis of caste, though it is permitted as a relevant factor for such determination.[80] Courts have insisted that the identification method must involve additional considerations such as occupation and poverty, or else the remedial measure becomes one that is motivated solely by caste. They have also insisted that the prohibition on caste discrimination does not cover discrimination on the ground of "Scheduled Caste".[81] The prohibition has also been relied on to require that any caste-based identification of a backward class mandatorily exclude all affluent or economically advanced members of the caste (the "creamy layer" rule).[82] Where governments treat affluence as irrelevant, courts characterise the consequent identification as discrimination solely based on caste. At the same time, it is crucial to keep in mind that not all constraints on the power to grant reservations stem from judicial hostility towards "pure" caste discrimination. Even where caste ceases to be the sole

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79 *T.M.A. Pai Foundation v. State of Karnataka* (2002) 8 SCC 481 [149].

80 *Indra Sawhney v. Union of India* (1992) 3 Supp SCC 217 [784] (Jeevan Reddy, J), [418] (Sawant, J.), [323(2)] (Thommen, J.); *Ashoka Kumar Thakur v. Union of India* (2008) 6 SCC 1, [162-163] (Balakrishnan, C.J.), [351], [358(7)] (Pasayat and Thakker, JJ.), [650], [664] (Raveendran, J.).

81 N.M. Thomas (n 56) [43] (Ray, C.J.), [82] (Mathew, J.) ("The word 'caste' in Article 16(2) does not include "scheduled caste"), [135] (Krishna Iyer, J.), [169] (Fazal Ali, J.).

82 *Indra Sawhney v. Union of India* (2000) 1 SCC 168 (Indra Sawhney (II)), [8], [65]; Ashoka Kumar Thakur (n 80) [170-171] (Balakrishnan, C.J.), [659], [664-65] (Raveendran, J.).

motivating factor and is required to be considered alongside additional factors, courts have found that reservations as a whole can become discriminatory where the proportion of the resources reserved is more than a certain maximum limit (the "50% ceiling").[83] This is important to note because it suggests that courts have been willing to prohibit "discrimination" which is not "pure" i.e., not *solely* motivated by a listed characteristic. It is unsurprising that this recognition has happened in relation with the rights of members of forward castes.

This theory of justification thus only prohibits "pure" forms of discrimination but allows for measures as long as the government can adulterate its motivations with "additional" considerations. From the discussion above, it should be clear that though each non-discrimination clause in the Constitution appears to treat all listed characteristics alike and offers a uniform mode of justification,[84] the results can be markedly different depending on the nature of the

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83 See, particularly, *M. Nagaraj v. Union of India* (2006) 8 SCC 212 [48], [120] ("[A] numerical benchmark is the surest immunity against charges of discrimination.") and *Dr. Jaishri Laxmanrao Patil v. The Chief Minister* 2021 SCC OnLine SC 362, at para.515 (Ravindra Bhat, J.). See also, Indra Sawhney (n 80) [294], [299] (Thommen, J.) (appearing to treat the 50% ceiling as a method of narrow-tailoring protective discrimination). These references aside, courts have been less specific about the precise source of the 50% ceiling, referring broadly to a principle of reasonableness in accounting for the rights and interests of forward classes (e.g., *M.R. Balaji v. State of Mysore* AIR 1963 SC 649, [31], [34]), antipathy towards protective discrimination becoming something more than an exception or special provision (e.g., Indra Sawhney (n 80) [618] (Sahai, J.), [808] (Jeevan Reddy, J.)), or antipathy towards proportional representation (e.g., Indra Sawhney (n 80) [505] (Sawant, J.), [613] (Sahai, J.), [807] (Jeevan Reddy, J.)). Arguably, a charge of "reverse discrimination" underlies these justifications as well.

84 As discussed, however, the interpretation of "only" in the non-discrimination clauses has not been consistent. What is more, the reasonable classification test has inexplicably featured at times as the appropriate test even in relation with non-discrimination e.g., *Madhu Kishwar v. State of Bihar* (1996) 5 SCC 125 [33]; Indra Sawhney (n 80) [741] (Jeevan Reddy, J.), and Jaishri Laxmanrao Patil (n 83) [161] (Bhushan, J.).

discriminatory act and the "additional" consideration supporting it. While benign outcomes have sometimes followed, these forms of justifications have generally served to narrow the range of discriminatory acts prohibited. In reality, a wide range of discriminatory acts may be motivated by more than one consideration, and even where a government is motivated by bare hostility towards a group, justifications of the type described above can easily be contrived to evade scrutiny. This means that for any non-discrimination guarantee in our Constitution to be meaningful, it must supply a theory of justification that better accounts for the social reality in which each kind of discrimination operates.

Stereotypes and Structures: Two Types of Reality

A range of cases have departed from the paradigm described above by bringing in more progressive interpretations of the prohibition on discrimination. A prominent point of departure is the case of *Anuj Garg*, in which the Supreme Court was considering a law that prohibited women from working in establishments where liquor was served.[85] The judgment rejected the paternalistic suggestion that discrimination against women would be permissible where it was claimed to be in their own best interests. The Court considered practical difficulties in ensuring the safety of women as serious[86] and affirmed that there was no absolute bar to sex-based classification,[87] but it insisted that measures aimed at protecting women should be shown to be both necessary for such protection and respectful of women's rights to privacy and employment,[88] and not instead animated by an oppressive and stereotypical understanding of gender

85 *Anuj Garg v. Hotel Association of India* (2008) 3 SCC 1. For a discussion on the significance of the case, see Bhatia (n 4), Chapter 1.
86 ibid [20].
87 ibid [21].
88 ibid [30]-[37].

roles.[89] The Court thus placed the burden on the government[90] to show that its protective discrimination was pursuant to a "compelling State purpose" that was "justified in principle" and "proportionate in measure".[91] It applied a strict standard of scrutiny to excuses on the supposed "best interests" of women, noting that practical difficulties in law enforcement did not "ontologically" rise to the level of justifications.[92] The mode of justification proposed in *Garg* was, however, specifically aimed at instances of protective discrimination, for which the Constitution provides explicit support in the form of Article 15(3). It remains unclear whether thiscan, on its own, confirm the appropriate level of scrutiny in contexts other than protective sex discrimination.

Further advancement in the law on sex discrimination came in the form of the Supreme Court's recognition of a range of rights held by transgender persons. In recognising that trans people were also protected from discrimination under provisions like Articles 15 and 16, the Court clarified that the discrimination on the ground of "sex" in such provisions included discrimination on the ground of gender identity (and not just biological sex).[93] This extension of the prohibition on sex discrimination to gender discrimination should have the positive effect of casting doubt on those judgments mentioned previously in this Part where discrimination was condoned because it was not solely on the ground of sex but on the grounds of gendered social structures built around sex.[94]

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89 ibid [41]-[45], [47].

90 ibid [21].

91 ibid [46]-[47], [49]-[51].

92 ibid [20].

93 *National Legal Services Authority v. Union of India* (2014) 5 SCC 438 [66], [82].

94 This may depend on whether one views the prohibition's extension to gender discrimination as an extension only to gender identities or additionally to discrimination resulting from the assignment of gendered social roles. Perhaps,

This was followed up with an explicit but qualified rejection of the narrow approach to non-discrimination in *Navtej Singh Johar*, where the Supreme Court considered the constitutionality of a provision criminalising "carnal intercourse against the order of nature". *Johar* was at once an opportunity to clarify the relation between manifest arbitrariness and non-discrimination and an opportunity to improve upon the old theory of discrimination. Findings of arbitrariness in the impugned law relied on *Shayara Bano* and rested on the law's failure to account for consensual behaviour,[95] its excessiveness or disproportionality,[96] and its irrational and unprincipled nature.[97] On the other hand, the reasoning on discrimination was not unanimous. One judge seemed to refer to the point passingly at best,[98] while two others employed entirely different interpretative methods. Chandrachud, J.'s explained how formalistic interpretations of Article 15 had rendered its guarantee meaningless and held that the prohibition was actually against discrimination that was grounded in and perpetuated stereotypes related to any prohibited ground.[99] He then supplemented this anti-stereotyping principle with additional accounts of how discrimination had to be identified not just on the basis of the government's objectives in adopting a measure but also on the basis of the disproportionate impact it could have, even if it appeared neutral on the face of it.[100] Finally, he relied on an intersectional theory of discrimination to hold

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this depends on the extent to which gender identities interact with and depend on gender roles.

95 Navtej Singh Johar(n 12) [252], [254-255] (Mishra, C.J.).

96 ibid [353], [366] (Nariman, J.); [417], [521] (Chandrachud, J.) (implying a proportionality-based logic given his focus on liberty interests).

97 ibid [417-419], [423] (Chandrachud, J.), [637.10-11] (Malhotra, J.).

98 ibid [367] (Nariman, J.).

99 ibid [429]-[440] (Chandrachud, J.) (overruling contrary findings in *Mahadeb Jiew* and *Nergesh Meerza*).

100 ibid [438]-[446] (Chandrachud, J.).

that discrimination based on sexual orientation was linked to sex discrimination because it perpetuated stereotypical notions of sex and gender roles.[101] On the other hand, Malhotra, J. read Article 15(1) as embodying a broader principle whose prohibitions extended beyond discrimination on grounds explicitly listed there to discrimination on any *analogous* ground that could undermine an individual's personal autonomy.[102]

Johar thus produced a fractured reading of Article 15 and no one opinion can be considered binding precedent regarding the provision's meaning. Chandrachud, J. sallied forth alone and unaccompanied to tackle the decades-old curse of "only" on India's anti-discrimination jurisprudence and, by all accounts, he continues alone. In *Joseph Shine*, the Court considered the validity of an explicitly sex-discriminatory provision criminalising adultery only by men, and once again it relied on the right to privacy coupled with ambiguous applications of the manifest arbitrariness test.[103] On discrimination, Nariman, J. in a single sentence found a violation of Article 15(1) because the impugned provision treated women as chattel.[104] Malhotra, J. struck down the provision on both Articles 14 and 15 by applying the reasonable classification test and making a brief finding that women were discriminated against on the basis of sex alone as a result of their being barred from prosecuting their husbands.[105] On the other hand, Chandrachud, J. entered into a wide-ranging discussion regarding the need to avoid a formal reading of the provision as merely involving under-inclusiveness,[106] and to turn

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101 ibid [448]-[453] (Chandrachud, J.).
102 ibid [638]-[639] (Malhotra, J.).
103 Joseph Shine (n 12) [29-30] (Misra, C.J.), [103-104] (Nariman, J.), [162], [168-169] (Chandrachud, J.).
104 ibid [105] (Nariman, J.).
105 ibid [272], [272.1], [272.4] (Malhotra, J.).
106 ibid [122]-[125] (Chandrachud, J.).

instead to an enquiry based on substantive equality that is sensitive to social realities and the impact of legal rules, particularly in terms of whether they contributed to the subordination of disadvantaged groups in the context of stereotyping and structural inequality.[107] Even after *Joseph Shine*, Chandrachud, J. has, while sitting in division benches, continued to combat gender stereotyping in a series of judgments on permanent commissions for women in the armed forces,[108] culminating in a potent and explicit ruling recognising indirect discrimination (a form of discrimination usually characterised by neutral criteria that fail to account for underlying systemic inequality) and formulating a carefully-structured effects-based test to address it.[109]

There is no doubt that the recognition of these facets of equality jurisprudence constitute vital advancements to which India has arrived all too late. It remains a matter of concern, however, whether these advancements are adequately supported by a broader judicial consensus and a firm jurisprudential foundation. Why wasn't Chandrachud, J. accompanied, in his rulings in *Johar* and *Shine*, regarding the need to abandon the narrow interpretation of discrimination? Was it simply because the other judges were not progressive enough to realise the significance of the positions he proposed? Can the rationale for adopting substantive equality be strengthened? Answering these questions first requires that we identify a peculiar problem with the narrow interpretation of discrimination discussed previously: it suffers not just from a failure to respect substantive equality but also a failure to respect meaningful formal equality. This is evidenced by the fact that Malhotra, J.'s

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107 ibid [171]-[172], [175-186] (Chandrachud, J.).

108 Babita Puniya (n 12); Annie Nagaraja (n 12).

109 Lt. Col. Nitisha (n 12) (borrowing from Fraser v. Canada, [2020] SCC 28 (Supreme Court of Canada)).

opinion in *Shine* eschews the substantive equality sledgehammer for the mallet of reasonable classification. The known problem with the formal approach to non-discrimination is that it views the prohibited "grounds" of discrimination as referring to the motivations or reasons for discriminatory treatment and not to factors whose involvement (correlation) causes discriminatory effects.[110] Escaping this ordinarily requires just that courts examine allegedly discriminatory measures on the basis of the effects suffered by victims of the discrimination and not on the basis of the motivations of the government. However, many of the provisions excused in India under the narrow interpretation have been excused despite there being strong evidence of discriminatory motivations in the explicit texts of the relevant laws, and challenges to them have instead failed because these motivations weren't *exclusive*. What is important then, is that even if we were to switch from a motivation-based reading to an effects-based one, the plea would still stand that the word "only" had to mean something,[111] that the effects were not "only" on interests linked to the listed characteristics, and that the effects in relation with other interests justified the relevant measure. In other words, substantive equality does not escape the curse of "only" because it continues to be susceptible to the word's peculiar influence on the nature of justifications that governments can rely on. The Constitution's non-discrimination guarantees suffer not just

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110 Atrey (n 6) at 164-166, 182-183 (differentiating motive-based models and causal models in describing some strategies by which the Indian non-discrimination guarantees can be made effective); Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 160-162, 165-171 (differentiating between causes of a discriminator's action and causes of a victim's suffering in describing a general theory of discrimination law).

111 This plea would be based, of course, on the rule of interpretation that no word in a statute should be ignored or read in such a manner as to render it meaningless, redundant, surplus, or otiose. See, generally, on the relative strictness of this rule of construction, John M. Golden, 'Redundancy: When Law Repeats Itself' (2016) 94 Texas Law Review629.

from a formal conception of equality but also from a specific formal interpretation of the text of the guarantees.

A further question is whether the recent judgments on substantive equality offer any alternative mode of justification for violations of the right against discrimination. At the outset, it is worth noting that some previous judgments seemed to treat any classification on the basis of a listed characteristic as automatically discriminatory, thus suggesting that the non-discrimination guarantees are absolute.[112] But how does this square with the apparent acceptability of certain forms of classification explicitly based on caste, descent and religion for which no exception clauses have been carved out?[113] Would abandoning the theory of justification underlying the word "only" *make* the non-discrimination guarantees absolute? In Chandrachud, J.'s recent sex discrimination opinions, the prevention of "stereotyping" is prominently forwarded as a basis for developing discrimination law. While it may not be anyone's case that anti-stereotyping is the sole principle behind discrimination law, even the recent identification of further complementary principles remains undeveloped, hastily smuggling in advanced concepts before the basics have been settled.

Anti-stereotyping has certainly served as a potent remedy against some discriminatory measures because it foregrounds the manner in which oversimplified assumptions regarding groups of

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112 See, for example Walter Alfred Baid (n 66) [7], [10] and Rani Raj Rajeshwari Devi (n 67) [73], [76], [94-96]. See also, for what was at best a speculative statement in a separate opinion, *Kathi Raning Rawat v. State of Saurashtra*, AIR 1952 SC 123 [7] (Sastri, C.J.) ("If [unfavourable bias] is disclosed and is based on any of the grounds mentioned in Articles 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition …").

113 See also, Lt. Col. Nitisha(n 12) [84] (choosing to distinguish direct and indirect discrimination on the basis of intention and effects instead of justifiability, and thus appearing to suggest that direct discrimination may also be justifiable).

persons have continuously disadvantaged them throughout history. In cases like *Johar* and *Shine*, well-understood stereotypes regarding gendered sexual roles were effectively identified and combated, and the government had no justification to turn to other than stereotyping. And where exclusion has been sought to be justified based on the safety and best interests of women, the Court has noted in *Anuj Garg* how such solutions may perpetuate social stereotypes instead of prioritising the more vital interest that women have in their own autonomy. The language of "stereotyping" can, however, appear less persuasive in other situations. For example, in *Babita Puniya*, an argument was raised that women would have to face greater challenges in the armed forces due to prolonged absence as a result of pregnancy, motherhood and domestic obligations, and the Court dismissed this claim as a "strong stereotype which assumes that domestic obligations rest solely on women".[114] Similarly, an argument that lengthy statutory periods of maternity leave can have negative effects on the economy, the participation of women in the formal sector, and the rule of law[115] can also be denounced as perpetuating stereotypes. However, those making such arguments may claim that there may be more significant strategic and economic interests involved than a single-minded effort to combat stereotypes, or that such interests at least need to be accounted for. Further, the logic of anti-stereotyping may face some challenges in the context of statistically-supported discrimination or rational proxies. The inadequacy of the anti-stereotyping principle may be precisely why, in both *Navtej Johar* and *Lt. Col. Nitisha*, Chandrachud, J. additionally relies on theories related to disparate impact, intersectionality,

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114 Babita Puniya(n 12) [68-69] (this claim is listed alongside other far more blatant stereotypical remarks).

115 Shruti Rajagopalan and Alexander Tabarrok, 'Premature Imitation and India's Flailing State' (2019) 24(2) The Independent Review 165, 174-176.

structural inequality, and indirect and systemic discrimination. Indian discrimination law would surely benefit from a broader foundation in compelling moral reasons to reject certain kinds of generalisations[116] and restructure certain kinds of distributions.[117]

This problem is certainly not as stark in the context of gender discrimination as it is in relation with other prohibited grounds, where stereotypes may often not be pronounced. One abiding issue with Chandrachud, J.'s call to overrule the old theory of discrimination, is that it fails to account for the use of that theory in relation with these other grounds. Indeed, soon after the decision in

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116 Frederick Schauer, *Profiles, Probabilities and Stereotypes* (Harvard University Press, 2003), Chapter 5 (discussing how empirically sound gender-based generalisations may be wrong not only because they might be contingent on cultural biases or because they contribute to the subordination of women, but additionally because of a need to make *compensatory* generalisations regarding the irrelevance of gender-based generalisations). We may also refer to justifications linked to the moral irrelevance of membership in certain groups (Sophia Moreau, 'What is Discrimination?' (2010) 38 Philosophy and Public Affairs 143).

117 See, Anca Gheaus, "Gender" in S. Olsaretti (ed), *The Oxford Handbook of Distributive Justice* (Oxford University Press, 2018) (arguing that the concept of implicit bias needs more attention than it has received and distinguishing distributive justice from recognition-based or relational justice, but also noting that the latter has an important distributive aspect); Sujit Choudhry, 'Distribution vs. Recognition: The Case of Anti-Discrimination Laws' (2000) 9 George Mason Law Review 145, 156-157 (including rational proxies and statistical discrimination within the concept of "stereotyping"); Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights', (2011) 11(4) Human Rights Law Review 707, 708-709 (referring to stereotypes as "widely accepted beliefs" and "supposed group characteristics"); Frederick Schauer, 'Statistical (and Non-Statistical) Discrimination' in K. Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge, 2017), fn.1 (noting that the term "stereotyping" is ambiguous and is often used to refer only to inaccurate statistical generalisations). My concern here is that excessive reliance on anti-stereotyping can lead doctrine back towards legal tests related to accuracy or instrumental rationality. In any case, anti-stereotyping is often understood only as one aspect of robust theories on substantive equality (see, for example, Sandra Fredman, 'Substantive equality revisited' (2016)14(3) International Journal of Constitutional Law 712).

Navtej Johar, Chandrachud, J. himself endorsed the narrow interpretation of non-discrimination in a case on compassionate appointments.[118] Further, as discussed, not only does the narrow interpretation form a potential basis for India's personal laws[119] and the preservation of the character of minority institutions, but a five-judge bench of the Supreme Court has also effectively treated it as part of the basic structure of the Constitution in *R.C. Poudyal*. To add to this, we must consider the fate of aspects of reservations law that rely on the narrow reading. Along with the above, we must take account of the fact that inconsistencies will only proliferate further in relation with additional categories and grounds of discrimination such as sexual orientation, gender identity, language, disability, age, place of birth versus place of residence, sub-castes within castes, and even economic class. And finally, exceptions from the non-discrimination guarantees are variously assessed on the basis of reasonable classification, strict scrutiny, and subjective satisfaction tests,[120] and this variable intensity of review would benefit from systematisation.

A resolution to the interlocking problems described requires that the word "only" be imbued with a different meaning from the one it currently has and, to do this, an alternative mode of justification must be offered that can account for the differential standards of scrutiny that need to be applied to different forms of discrimination to regulate the width of the exceptions available in

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118 *Union of India v. V.R. Tripathi* (2019) 14 SCC 646 [12-13], citing *V. Sivamurthy* (n 69), and stating that, "Compassionate appointment … is not founded merely on parentage or descent …"

119 See, generally on the question, Law Commission of India, Consultation Paper on Reform of Family Law (31 August 2018), <https://lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf> accessed 17 June 2021.

120 While the first two have been noted in discussions above, the third test forms part of certain aspects of reservations law (Indra Sawhney(n 80) [798] (Jeevan Reddy, J.)).

relation with each. In what follows, this is attempted by considering how non-discrimination fits into the general equal protection guarantee and how it relates, along with the manifest arbitrariness test, to a common set of principles underlying the right to equality.

III. RATIONAL FOUNDATIONS FOR THE RIGHT TO EQUALITY

The challenges facing the development of the right to equality in India are formidable because they are old and many-sided. In the discussion above, key problems with recent jurisprudence in both Articles 14 and 15 have been outlined. This Part makes a limited attempt at describing what a solution to these problems could look like. A comparative view of modern equality and discrimination law shows that courts in other jurisdictions have moved past some of the basic issues that Indian law still grapples with, and these perspectives naturally offer attractive avenues for development. While noting this, the discussion that follows offers a distinct vision for the right to equality in India drawing from its existing case-law.

This approach addresses the allegation made in Part 2 of this article: that Indian equality jurisprudence has a tendency to drop everything and start from scratch when faced with difficulties. It also takes seriously the ritual incantation by Indian courts that the general right to equality and the right against discrimination have a common home within the Constitution's Equality Code. The discussion below thus outlines a common set of principles capable of governing both rights without diminishing the richness of the contexts in which each is operationalised. Such a solution would, however, remain inadequate when it comes to the Constitution's non-discrimination guarantees which are additionally constrained by a textual limitation. This final challenge is tackled by offering an alternative interpretative strategy.

a. A COMPARATIVE VIEW OF COMPARISONS

Most modern comparative accounts regarding the evolution of the right to equality focus on its departure from the confines of formal equality and its recognition of some conception of substantive equality. Formal equality is often associated with the precept "treat like cases alike",[121] which equates with what is often referred to as the "similarly situated" test.[122] This logic has often been repeated in Indian judgments in statements to the effect that only discrimination "among equals" is prohibited[123] or that "Equality is for equals".[124] The precept demands that we first identify some form of descriptive equality (i.e., factual similarity between compared persons) which serves as the basis for some form of prescriptive equality (i.e., similar treatment towards the compared persons). However, the test then confronts the classic question faced in any analysis of the principle of equality: equality of what?[125] What kind of factual similarity of situation should matter? What is the metric, parameter or "currency" of equality? What benefit, good, or resource should everyone have the same of? The ubiquity of this question (and the smorgasbord of answers to it) characterises philosophical discourse on equality, and its centrality will also shape the proposal provided later below. Without a meaningful answer to this question, the "similarly situated" test remains inadequate and underdetermining.[126] Constitutional law

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121 Susanne Baer, 'Equality' in Rosenfeld and Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 986.

122 Joseph Tussman and Jacobus tenBroek, 'The Equal Protection of the Laws' (1949) 37(3) California Law Review 341, at 344-345.

123 *State of West Bengal v. Anwar Ali Sarkar* AIR 1952 SC 75 [55] (Das, J.).

124 *State of Jammu & Kashmir v. Triloki Nath Khosa* (1974) 1 SCC 19 [29].

125 Amartya Sen, 'Equality of What?' The Tanner Lecture on Human Values (May 22, 1979); Elizabeth Anderson, 'Equality' in David Estlund (eds) *The Oxford Handbook of Political Philosophy* (Oxford University Press 2012).

126 H.L.A. Hart, *The Concept of Law*, 3rd Ed. (Oxford University Press, 2012) 159; Peter Westen, 'The Empty Idea of Equality' 95(3) Harvard Law Review 537, 572-573 (1982).

has traditionally provided a highly simplified response to this problem: that equality should be assessed against legislative purpose.[127] This equates with the reasonable classification test under Article 14[128] and is described as a rationality or relevance-based test.

The formal precept has been roundly criticised because it collapses the universe of possible conceptions of fair distribution to a solitary, isolated consideration: the governance objective selected by the legislature. Rooting equality in legislative purpose produces a right that amounts to a form of instrumental rationality beholden to majoritarian priorities. This kind of rationality weakens claims to equal treatment because it emphasises differences instead of similarities, always offering some or the other conception of what is a relevant difference and encouraging judges to side with legislative choices.[129] Crucially, the test is also insensitive to prior social inequality and the significance of group-based claims to equality.[130] In Canada, for example, the rationality standard was initially proposed in the form of a test of "internal relevance" (indicating that relevance was to be adjudged on the basis of functional values internal to the legislation), but it was rejected because of its manipulability and circularity.[131] The proposal has instead been to ground the right in a

127 Anwar Ali (n 123) [346-347].

128 Triloki Nath Khosa (n 124).

129 Tussman (n 122), at 986-987 (providing examples of the Nazi distinction between Aryans and Jews, the American 'separate but equal' doctrine underlying segregation laws, and modern legal practice emphasising the uniqueness of abortion and pregnancy); Denise Réaume, 'Dignity, Equality, and Comparison' in Hellman and Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013).

130 Kate O'Regan and Nick Friedman, 'Equality' in Ginsburg and Dixon (eds) *Comparative Constitutional Law* (Edward Elgar 2011) 474.

131 ibid [477]; *Miron v. Trudel* [1995] 2 SCR 418, 489 (Supreme Court of Canada) (McLachlin, J.) ("Having defined the functional values underlying the legislation in terms of the alleged discriminatory ground, it follows of necessity that the basis of the distinction is relevant to the legislative aim. This illustrates

principle of substantive equality that does not accede entirely to legislative purpose as the sole standard for assessing claims. The fundamental operational shift has been to move beyond questions of purpose, intent and treatment to questions regarding the *impact* of the law.[132] By making the effects of a law relevant, substantive equality automatically accounts for pre-existing social disadvantage because facially neutral laws may affect differently advantaged groups of persons differently.

This operational shift has also modified the core values employed to explain the right to equality. Instead of being a guarantee to deliberative reasoning and rational action, the right is instead characterised as a promise to ameliorate disadvantages resulting from dominance, subordination and discrimination.[133] This emphasis has also given rise to a rich body of jurisprudence on what makes *discrimination* law unique and distinct from the general body of equality law. The emphasis on group disadvantage yields a uniquely asymmetric structure to the right against discrimination, distinguishing non-arbitrariness from anti-discrimination[134] and "colour-blindness" from anti-subordination.[135] Further, these evolutionary trends have also yielded pressures against the use of comparative exercises in assessing claims of discrimination, given that

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the aridity of relying on the formal test of logical relevance as proof of non-discrimination …").

132 Miron (n 131).

133 Tussman (n 122) at 986-988; see also, Khaitan (n 7) at 197-201, and Bhatia (n 4) at 68 (for discussions of substantive equality's link to values of personal autonomy and group disadvantage).

134 Khaitan (n 110) at 31-38 and fn.11 (suggesting that the idiosyncrasy of the 14th Amendment of the US Constitution is the source of confusion equating guarantees against arbitrariness with those against discrimination, and arguing that this is discounted by practice in other liberal democracies and in statutory protections in the US itself).

135 Reva B. Siegel, 'Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown*', (2003-2004) 117 Harvard Law Review 1470.

disadvantages can be incomparably unique, and exclusion can be prevented without necessarily engaging in comparison.[136] Instead, scholars have argued that the right against discrimination isn't rooted in equality at all but instead in values like freedom and dignity which are affected as a result of actions connected with certain personal characteristics or "grounds" (religion, race, sex etc.).[137]

This brief comparative account reveals how Indian equality law is yet to confront a range of fundamental questions in its evolutionary journey. The discussion to follow attempts to describe how these questions can best be confronted while maintaining the coherence of the broader body of existing precedent.

b. THE SUPPOSED INADEQUACY OF RATIONALITY

A central challenge for Indian equality law is the need to explain the relationship between the jurisprudence under Article 14 of the Constitution and that under Articles 15, 16 and 29. The traditional view is that Article 14 is the genus and Article 15 and its siblings are the species.[138] But what general principle should Article 14 be read to contain such that the non-discrimination guarantees flow logically and necessarily from it? On this point, the traditional account is that Article 14's conception of equality is to be understood merely as a guarantee of rationality or non-arbitrariness, and non-discrimination guarantees prohibit the irrational use of supposedly irrelevant personal characteristics. This account is troublesome not just because rationality-based tests have been considered circular, manipulable and deferential (as discussed above), but because they are considered simultaneously overbroad and inadequate as a protection against discrimination.

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136 Miron (n 131), at 479.

137 Elisa Holmes, 'Anti-Discrimination Rights without Equality' (2005) 68(2) The Modern Law Review 175; Moreau (n 116); Réaume (n 130).

138 See, for example, *S.G. Jaisinghani v. Union of India*, AIR 1967 SC 1427 [9]; EP Royappa (n 10) [85]; Naz Foundation (n 12) [99].

When we understand a guarantee against discrimination as being a guarantee against arbitrariness, we are faced with the question as to why only certain traits like religion, race etc. are listed as grounds in the non-discrimination provisions. All traits that are predominantly irrelevant in society such as eye- or hair-colour or left-handedness or curly hair should be listed as grounds as well. This suggests that non-arbitrariness is an overbroad conception of non-discrimination, and we are compelled to search for some further reason why only those traits that are socially salient should be listed as grounds.[139]

At the same time, non-arbitrariness is argued to be a narrow and inadequate basis for explaining non-discrimination. When we prohibit discrimination on the grounds of certain traits only because they are irrelevant, we are then compelled to permit the use of those same prohibited traits if they happen to be at all empirically relevant to any objective we choose to pursue. Viewing non-discrimination this way seems to convert a prohibition on the use of certain grounds into a nullity: if the standard was rationality all along, there is no need to specially prohibit discrimination. As a matter of fact, there are a range of situations when we feel compelled to ignore seemingly relevant traits or to treat them *as if* they are irrelevant despite the existence of an accurate empirical connection between the trait and a chosen objective. In one set of situations, a personal characteristic may be relevant because of "reactive attitudes", such as when the sex or religion of an employee is relevant to the effective performance of her job because of the explicit or implicit preferences of customers or

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139 Lena Halldenius, 'Discrimination and Irrelevance' in K. Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge, 2017) (drawing on Kasper Lippert-Rasmussen, *Born Free and Equal?: A Philosophical into the Nature of Discrimination* (Oxford University Press, 2014) 30; and Janet Radcliffe Richards, 'Discrimination' (1985) 59 Proceedings of the Aristotelian Society 53, 66, 70 and 75).

business partners.[140] The trait is relevant here because discrimination by members of society must be taken into account to ensure the effective performance of a job requiring social interaction. Similarly, it is a legitimate business objective to hire persons who would more regularly come to work, and sex is relevant to the pursuit of this objective because women are more likely to take leave when they have children than men are.[141] A prohibited trait may also serve as a rational proxy to efficiently screen out unqualified applicants for a job, but the reason behind the statistical correlation between the trait and qualifications may be historical discrimination.[142] There are good reasons to find these relevance-based choices unfair, and the wrongness of the consequences of these choices compels scholars to reject "rationality" as a basis for non-discrimination.[143]

One may respond to such situations by engaging in more individuated classification (stop using the prohibited trait as a proxy and instead adopt the underlying characteristic for decisions) or by adopting measures of reasonable accommodation and affirmative action (modify the status quo by correcting the structural reasons for the use of a trait). No matter how one responds to such situations, one does so because one is concerned not just with the objective at hand but also with the conditions of the lives of persons excluded as

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140 Halldenius (n 139) 115-116.

141 Deborah Hellman, 'Discrimination and Social Meaning' in K. Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge, 2017) 99.

142 Schauer (n 116).

143 For example, see Hellman (n 142) ("The wrongfulness of discrimination cannot be reduced to irrationality or overgeneralization."); Choudhry (n 117) at 156 ("The difficulty rational proxies pose is that they exhaust the first justification for anti-discrimination laws by forcing apart relevance and discrimination. Proxies clearly meet the test of relevance, which is why employers often use them. Nevertheless, to exclude an otherwise qualified individual from consideration simply because of a group-linked trait that is not directly linked to individual job performance, such as sex, still strikes us as discriminatory.").

a result of structural and systemic social issues.[144] Concern for social disadvantage is thus argued to be a superior explanation for the adoption of a list with socially salient traits as well as the asymmetric protections afforded to vulnerable groups identified by those traits.[145] Significantly, antipathy for relevance-based approaches to equality has also yielded the suggestion that the relation between Articles 14 and 15 should be reversed such that the general right to equality is understood as abstracting or generalising the specific disadvantage and exclusion-centred protections of the right against discrimination.[146]

c. KEEPING RELEVANCE RELEVANT

Understanding the right to equality to be fundamentally about disadvantage and exclusion (and jettisoning the rationality conception) has a number of attractive results but yields some troubling conundrums. For one matter, this conception of equality seems to separate formal and substantive equality into two distinct and seemingly unrelated modules. It seems unclear what substantive equality and its emphasis on group disadvantage has to do with the continued and conspicuous significance of formal equality in such matters as the general application of criminal laws or the symmetrically equal procedural treatment of rival parties before a court. Nor does it seem to be involved in the legal foundations for democracy under which each person is afforded one vote and no

144 Halldenius (n 139) 115-116.

145 Khaitan (n 110) 31-38.

146 Bhatia (n 4) 57-68, 107-109. To be fair, Bhatia does accept the need for a rationality and reasonable-classification model, but suggests that this only serves a supplementary role under the right to equality, adequately addressing those situations under the equal protection clause where no discrimination-related questions are raised (n 4 at 66).

more, regardless of the gravity of the socio-economic disadvantage they suffer.[147]

For another matter, we may consider the nature of exceptions available to specific prohibitions against discrimination. Certainly, some of the explicit exceptions under Articles 15 and 16 are aimed at ameliorating disadvantages faced by women, Scheduled Castes and Tribes, and backward classes. However, as we have noted in discussions above, there are notable exceptions to the prohibition against discrimination on the basis of caste, religion and descent. What is more some jurisdictions even provide narrow grounds on which differential treatment on the basis of sex may be treated as non-discriminatory if there is a "genuine and determining occupational requirement" with a legitimate objective pursued proportionately.[148] Exemptions from prohibitions on discrimination on the grounds of age and disability also notably feature considerations of proportionality[149] or regard for genuine qualifications for a job, undue hardship for an employer, and the fundamental nature of relevant activities.[150] The legitimacy of individual exceptions aside, these provisions emerge as a result of the continued operation of a principle of relevance animating discrimination law. This is not least because some of the above instances of "exceptions" are not designed as exceptions at all but definitions of what constitutes discrimination in the first place.

The discussion above should suggest that there is tension between the reasons for jettisoning equality-as-rationality and reasons for considering its retention. A further reason for its retention, in the Indian context, is that the judicial development of constitutional

147 Schauer (n 116) 222-223.
148 EU Directive 2006/54/EC, Title II, Chapter 3, Article 14.2.
149 S.13(2) and (3), UK Equality Act, 2010.
150 Americans with Disabilities Act of 1990, §§12111(10), 12112(5)(A), 12113, 12143(c)(4), 12182(b)(2)(A)(ii) & (iii).

doctrine should avoid, if possible, the urge to entirely disregard existing jurisprudence in formulating new tests and principles for a fundamental right. Reading Article 14 as being fundamentally rooted in substantive equality would likely have this effect, wasting doctrinal resources that may have considerable potential if only they are viewed from a new perspective. As it happens, the arbitrariness doctrine offers precisely such a perspective and it need not take much judicial effort to bring it to light.

A starting point for this is the simple observation that rationality and relevance-based conceptions of equality have been roundly criticised not because of something inherent in terms like "rationality" and "relevance" but solely because tests like the reasonable classification test have been overly deferential and self-defeating in their obsessive focus on the government's identification of the object of the law. If the fatal flaw of relevance-based tests is their isolated consideration of equality against legislative purpose, then a test which relies on "relevance"[151] but is not restricted to such an isolated standard should not be discarded out of hand but built up to meet the requirements of constitutional democracy. Indian equality jurisprudence already provides pointers as to when the object of a law should itself be treated as discriminatory, such as when a law impacts values like legislative control over administrative action,[152]

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151 Here, I refer to the original conception of the arbitrariness doctrine under *E.P. Royappa* (n 10) as discussed above in Part 2.1.1. For the purpose of the present discussion, this idea of "relevance" may be viewed as synonymous with the ideas of "rationality", "adequacy of determining principle" etc. adopted in *Shayara Bano* (n 11) [101] as applicable to plenary legislations.

152 *Bidi Supply Co. v. Union of India* AIR 1956 SC 479 (Bose, J.) [18]. The opinion drew upon a previous judgment on a similar point in which one opinion insisted that "insidious discrimination" can be "incorporated" into the general terms of a law such that any actual discrimination in the exercise of discretion would be "ultimately traceable" to the law itself (*Anwar Ali Sarkar* (n 124) [27-28] (Fazl Ali, J.)). Note that this is only one conception of a line of rulings elaborating on a link between equality and unguided discretion including

minority rights,[153] valuable constitutional freedoms,[154] and hostility towards preferential treatment under the rule of law.[155] This implies that in designing a stronger relevance-based test, adopting a free-flowing and unconstrained conception of relevance is far too broad and would allow judges to simply replace the legislative selection of priorities with their own views regarding appropriate principles of distribution.[156] On the other hand, we may be tempted to equate the arbitrariness doctrine with substantive equality, making questions of

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Anwar Ali Sarkar (n 124); *Lachmandas Kewalram Ahuja v. State of Bombay* AIR 1952 SC 235; *Kathi Raning Rawat* (n 112); *Kedar Nath Bajoria v. State of West Bengal* AIR 1953 SC 404; *Shri Ram Krishna Dalmia v. Justice S.R. Tendolkar* AIR 1958 SC 538; *Delhi Transport Corporation v. D.T.C. Mazdoor Congress* (1991) Supp (1) SCC 600; *Subramanian Swamy v. Director, CBI* (2014) 8 SCC 682 (acknowledging the continued availability of the ground at para.49). See also, for a reference to the link between lack of classification and "scope for misuse", *Navtej Singh Johar* (n 12) [637.10-11]. See, for a contemporary application, Douglas McDonald-Norman, 'The Citizenship Amendment Act and 'Persons Belonging to Minority Communities", *Law and Other Things* (28 December 2019), <https://lawandotherthings.com/2019/12/the-citizenship-amendment-act-and-persons-belonging-to-minority-communities/> accessed 23 June 2021.

153 Though in an *obiter*, this was explicitly indicated as a ground for finding the object of a law to be discriminatory in *Nagpur Improvement Trust v. Vithal Rao* (1973) 1 SCC 500 [26]. Opinions in *Navtej Singh Johar* (n 12) also suggested that criminal provisions singling out minority groups could have a discriminatory object (at para.353 (Nariman, J.)) or else lack any legitimate object at all (at para.238 (Misra, C.J.)). In *Joseph Shine* (n 12) Nariman, J. not only held the impugned provision to be manifestly arbitrary, but also held its object to be manifestly arbitrary (at para 103).

154 The finding of a discriminatory object in *Nagpur Improvement Trust* (n 154) was arguably triggered by the disproportionate invasion into a general right to property in that case (at para.31).

155 In *Subramanian Swamy* (n 153),the Court found the object of a special law protecting senior public servants to be discriminatory because it conflicted with the object of a general anti-corruption law (at paras 64, 68).

156 Réaume (n 130) 11-12 ("We elect representatives based on views about just what sorts of distributive principles we want them to put into action. If an equal rights provision enabled claimants to contest any and all of these distributions on the basis of any plausible competing argument about how benefits and burdens should be distributed, the courts would be *comprehensively* substituting their judgment for that of the legislature. This ratchets up the usual concerns about the propriety of judicial review.").

group disadvantage relevant to the constitutional adjudication of differential treatment and effects. But this approach faces the objections on the limited scope of substantive equality raised above. It not only forecloses any departure from the reasonable classification test's object-related deference for significant purposes other than those that substantive equality values but also fails to account for the arbitrariness doctrine's present structure.

Instead, it would be far more appropriate, analytically and doctrinally, to understand non-arbitrariness as articulating a broad-based conception of rationality that accommodates both formal and substantive equality. This is achievable if we can identify a set of principles to explain why considerations *external* to a law (not necessarily implied by its stated objective) should nonetheless be *mandatorily relevant* in the construction of the law's classifications and distributive aims. This set of principles can best be located within the variety of fundamental values embedded in the Constitution itself. Under this proposed approach, the right to equality would be applied by ordinarily considering the relevance of a classification or distribution against the object of the law, *but departing from such a narrow analysis whenever a fundamental constitutional value is at stake*. By virtue of their inclusion in the Constitution, these fundamental values serve as considerations that are perennially relevant to any classificatory or distributive measure: any clear negative impact on such values affords judges adequate reason to depart from deferential review and employ stricter standards.

This conception of equality-as-rationality remains in consonance with India's constitutional ethos and respects the principle of separation of powers. Notably, it also aligns with precedents in *Indian Express* and *Khoday Distilleries (II)* that respectively conceived of manifest arbitrariness as State action that fails to take

into account "very vital facts"[157] or contains "self-evident disproportionality".[158] The proposal only narrows the ambit of this conception to *constitutional* values for the purposes of assessing plenary legislation.[159] What it also seems to do, however, is to convert the right to equality into a conception of rationality unconnected to strict egalitarianism.[160] For example, under this view, concern for group disadvantage would seem to emerge not out of respect for the moral equality of all individuals but would be the result of a combined reading of equality's demand for the rationalisation of social differences and the protections afforded to personal autonomy, deliberative freedoms, and dignity under Articles 19 and 21.[161] Given limitations of space here, it is difficult to elaborate on the significant connections that scholars have been drawing between non-discrimination and liberty or dignity, but

157 Indian Express Newspapers (n 27).

158 Khoday Distilleries (n 28).

159 This may be read as an appropriately constrained alternative to the formulation of non-arbitrariness proposed by Ahmed (n 1) at 126-131 (arguing that the manifest arbitrariness test should be viewed as a device by which to identify laws and measures that are indifferent to relevant considerations or that employ pretextual objectives to hide real motivations). This approach is necessary because of the urgent need to narrow the arbitrariness doctrine's reliance on "substantive due process", a concept whose application is restricted to specific constitutional interests in life, liberty and property even in the United States (Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 5th Ed. (Wolters Kluwer 2015) §§7.1, 8.2.3, 10.2.2, 10.2.4, 10.3.2).

160 For a prominent argument rejecting strict egalitarianism, see Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986), Chapter 9.

161 See, for instances where such linkages have been drawn, n 134. See also, n 138, for scholarly works defining the goals of discrimination law in terms of freedom or dignity instead of equality per se. Indian constitutional law already recognises the result of exporting "reasonableness" from Article 14 to Article 21. It should not be a great stretch to conceive of an import of "dignity" from Article 21 to Article 14. For relevant insights, see Laurence H. Tribe, 'Equal Dignity: Speaking Its Name' (2015) 129 Harvard Law Review Forum 16. See also, Khaitan (n 110) at 113; n 122 at 994 ("The more equality is understood as a right against discrimination, the more a test moves away from a comparative exercise and resembles a liberty test, directed against a violation of a fundamental interest or need.").

readers need only imagine how discrimination targets traits that individuals have no meaningful control over, limiting their ability to make choices and expressing contempt towards them. The prohibition on the usage of listed traits under non-discrimination provisions is thus rationally justified not because the traits are always irrelevant but because of the higher relative relevance of autonomy and dignity in certain contexts. Similarly, heightened scrutiny may also be triggered when distinctions between persons affect constitutional values like the rule of law, free and fair elections, and rights like those to property or to the freedom of speech. Despite the proposal that courts should be guided by constitutional values in navigating such contextual relevance, there may be legitimate criticism that this requires balancing between and comparison of incommensurate values.[162] However, in circumstances where such issues seem gravest, the balancing of the relative relevance of different considerations would be more appropriate at the stage of defining the rights themselves and not when adjudicating whether a violation of the right is justified.[163]

d. TEXT MEETS REALITY

Finally, this approach can guide us in formulating an appropriate interpretative response to the textual limitations of the Constitution's non-discrimination provisions. We may demand, for example, a harmonious construction of Article 14 with Articles 15(1),

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162 Stavros Tsakyrakis, 'Proportionality: An assault on human rights?' (2009) 7(3) International Journal of Constitutional Law 468.

163 T.M. Scanlon, 'Rights, Balancing, and Proportionality' in Kioussopoulou et al (eds), *Human Rights in Times of Illiberal Democracies: Liber Amicorum in Memoriam of Stavros Tsakyrakis* (Nomiki Bibliothiki, 2020) (discussing how even categorical norms are subjected to balancing when they undergo redefinition). For an example where such balancing is undertaken in defining the right against discrimination, one may consider Schauer's argument that the right requires the mandatory underuse of certain traits so as to compensate for the historical overuse and abuse of such traits (Schauer (n 116)).

16(2) and 29(2), so as to temper the explicit exclusion of non-citizens from the protections of the latter. Arguably, the distinction between citizens and non-citizens has no rational nexus with the constitutional objective of protecting against discrimination (it seems to serve some purpose only in relation with discrimination on the ground of "place of birth"). Even if strict non-discrimination safeguards are viewed as some kind of special privilege accompanying citizenship, rational treatment would still require at least an intermediate heightened safeguard for non-citizens.

Similarly, we may address the formalistic interpretation of the word "only" in the non-discrimination provisions. As discussed in Part 2, courts have read the word as allowing for a peculiar form of justification for discriminatory acts.[164] Avoiding this usage of the word requires that we first read the word "discriminate" differently. The word is often read in a value-neutral sense that makes it synonymous with "classify".[165] This makes each non-discrimination provision an absolute prohibition on the use of the listed traits and does not align with what we understand regarding the need to allow for the use of the traits in narrow circumstances defined by the theory of wrongful discrimination at play (whether this theory is based on equality-as-rationality or not). Instead, the word "discriminate" should be given a value-laden meaning that excludes from its scope all justified uses of the listed traits.[166] This takes the

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164 In fact, this seems to have been the intention at the time that the provision was being drafted. See, B. Shiva Rao, *The Framing of India's Constitution* (Indian Institute of Public Administration, 1968) 186 (B.N. Rau seemingly considered the word necessary to allow for discrimination against foreign nationals). This is discussed further in Mohammad Ghouse, 'Judicial Control of Protective Discrimination' (1969) 11(3) Journal of the Indian Law Institute 371, 374-375.

165 See n 112 (for indications that it tends to be given this meaning by courts).

166 For an insightful discussion on the distinction between the value-neutral and value-laden meanings of the word "discriminate" and its relation to the concept of "relevance", see Halldenius (n 140) at 111.

weight of regulating exceptions to the prohibition off of the word "only" and allocates that work to the definition of the right itself (justified acts are simply not to be termed "discrimination").

The second step would be to read the word "grounds" not as *motivating* factors or *causal* factors for wrongful discrimination,[167] but instead as *enabling* factors. This would mean that a classification or a set of effects would become unlawful where the discriminatory nature of the outcome would have been different if not for the involvement of a listed characteristic in some meaningful way.[168] Significantly, this interpretation of "grounds" as enabling factors is not limited by the word "only", which now serves to clarify and advance the reading. This is because enablement, unlike causation, may be the cumulative result of a number of necessary factors, each of which can simultaneously be claimed to have been solely or exclusively responsible for making some outcome (here, discrimination) possible.[169] One may note the difference between the

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167 n 110.

168 The proposed interpretation may seem to have significant parallels with a "but-for" theory of anti-discrimination law, which is considered one mode by which an effects-based understanding of "grounds" can be brought to bear on discrimination law while maintaining the form of the more traditional understanding of grounds as "reasons". See, Khaitan (n 110) at 162 (discussing *James v. Eastleigh Borough Council*, [1990] 2 AC 751). The word "only" is merely adapted into this understanding here. A similar theory was also employed in *Bostock v. Clayton County*, 590 US __ (2020) to allow for a kind of conflation between sex discrimination and sexual-orientation discrimination. However, the formulation in *Bostock*, and even extensions of the formulation, still differ from a true disparate impact standard (See, for example, Katie R. Eyer, 'The But-For Theory of Anti-Discrimination Law' Virginia Law Review (Forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3801699> accessed 25 June 2021). To the extent that this limitation exists, one need only note that the reading here would not suffer from it because it treats "grounds" as factors that enable the discriminatory nature or status of relevant outcomes, and not the outcomes themselves.

169 As the involvement of a ground only *enables* a finding of discrimination under this reading, such involvement is a necessary element of discrimination, but

statements "I researched only because of a grant" and "I was able to research only because of a grant". In the first sentence, the research is caused exclusively by the grant, but in the second sentence, the research is made possible by the involvement of the grant, though other factors like research skills and mentorship may also be necessary in making the research possible. Enablement is an inclusive conception of causation, and its usage allows us to respect the text of the Constitution as well as the nature of wrongful discrimination (which can be intersectional[170] and incident in relation with traits outside of a closed list[171]).

IV. CONCLUSION

If equality jurisprudence under the Indian Constitution is in a state of uncertainty today, it is because it is disjointed, its separate doctrines estranged from each other due to a combination of confusion, mutual aversion and seeming incompatibility. It is easy to suggest that this is a result of one or some of the aspects being entirely incorrect and others having things entirely right. Instead, as this article has attempted to show, each doctrine or test faces issues due to overt deference, incoherence, overbreadth, inadequacy of basis, or inadequacy of applicability.

Part 3 of this article outlined the basic premise for a conception of equality that puts relevance and rationality at its centre, but not sterile forms of descriptive relevance and instrumental rationality joined at the hip with majoritarian objectives viewed in

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not a sufficient one. There may be additional criteria for determining whether an outcome in a case is unjustified (See, Khaitan (n 110) at 180-194).

170 See generally, Atrey (n 6) (on how the narrow interpretation had limited the applicability of intersectional analysis).

171 As scholars have already noted, the principles underlying the specific non-discrimination guarantees may be read backwards into the general right to equality so that some heightened (or even intermediate) intensity of review may be required for grounds analogous to the listed grounds (See, Khaitan (n 7) at 203; Bhatia (n 4) at 57-59).

isolation. Instead, it is proposed that rationality can serve as the basis for equality if it is rescued from its traditional reputation of weakness and deference. There are a variety of utilitarian, prioritarian, sufficientarian, contractarian, relational, virtue-ethical and other traditions in political philosophy that employ independent and overlapping models of "rationality", and any of these could well offer a sound common foundation for non-arbitrariness and non-discrimination. Admittedly, the proposals made above may seem to have failed to rescue equality-as-rationality from the allegation of emptiness. The pursuit of rationality may appear to prize the ever-growing discovery of differences between persons and the necessary relevance of these differences to different aspects of life. And yet, the symmetrical generality of many branches of the law and substantive equality's offer of the same amount of concern to all individuals seem to echo each other by speaking in the language of *similarity* or *sameness* (whether of treatment, opportunities or outcomes).

This is a problem faced by any conception of the right to equality that rejects strict egalitarianism and a complete solution cannot be provided at this point. Perhaps, equality only results as a by-product of concern for values like autonomy because of a rational attitude of forbearance in the face of uncertainty. Seemingly relevant differences between persons have to be treated as immaterial because of uncertainty regarding whether those differences should be allowed to constrain autonomy. Rational responses to uncertainty could well run to the extent of allowing doubt and humility to govern instead of always believing that the collective action of categorisation should conclusively impinge on the ability of individuals to plan their own lives and set their own objectives.

These quandaries apart, it is hoped that this article has alerted readers as to the minimum conditions for articulating a coherent

vision for the future of the right to equality, especially in the context of the Indian Constitution. The increasing availability and manipulability of information regarding groups and individuals means that governments will necessarily have a heightened ability to discriminate as time goes forward. It will only become easier to present some putative difference to claim that some or the other discriminatory measure is "rational". But the purpose of the equal protection guarantee is not to improve the ability of governments to come up with excuses, thereby hampering both the rule of law and the informed nature of participation that democracy requires. If this outcome is to be prevented, the right to equality must co-evolve with the government's capacity to gamble with public reasons. It must call the bluff and match the bet.

COEXISTENCE OR SEGREGATION? EXAMINING CONSTITUTIONAL PUBLIC POLICY AND THE DISTURBED AREAS ACT 1991 IN GUJARAT

Devansh Shrivastava, Anubhav Bishen [*]

Abstract

Ethnic conflict and residential segregation in democratic societies challenge heterogenous and diverse character of a society as they tend to operate in identity binaries and constrained choices. It throws open more challenges to urban planning and policy-makers as the deep structural roots of conflict hinder redistributive aspects of governance. In societies with history of violence, policies aimed at segregation or integration of different communities in "sensitive areas" demand state intervention to restrict polarization between them in different forms. Moreover, restrictive land zoning laws in such a context open a plethora of questions to the constitutional structures already in place.

This paper offers a critique of a restrictive zoning law i.e., Gujarat Prohibition of Transfer of Immovable Property and Provision for Protection of Tenants from Eviction from Premises in Disturbed Areas Act, 1991. The Act was enacted in 1991 to prevent 'distress sales' and 'bootlegging' in Ahmedabad in the background of communal violence in the 1980s in particular. As the Act stands challenged in the Gujarat High Court by a minority rights activist, we analyze some of the legal disputes pertaining to Act. We suggest a comparative analysis of the Act with the Supreme Court judgment in Zoroastrian Co-Operative ... vs District Registrar Co-Operative (2005) and its joint reading with the 2019 amendment to the Act. In doing so, we highlight the arbitrary nature of the Act's and its

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conflicting conduct with the constitutional guarantees on grounds of constitutional public policy.

I. Introduction

How should law and policy respond to institutionalizing social change in democratic societies ridden by years of violent ethnic segregation? A fundamental problem before engaging with the challenge is of defining what constitutes 'public policy' in a democratic society, faced with structural challenges of accumulated group inequality. In an urban setting, spatially carved divisions, including those socially constructed through informal boundaries, can fundamentally affect the impact a policy may have. In democratic societies ridden by protracted conflicts between communities, mutual distrust and social cohesion remain enormous challenges. These challenges become more multifaceted when the patterns of residence also reflect spatial segregation based on divisions of caste, religion, sect, and/or race.

It is often due to mutual distrust between communities that communities choose to self-segregate. There are two important points to take note of. One, (ethnically) mixed areas can offer liberatory potential by creating more and more shared spaces. One the other hand, they can also become sites of insecurity for social groups either giving rise to cluster-based living (gated communities) or intra-city migration, while severely constraining mobility choices.[1] Segregation can then be contextualized in Ellen & Steil's conception as constrained choices due to fear and insecurity.[2] This sense of

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1 Rubina Jasani mentions the intracity migration in Ahmedabad post 2002 mass violence. *See*Rubina Jasani, 'A Potted History of Neighbours and Neighbourliness in Ahmedabad' in Edward Simpson and Aparna Kapadia (eds), *The Idea of Gujarat: History, Ethnography and Text* (Orient Blackswan Private Limited 2010).

2 Ingrid Gould Ellen and Justin Peter Steil, 'Introduction' in Ingrid Gould Ellen and Justin Peter Steil (eds), *The Dream Revisited: Contemporary Debates About*

collective choice as reflected in "communal living", as Sanderien Verstappen calls it,[3] reflects deeper patterns of spatial segregation.

The formation of informal settlements and surrounding areas could very well be attributes of fear and mistrust between communities. Needless to say, welfare governance in a highly divided society also resorts to "voluntary bystanderism",[4] at a distance away from bringing significant structural changes in the delivery of public utilities. It then becomes imperative for policy-makers to bridge the gap between constitutional guarantees, the context in which they operate, and redistributive governance through the state's institutions aimed at public welfare.

In Ronald Dworkin's view, the interpretive role of courts should be limited to examine whether public policies are violative of citizens' rights.[5] Moreover, Pellissery et al.[6] direct our attention to two conditions which trigger policies; first, when the executive does not perform positive action to generate public good and second, when the courts judge the constitutional validity of such policies decreeing them as *ultra vires*. Thus, one of the foremost challenges before the policy-makers is to determine what constitutes the public good in a fragmented society. One way to address this is to determine

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Housing, Segregation, and Opportunity in the Twenty-First Century (Columbia University Press 2019).

3 Sanderien Verstappen, 'Communal living: Religion, class, and the politics of dwelling in small-town Gujarat' (2018) 52(1) Contributions to Indian Sociology 53–78.

4 Professor Upendra Baxi uses the metaphor to explain the withdrawal of state's presence in the context of 2002 mass violence. *See* Upendra Baxi, 'The Twilight of Human Rights', (2003) 30(2) India International Centre Quarterly 19-28.

5 Sony Pellissery, Babu Matthew, Avinash Govindjee and Arvind Narrain, 'Why is law central to public policy process in the Global South?' in Sony Pellissery, Babu Matthew, Avinash Govindjee and Arvind Narrain (eds.) *Transformative Law and Public Policy* (Routledge 2020).

6 ibid.

the redistribution of public services in areas which resemble deeper patterns of spatial segregation in a historical sense.

Historically, communities in societies ravaged by years of armed and sectarian conflict, say the overlapping nationalist (Irish/British) and religious (Catholics/Protestants)[7] conflict in Belfast (Northern Ireland),[8] have resorted to spatially carved divisions engendering definitive ethnic (spatial) segregation. Ascriptive identities[9] in such contexts are thus, hard to let go off. The state desiring policy changes in such cases, needs to be wary of the wicked problems posed due to ethnic conflict;[10] for a policy aimed at reducing inequalities between conflicting groups may end up perpetuating the same in conduct.

In the context of post mass violence Indian cities, ethnic segregation and informal boundaries have often emerged as visible markers of everyday life. This essay looks one such unique case. It examines a restrictive zoning policy related to ethnic conflict and spatial segregation in the state of Gujarat. From the lens of constitutional fundamental guarantee under Article 15(2), the paper examines the validity of the Gujarat Prohibition of Transfer of Immovable Property and Provision for Protection of Tenants from Eviction from Premises in Disturbed Areas Act, 1991 (also known as the Disturbed Areas Act 1991) (hereinafter, the Act). The background to the Act must begin with a fundamental question – Do

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7 Scott A. Bollens, *On Narrow Ground: Urban Policy and Ethnic Conflict in Jerusalem and Belfast* (State University of New York Press 2000) 189.

8 Separation barriers called "peacelines" in order to segregate Catholic neighbourhoods from Protestant neighbourhoods are the most visible example. *See* Paul Doherty and Michael A, Poole, 'Ethnic Residential Segregation in Belfast, Northern Ireland, 1971-1991', (1997) 87(4) The Geographical Review 528.

9 In the context of the paper, it implies the magnification of religious, caste, racial or any other identity over the citizen's identity in policy formulation.

10 Donald L. Horowitz, *Ethnic Groups in Conflict* (University of California Press 1985) 563–568.

ethnically mixed areas cause more violence in times of distress or witness more social cohesion? This question has acquired a key position among policymakers contemplating ethnically mixed nature of areas in sensitive areas.

In scholarly work, this question has been addressed with contrasting views. Ashutosh Varshney's significant work titled "Ethnic Conflict and Civic Life" advocates routine engagement between communities and "pre-existing local networks of civic engagement" as decisive in defusing tensions between ethnically divided communities. Varshney's argues that presence of intercommunal engagement can lead to communal peace, thus advocating a version of coexistence rather than its contrasting policy option of segregation. It leads policy makers to emphasize on the modes of governance which can address the diluting character of mixed areas and mushrooming segregating public spaces in the guise of private land-use. This leads us to view housing as a primary site, borrowing from Solange Muñoz's study on housing in Buenos Aires (Argentina),[11] from which residents' access to urban resources and services such as education, health care, jobs and transportation gets mediated.

II. THE ORIGIN OF THE ACT AND CASE LAWS

The city of Ahmedabad has been grappling with the problem of mass violence since 1969, and communal violence has been endemic, post-independence. Howard Spodek demonstrates that violence in the city has not been simply sporadic but endemic with breaks in 1941, 1942, 1946, 1956, 1958, 1964, 1969, 1974, 1981, 1985 and 1986 (including the pogrom in 2002).[12] During rising ethnic

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11 Solange Muñoz. 'A look inside the struggle for housing in Buenos Aires, Argentina', (2017) 38(8) Urban Geography 1252.

12 Howard Spodek, 'From Gandhi to Violence: Ahmedabad's 1985 Riots in Historical Perspective', (1989) 23(4) Modern Asian Studies 765.

tensions in the 1980s, 'distress sales' led to exodus and evictions of minorities from communally sensitive areas. It also led to consolidation of informal boundaries between Hindu and Muslim areas.

The Disturbed Areas Act was initially passed as an ordinance in 1986 to stem the bootlegging activities and 'distress sales'.[13] Ornit Shani explains that the purpose of the law was to prevent the dilution of mixed localities and it was enacted first in eastern Ahmedabad (with reference to Bapunagar area) where Muslims were evicted from Hindu-dominated localities and had to sell their properties at distressed rates. Shani critiques the Act by arguing that it had little possibilities of success as the Act "sought to reverse the situation that existed on the ground after the riots" where patterns of spatial segregation had reified.[14] Over the years, the policy has been extended to various areas in Ahmedabad and cities across Gujarat. Its extension criticised by scholars for perpetuating social segregation, an objective against which the Act was brought in.[15]

The prohibition on transferring of property includes prohibition of transfers by gift, exchange, sale, lease or otherwise. Though the Act does not mention religion as the basis of such a prohibition, in practice it becomes more complex when one wants to move out of a disturbed area and relocate. It is so because the religious ascription to areas and religious identities in the social context are intertwined in the practice of segregated living. The

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13 Howard Spodek, *Ahmedabad: Shock City of Twentieth–Century India* (Orient Blackswan Private Limited 2012) 235–236.

14 Ornit Shani, *Communalism, Caste and Hindu Nationalism: The Violence in Gujarat* (Cambridge University Press 2007) 127–128.

15 For instance, Fahad Zuberi calls it "Apartheid by law" to signify the deep ethnic divisions perpetuated by the existence of the law. *See* Fahad Zuberi, 'Apartheid by Law: Sustaining Conflict, Producing Divided Cities, The Case of Disturbed Areas Act, 1991' in A. Srivathsan, Seema Khanwalkar and Kaiwan Mehta (eds), *CEPT Essay Prize 2019* (CEPT University Press 2020).

extension of the Act to a new area would mandate that residents apply for permission to the authorities for selling their respective properties. In ethnically mixed areas, the probability of selling the property to buyer of another community is unlikely, leaving the option to sell it at lower price to a co-ethnic/co-religionist. It may also impact the market price of properties in that area.[16] This appears as a compromise of the Act's initial intent which had originally focussed on preventing forced transactions/evictions.

The disputes arising under the Act in front of the Gujarat High Court are disputes about personal property on various grounds, that include individual parties, cooperative societies, builders and so on. The cases are about the vagueness of the language of Act with regard to the state's extension of the Act to applicants' area,[17] the illegal possession of one's property after a riot situation,[18] or challenging the involvement of a third party between two consenting parties.[19]

A major contestation with regard to the Act's application has appeared in transactions involving inter-faith property transfers

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16 For instance, a resident in Shahpur (East Ahmedabad) wanted to migrate to Navrangpura (an area known for upward residential mobility) by selling his existing property. Due to the imposition of the Act, he could not do so. Since his ascriptive identity happens to be Hindu, he could only sell it to Hindu or Jain buyers. He frustration with the imposition of the Act can be summarized in his statement "at the rate being offered by Hindu or Jain buyers, we can't even afford to buy even a bathroom there. There were Muslim buyers who were willing to offer the market price, but getting the collector's permission to make the sale to them is a hindrance." *See* Nileena MS, 'The Gujarat government is enforcing communal segregation and criminalising property transfers' *The Caravan* (21 August 2019) <https://caravanmagazine.in/policy/the-gujarat-state-is-enforcing-communal-segregation-and-criminalising-property-transfers> accessed 12 August 2021.

17 *State of Gujarat v. Nareshbhai P. Parmar* 2012 SCC OnLine Guj 2688.

18 *Abdul Azziz Mohammad Shafi Rangwala v. State of Gujarat* 2016 SCC OnLine Guj 4753.

19 *Bharatkumar Shankarlal Somani v. State of Gujarat* Special Civil Application No. 11362 of 2017 [11].

particularly in ethnically mixed as well as homogenous areas. It has been contested on assessments of potential future law and order problems. The SNA case offers a significant direction in this regard.[20] It represents the tussle between the community sentiment of maintaining exclusive membership and preventing members of other communities from acquiring property in their vicinity. In this case, Justice Waghela held that the applicants' contention[21] was "suffering from communal prejudice" and they had "misconception about the law".[22] Moreover, in his reading of the Act, Justice Waghela observed that the original intent of the Act was not to divide "residents or citizens on communal lines". He also held that no law in India could be interpreted in a manner to "exclude the members of one or the other community from carrying on legitimate business activities and entering into communal transactions".[23] This reinforces our attention to the original intent of the Act which is free consent between parties and not inter-community property sale.

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20 *SNA Infraprojects Private Limited v. Sub Registrar* 2011 SCC OnLine Guj 2504. (hereinafter '*SNA*').

21 ibid [5]. The case mentions appeal of ten Mevawala flat residents through multiple civil applications who had requested the Speaker of the Gujarat Legislative Assembly to intervene as there were attempts to sell properties to Muslims. Moreover, they refer to a letter drafted by the then Deputy Collector to the Chief Minister in 2006 indicating that such property transfers would force more than a thousand Hindus to leave the area in question. It is for preventing the defeating of the purpose of the Act that these applicants had argued that such a sale deed by the petitions be held illegal. In this case, the involvement of a non-state actor called as "Shree Kochrab Ellisbridge Hitrakshak Samiti" which had insisted the Speaker to take note of the transactions happening in the sensitive area. However, the petitioners had contended that the applicants suffered a misconception about the Disturbed Areas Act that its primary objective was to prevent entry of persons of a community into another.

22 ibid [9.1].

23 ibid [10].

The Act was amended in 2019 (hereinafter, the Amended Act) to plug in the loopholes in the previous iteration of the Act.[24] In the Amended Act's language, "harmonious demographic equilibrium" was prescribed as the most essential parameter helping in maintaining public order in disturbed areas. In as many as three cases,[25] the Gujarat High Court has interpreted that free consent and fair value between parties is the objective of the Act, and the matter should not be unnecessarily complicated by emphasizing upon the religious demography angle. Though the Gujarat High Court judgments have been important in their own sense, the constitutionality of the Act has not been tested by the Court. In light of the Amended Act, the constitutionality of the Act needs to analysed from the aspect of public policy.

An important judgment on the constitutionality of segregated housing (or rather housing membership on exclusive criteria) from the aspect of public policy is the Supreme Court's ruling in

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24 The Statement of Objects and Reasons states, "In place of the existing provision in section 3 of the aforesaid Act, a new provision is sought to be substituted whereby, while enlarging the instances for declaration of any area to be a disturbed area illegal transfers of immovable property disturbing the proper clustering of the persons of one community and to have harmonious demographic equilibrium by introducing the concept of identification of proper clustering of the persons of one community on the basis of the traits of the residents of a particular geographic al area having common norms, religion, values or identity and sharing a sense of place in the said area." *See* 'The Gujarat Prohibition of Transfer of Immovable Property and Provision for Protection of Tenants from Eviction from Premises in the Disturbed Areas (Amendment) Bill, 2019'. *National eVidhan Application – Ministry of Parliamentary Affairs (NeVA)*<http://cms.neva.gov.in/FileStructure_GJ/Notices/4d0680e4-0ff4-4038-90bc-ae75232223d2.pdf> accessed 12 August 2021. (hereinafter '*Amended Act*').

25 *Bharatkumar Shankarlal Somani v. State of Gujarat* Special Civil Application No. 11362 of 2017. *Sudhakar Chudaman Borse v. State of Gujarat* Special Civil Application. No. 10628 of 2016 and *Onali Ezazuddin Dholkawala v. State of Gujarat* Special Civil Application No. 13041 of 2019.

Zoroastrian Cooperative v. District Registrar.[26] The context of the Zoroastrian case has larger implications on rapidly urbanizing spaces where de-facto practices of social segregation and restrictive covenants (private bye-laws) based on exclusive membership (say religious, caste or sect identity) meet de-jure restrictive zoning law such as the Disturbed Areas Act 1991. This critical comparison of the judgment can thus provide an important lens to judge other legislations, including the Act, that relate to housing based on ethnic identities. Accordingly, the following section will analyse the Zoroastrian Cooperative judgment to identify its core principles and apply them to the Act.

III. ZOROASTRIAN COOPERATIVE JUDGEMENT AND THE DISTURBED AREAS ACT

The Zoroastrian Co-operative Housing Society was a society registered under the Gujarat Co-operative Societies Act, 1961, with its own set of by-laws. The Housing Society contended that Respondent no. 2 (a Parsi) as a member of the Co-operative Society violated clause 7 of its bye-laws by entering into negotiations for selling the property to Respondent no. 3 (a non-Parsi). It led to the violation of Fundamental Right to Freedom of Association under Article 19(1)(c) of the Co-operative Society. The right of Parsis, a religious minority, to preserve their culture under Article 29 was also invoked. The Respondents contended that Section 4 of the Gujarat Co-operative Societies Act, 1961 under which the Cooperative was now registered, "clearly indicated that no bye-law could be recognized which was opposed to public policy or which was in contravention of public policy in the context of the relevant provisions in the Constitution of India and the rights of an individual

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[26] *Zoroastrian Cooperative Housing Society Limited v. District Registrar Cooperative Societies(Urban)* (2005) 5 SCC 632. (hereinafter '*Zoroastrian*')

under the laws of the Country. A bye-law restricting membership in a co-operative society, to a particular denomination, community, caste or creed was opposed to public policy".[27]

According to Gautam Bhatia,[28] the judgment defined "public policy"[29] within the confines of the statute in question and did not see the bye-law violating the Constitution on the aspect of religious based discrimination. Our purpose here is to contribute to the critique to the judgment in the Zoroastrian Cooperative judgment case, and also to import some parallels which inform the Act tangentially. The proposal is not to disagree with what Bhatia argues, rather it is to reiterate the blatant unconstitutionality of the Disturbed Areas Act.

First, in the Zoroastrian Cooperative judgment, the Supreme Court was clear about the need of a legislative intervention to formulate non-discriminatory law. A law under which the bye-laws made on discrimination based on religion or sex would be held invalid. Only then the by-law can be said to be violative of public policy. The Court held that it is not for it to give a theory of what is consistent with public policy as envisioned by Part III of the Constitution.

When it comes to the Amended Act, the discriminatory provisions based on religion and caste are inscribed in the legislation itself.[30] The most important aspect here is that it is being enforced by

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27 ibid [6].

28 Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts*. (Harper Collins India 2019) 114-140.

29 *Zoroastrian* (n 26) [32]. The SC refused to delve into the question of what constitutes public policy according to it. The Court felt that while "theoretically it could devise a new head of public policy under exceptional circumstances, such a course would be inadvisable in the interest of stability of society". Also, the SC felt observed that it was left best to the legislature to decide what is appropriate public policy.

30 *Amended Act* (n 24).

the State that falls under the purview of Article 12 of the Constitution. The question whether Cooperatives fall under the purview of State, as was the question in Zoroastrian Cooperative judgment, is not for consideration here. The Court pointed out in the Zoroastrian Cooperative judgment that had such a discrimination based on class and religion been purported by State, it would have been forced to intervene. Hence, the Act should be held unconstitutional on this very basis.

Second, the essay agrees with the Court holding that a Cooperative is a voluntary organisation. The Parsi Respondent who was willing to sell to a non-Parsi Respondent became the part of the society on his own volition. With this, he not only acquired the rights but also the obligations that came along with being member of the Cooperative.[31] Under the Act, the people unable to sell property to a person of different identity was not due to being part of a restrictive covenant, being part of a voluntary cooperative, etc. It was due to an action of the State preventing a private contract from being enforced on the basis of caste and religion, thus violating the Fundamental Right under Article 15(2).

Third, the Indian Medical Association (henceforth IMA) v. Union of India[32] judgment could be referred to in order to further strengthen the argument. The IMA judgment held that no private service can be restricted due to any legislation based on ascriptive identities, as it was a violation of Fundamental Right under Article 15(2). Similar argument can be made with reference to the Act too, as it is restricting a private contract based on ascriptive identities. The Court, citing the speeches of Babasaheb Ambedkar in the Constituent Assembly, ruled in the IMA case that the word "shop"

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31 ibid [29].

32 *Indian Medical Association v. Union of India* (2011) 7 SCC 179. (hereinafter '*IMA*')

used in Article 15(2) is used in a generic manner and hence entails "educational institutions" too.[33] Since the word "shop" is used in a generic manner, hence obviously its reach is not restricted by "educational institutions" but encompasses "housing" or "property transactions" too, which is of concern in this discussion. Gautam Bhatia takes the argument further and strongly contends that the Court in the IMA case brought horizontal discrimination based on grounds of sex, race, religion, etc. under the purview of Article 15(2).[34]

From the above arguments, it would be reasonable to comment on the unconstitutionality of the Act. This essay contends that any legislation stepping on the right of the economic transaction (in its conduct or as a 'disparate impact') between consenting private parties based on exclusivity of religion and caste, is a clear violation of the Fundamental Right under Article 15(2). More importantly, the Gujarat High Court while dealing with cases with respect to the Act,

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33 ibid [112] of the judgment indicates how social justice is a pressing concern under Article 15(2). Para 113 reads an egalitarian jurisprudence when read with other provisions of the Constitution. The beginning of the Para 113 would indicate how the judgment is using words of Babasaheb Ambedkar in the Constituent Assembly to interpret an expanded meaning of "shops" in Article 15(2). Para 113: "The purport of Article 15 (2) can be gathered from the Constituent Assembly debates. Babasaheb Ambedkar elucidated on the same saying that "To define the word `shop' in the most generic term one can think of is to state that `shop' is a place where the owner is prepared to offer his service to anybody who is prepared to go there seeking his service. .... Certainly it will include anybody who offers his services. I am using it in a generic sense. I should like to point out therefore that the word `shop' used here is not used in the limited sense of permitting entry. It is used in the larger sense of requiring the services if the terms of service are agreed to."'

34 Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins India 2019) 129. In Chapter 4 Bhatia contends that the Constituent Assembly Debates, the IMA judgment, and the uniquely transformative nature of the Indian Constitution "justifies the use of horizontal constitutional rights against discriminatory economic transactions in the private sphere". He interprets the use of the word "shop" in Article 15(2) is "merely the concrete expression of the idea of the impersonal, abstract market of the modern liberal-capitalist economy".

has also reiterated that free consent and fair value are the objectives underlying the Act, irrespective of the ascriptive identities of the parties entering the transaction.

Fourth, the Zoroastrian Cooperative judgment had also held that prevention of formation of a "ghetto" is an important aspect that the legislation must focus on.[35] The Act with its arbitrary formulation (discussed in detail later), which may be deliberate too, may escape the scrutiny of the judiciary for being discriminatory and perpetuating inequality.[36] It needs to be emphasised here that the State can deliberately draft a law in a particular manner in order to keep itself away from the scrutiny of the Courts. It is not hard to see that the Act with its drafting formulation falls under this. Unlike the Amended Act, the 1991 version of the Act does not have explicit mention of identity markers. The Amended Act helps us understand that residence based on identity markers (either caste, religious or otherwise that have not been endorsed by the Gujarat High Court as the Court has upheld fair value and free consent principles as the original objectives of the Act) have been sought to be imposed through the amendment as the original objectives of the Act.

Fifth, the Zoroastrian Cooperative judgment states that bonds of common usage and common habits are found in a community and caste that eventually becomes the basis of housing together. It contradicts its own statement later in the judgment that in secular India it is retrograde to form cooperatives based on identities

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35 *Zoroastrian* (n 26) [28]. It further needs to be taken into account that the term ghetto in understanding spatial segregation is problematic. In the case of Ahmedabad, before evoking the term, one needs to make a critical assessment as to why certain communities choose to cluster around certain areas and what are the structural barriers to their residential mobility.

36 Re Drummond Wren (1945) O.R. 778 (Ont. HC). A restrictive covenant that prohibited land to be sold to a 'Jew or person of objectionable nationality' in a Canadian case called Re Drummond Wren in 1945 was held unconstitutional for violating international law and being racist in character.

of religion and caste.[37] The former statement seemingly justifies what the Amended Act aims to achieve, a "proper clustering of people of one community".[38] The argument of "proper clustering" might stand for the preservation of culture under Article 29 for Parsi community, a minority, as it did in the Zoroastrian Cooperative case.[39] But it would fail to stand ground in case of the Act, as clustering of Hindus (or sub-clustering based on caste) would not stand the minority argument under Article 29.

Even if it is accepted that by means of Freedom of Association under Article 19(1)(c) the people of a similar community are allowed to self-segregate, as the judgment also observes, the active intervention of the State to enforce the proper clustering based on identity markers is questionable and opposed to constitutional public policy.[40]

The next section points towards the problematic aspects in the Amended Act that have previously not been highlighted. As already stated, the amendment is important because it adds identity elements to the Act. The essay contends that the added aspects depict the essential objectives of the Act. On the basis of these, the Act would fail to stand the test of constitutionality. Most importantly, the subjectivity and the ambiguity of the provisions of the amendment to the Act would be brought to light. These ambiguities would point to the exacerbation of the problems with the Act, in relation to religious discrimination as examined above. It can rightly be inferred that the Act would not hold the test of constitutionality even when looked from the lens of an often-criticized judgment as in the Zoroastrian Cooperative case.

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37 *Zoroastrian* (n 26) [26].
38 *Amended Act* (n 24).
39 *Zoroastrian* (n 26) [6].
40 ibid [27]-[28].

IV. THE 2019 AMENDMENT AND ARBITRARINESS OF THE ACT

First, it needs to be pointed out that the Amended Act emphasises that the religious demography is an important component of the Act. Apart from free consent and fair value, demographic equilibrium and proper clustering have become important criteria that need to be taken into consideration by the Collector in order to allow the sale of the property.[41] The demographic equilibrium and proper clustering elements can be assumed to be added after the Gujarat High Court thrice reiterated that free consent and fair price was the only objective of the Act.[42]

These added criteria related to ascriptive identity have already been criticised in the previous section, but what further needs to be understood is the ambiguity in the language of the legislation. It is up to the Collector to decide if the sale of the property will lead to a likelihood of polarisation or an improper clustering of people,[43] which leaves a lot of discretion at the hands of the bureaucracy, as there are no definite criteria to define what would lead to likelihood of polarisation or improper clustering of people. Any inter-identity sale would be curbed by the addition of the criteria. It would prevent any sale by free consent and fair price, because the additional new criteria would prevent it. Thus, it would hamper the original intent of the Act that was meant to prevent distress sale, but not to impose curb on sale by free consent and fair price.

Second, the Amended Act is largely ambiguous about its choice from the two opposite policy choice of segregation and coexistence. It states in its Statements of Objectives and Reasons that it aims to prevent "disturbing the proper clustering of the persons of

41 *Amended Act* (n 24).
42 n 25.
43 *Amended Act* (n 24) in section 5, sub-section (3), clause (b).

one community".[44] The Amendment goes on to emphasise what it means by "proper clustering" in section 2(d). It wants disturbed areas "to have harmonious demographic equilibrium by introducing the concept of identification of proper clustering of the persons of one community on the basis of the traits of the residents of a particular geographical area having common norms, religion, values or identity and sharing a sense of place in the said area".[45] The bare reading of this portion of the Act seems to be tilting towards the policy option of keeping people ascribing to one identity in a segregated cluster.

The policy intention of the Act is further complicated by section 3(1)(ii) that describes the areas that can be held eligible for being declared as a disturbed area. According to section 3(1)(ii), the area that can be declared disturbed is "Where the State Government is of the opinion that polarization of persons belonging to one community has taken place or is likely to take place disturbing the demographic equilibrium of the persons of different communities residing in that area or that improper clustering of persons of one community has taken place or is likely to take place where the mutual and peaceful coherence amongst different communities may go haywire in that area".[46] A bare reading of the section points to the need to maintain an equilibrium between people of different communities. On reading the section one can come to the conclusion that the policy option of keeping the demographic composition of the geographical area at status quo has been adopted.

Arbitrariness as a policy motive stands out from the language of the Act. It would further confuse the bureaucratic machinery, moving further away from worrying about distress sale. Rather the focus would shift on religious and caste demography that are

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44 *Amended Act* (n 24).
45 ibid.
46 ibid.

subjective criteria at their best. The discretion handed in the hands of the bureaucracy can lead to dangers of bureaucracy tilting in favour of one identity that has previously also been seen in Gujarat.[47]

Third, the Amended Act "includes an area of five hundred meters adjacent to the boundary of the disturbed area" in the disturbed area.[48] There have been cases of vagueness of the language of Act with regard to the government's extension of the Act.[49] The addition of the extended feature would lead to further disputes. It is the responsibility of the citizen that they make their residential decision keeping the Act in mind. Most importantly, it would hand further discretion in the hands of the bureaucracy with yet another ambiguous feature in the Act.

V. LESSONS FROM A FOREIGN LAND: IMPORTING 'DISPARATE IMPACT' TO DISTURBED AREAS

India lacks a comprehensive national anti-discrimination housing policy. The case of disturbed areas in Gujarat can perhaps benefit from a desegregation legislation perspective. It can benefit by taking inspiration from its American counterpart, where the Fair Housing Act was enacted in 1968. Disparate impact, as a conceptual tool, helps us foreground discriminatory practices which perpetuate segregation between communities.[50] It helps us understand the fair market value of a property as well as the informal practices which prevent mobility as dictated by members of the dominant castes or ethnic communities in the respective areas.[51]

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47 Nikita Sud, *Liberalization, Hindu Nationalism and the State: A Biography of Gujarat* (Oxford University Press 2012).

48 *Amended Act* (n 24), addition under section 3 clause (a).

49 *State of Gujarat v. Nareshbhai P. Parmar* 2012 SCC OnLine Guj 2688.

50 Tom Agnotti and Sylvia Morse, 'Racialized Land Use and Housing Policies', in Tom Agnotti and Sylvia Morse (eds.) *Zoned Out!: Race, Displacement, and City Planning in New York City* (Terreform 2016) 46-71.

51 ibid.

In the context of segregation in American cities, as Angotti and Morse inform, segregation was evident through exclusion in the form of exclusionary zoning as a "legally defensible means for communities to segregate under the guise of a public interest" through social indicators of wellbeing including the health, safety, and people's welfare in the form of protection of property value or "neighbourhood character".[52]

On defining housing discrimination in the context of the Fair Housing Act, Angotti and Morse make a distinction between 'intent and disparate impact'.[53] The Fair Housing Act, which prohibits discrimination of protected classes on various grounds, does not require explicit intent to be proved to examine intentional discrimination.[54] Rather, the resulting impact of a housing policy on racial groups or protected classes determines its disparate impact.[55]

The disparate impact approach has guided case laws pertaining to housing discrimination in the US for the past three decades.[56] Agnotti and Morse cite the US Supreme Court ruling on Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc., et al, in which the Apex Court had ruled that to prove racial discrimination it is sufficient to establish "a disparate impact of public policy without necessarily proving discriminatory intent".[57].

It is important to revisit the scholarship of Richard Rothstein, who adds an interesting dimension to the institutionalization of

52 ibid [50]–[51].
53 ibid [65].
54 ibid.
55 ibid.
56 ibid.
57 ibid.

segregation through nationwide legislation.[58] In the context of segregation in the United States, he takes into account the crucial role of state's restrictive legislation in institutionalizing segregation.[59] He argues that the patterns of residential segregation in the North, South, Midwest, and Western America is not the unintended consequence of individual choices and of otherwise well-meaning law or regulation. Rather it is that of unhidden public policy that explicitly segregated every metropolitan area in the United States.[60] He informs us that the policy was so systematic and forceful that its effects continue to the contemporary times.[61] He emphasizes that even without American Government's condoning of racial segregation, the menace of "private prejudice, white flight, real estate steering, bank redlining, income differences, and self-segregation" would still have persisted "but with far less opportunity for expression". Hence, Rothstein concludes, "segregation by intentional government action is not de facto. Rather, it is what courts call de jure: segregation by law and public policy".[62]

The significance of 'disparate impact' as a tool in assessing the resulting intent of a public policy could also be useful in examining segregation in Gujarat. It implies that the Disturbed Areas Act could also be examined through the lens of 'disparate impact'. It is so since the Act has at multiple levels of enquiry by authorities in the course of its operation (as seen from the disputes), witnessed through perpetuation of structural inequalities in the areas where its original intent gets moulded or defeated all together.

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58 Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (Liveright Publishing Corporation 2017) 8.

59 ibid.

60 ibid.

61 ibid.

62 ibid.

VI. CONCLUSION

The case of disturbed areas in Gujarat presents a peculiar case of Robert Merton's "Unanticipated consequences of purposive social action". The Act, though extended in accordance with the government's view of law and order situation, impacts structural inequality in housing and property ownership individually as well as communally. The Act stands challenged in the Gujarat High Court by minority-rights activist Danish Qureshi.[63] More recently, the Court has restrained the state government from issuing further notifications in accordance with the Amended Act against a special civil application moved by the Jamiat Ulama-e-Hind Gujarat challenging the recent amendments to the Act.[64]

As the Gujarat High Court grapples with the question of the Act's constitutionality, it is imperative that the Act must be understood broadly in terms of its manifestations in the existing *de facto* segregation in Gujarat. While critiquing the rationale to the Act, a pertinent question is– can law become the torchbearer of change when the communities in conflict refuse to even break bread together, irrespective of the residential patterns of segregation? German Philosopher Walter Benjamin had evoked "law preserving violence" to signify when violence is used to pursue legal ends rather than natural ends.[65] He insisted that it operates via a constant threat

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63 'Disturbed Areas Act challenged in HC' *The Times of India* (Ahmedabad 03 May 2018) <https://timesofindia.indiatimes.com/city/ahmedabad/disturbed-areas-act-challenged-in-hc/articleshow/64006616.cms> accessed 08 January 2021.

64 'Disturbed Areas Act: Gujarat HC stays fresh notifications on amended sections' *The Indian Express* (Ahmedabad 20 January 2021) <https://indianexpress.com/article/cities/ahmedabad/disturbed-areas-act-gujarat-hc-stays-fresh-notifications-on-amended-sections-7154739/> accessed 09 August 2021.

65 Andy McLaverty-Robinson, 'Walter Benjamin: Critique of the State' *Ceasefire* (31 December 2013) <https://ceasefiremagazine.co.uk/walter-benjamin-critique-state/> accessed 12 August 2021

and that it serves a means to keep the appearance of fate in place.[66] In the context of this essay, the constant threat of polarization between communities if residential mixing is not prohibited, resonates with Benjamin's view on the Act serving legal ends than the constitutional public policy mandate of upholding the citizen's identity (a natural end). This demands a critical examination of state's role in impacting the mandate of constitutional public policy against the background of communal conflict and mutual distrust between communities.

The fundamental problem which the Act evokes is not only of 'distress sales' and 'forced evictions' in the contemporary scenario for two reasons. First, a society cannot be projected in perpetual conflict by the state when the last episode of mass violence was in 2002. Second, a public policy aimed at welfare cannot prohibit individuals from different communities by simply citing the pretext of a sensitive area and upholding the religious identity of a citizen as its primary marker. It is for this reason that the Act has become a tool of fixing the residential mobility of communities to prevent mixing based on the religious identity of the citizen. As the Amended Act equates polarization with that of "improper clustering" of communities, the constitutionally flawed rationale to the Act itself serves as a reminder of state's withdrawal from becoming the central platform for facilitating mixed living as a core feature of public and private housing.

The Disturbed Areas Act is not only an opportunity to evoke the Constitutional mandate of public policy but also a broader window to deal with the broader problem of social segregation in the Indian cities beyond Gujarat. It can also serve as a critique to the 'theory of area of operation' (from the *Zoroastrian* judgement) and

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66 ibid.

'caste-based residences' which substantiate community associations and discourage mixed living. Our purpose is not to challenge one's right to associate and form unions but to highlight its discriminatory aspect. Moreover, the intense involvement of bureaucracy ailing with objections from non-state actors such as cooperative society committees to raise objections between two consenting parties is a breach of citizens' free will, right to privacy and autonomy. How can a public policy be solely defined by the state with the portrayal of law and order entirely dependent on the demography of the respective areas? There is an objective order of values grounded in Constitutional doctrines, and hence legislative action such as the Act need to be analysed in that light. It is for this reason that the judiciary is constantly relied upon to ensure that democratic and constitutional doctrinal values are adhered to in principle and conduct to prevent discrimination based on ascriptive identities.

INTERPLAY OF THE RIGHT TO RELIGIOUS FREEDOM WITH OTHER FUNDAMENTAL RIGHTS IN THE INDIAN CONSTITUTION: A CONSTRUCTIVIST COHERENCE ANALYSIS

Shubhangi Maheshwari and Shrey Nautiyal[*]

Abstract

The Indian Constitution presents an inherent dichotomy qua Articles 25 and 26. Article 25 guaranteeing religious freedom to individuals, has been explicitly made subject to other fundamental rights. On the other hand, no such restriction can be found in Article 26, which enshrines the right to freedom of religion for groups. Despite its vast jurisprudence in matters of religion, the Supreme Court has rarely grappled with this question in detail. This paper argues that this is due to the application of the essential religious practices test by the Court which has allowed it to determine religion based-claims based at the definitional level, without having to define the relationship between religious freedom and other fundamental rights. The paper then seeks to answer the query using Professor Fallon's constructivist coherence theory of constitutional interpretation. The paper advances textual, historical, doctrinal, structural, and value arguments in favour of a holistic reading of Articles 25 and 26, in conjunction with other fundamental rights. This question has gained importance as it is one of the questions pending before the Supreme Court in the review petition against its judgement in the Indian Young Lawyers Association v The State of Kerala (Sabarimala). Finally, this paper briefly looks at the anti-

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exclusion test proposed by Justice D.Y. Chandrachud in the Sabarimala case and suggests the way forward.

I. Introduction

The Indian Constitution recognises the right to religious freedom of both individuals and groups via Articles 25 and 26 respectively.[1] This right is not absolute and is subject to the limitations of public order, morality, and health.[2] However, a crucial textual difference lies between individual and group rights to religious freedom. Article 25, which guarantees the freedom of conscience and religion to individuals, has been expressly made subject to other fundamental rights enshrined in Part III of the Constitution.[3] Article 26 on the other hand contains no such restrictions and is only limited with respect to *public order*, *morality*, and *health*. The weight to be accorded to this difference has not been debated adequately over the years, leading to the vexed question of the interplay of the right to religious freedom and other fundamental rights. This question has gained importance because it is, presently, one of the questions pending before the Supreme Court in the reference made by the Court in the review petition against its judgement in *Young Lawyers Association v The State of Kerala*[4] ["Sabarimala case"].

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1 The Constitution of India, art. 25(1) and art 26. Article 25(1) reads as: "*(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.*" Article 26 reads as: "*Subject to public order, morality and health, every religious denomination or any section thereof shall have the right*
(a) to establish and maintain institutions for religious and charitable purposes;
(b) to manage its own affairs in matters of religion;
(c) to own and acquire movable and immovable property; and
(d) to administer such property in accordance with law."

2 The Constitution of India, art. 25(1) and art 26.

3 The Constitution of India, art. 25(1).

4 *Indian Young Lawyers Association v The State of Kerala*, (2019) 11 SCC 1 ["Sabarimala Case"].

This paper begins by setting the context of this interpretational conflict. **Section II** of the paper briefly explains the dispute as it arose in the context of the Sabarimala case and its pending reference before the Supreme Court. It further explains why the Supreme Court has rarely grappled with this conflict despite its vast jurisprudence in the matters of religion. It argues that the application of the essential religious practices test ["ERP Test"] has allowed the Court to determine claims based in religion at the definitional level, without having to balance competing interests of religious freedom and equality. **Section III** then delves into the constitutional interpretation of Articles 25 and 26 of the Indian Constitution to answer this question of interplay. It argues in favour of a holistic reading of Articles 25 and 26, in conjunction with other fundamental rights contained in Part III of the Constitution. Thus, it argues for the right to religious freedom for both individuals and groups to be limited not only by public order, morality and health but also to be read with other fundamental rights. In order to build this argument, the paper relies on the constructivist coherence theory of constitutional interpretation propounded by Richard H. Fallon Jr for it provides a holistic method of interpretation when different techniques lead to different answers.[5] Finally, **Section IV,** briefly looks at the anti-exclusion test proposed by Justice Chandrachud in the *Sabarimala case* as the way forward in the jurisprudence relating to the right to religious freedom.

II. RELIGIOUS FREEDOM *VIS-A-VIS* OTHER FUNDAMENTAL RIGHTS- THE CONUNDRUM

The implications of the textual difference between Article 25 and 26 in terms of their interplay with other fundamental rights has

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5 Richard Fallon, 'A Constructivist Coherence Theory of Constitutional Interpretation' (1987) 100(6) Harvard Law Review 1189.

received little attention from the Supreme Court. On a textualist reading, the absence of the phrase "subject to […] other provisions of Part III" in Article 26 could suggest its interpretation as a discrete, self-contained code unaffected by other fundamental rights.[6] This is one of the arguments that the respondents raised in the *Sabarimala Case*.

A. The Sabarimala Case

In the *Sabarimala Case*, the Supreme Court grappled with the interplay of a) the right to religious freedom with other fundamental rights. It sought to balance the right to *equality*, *dignity*, *non-discrimination*, and *religious freedom*, under Articles 14, 15, 17, 21, and 25, of women aged 10-50 years, who were barred from entering the Sabarimala Temple with b) the right of a religious denomination to manage its own affairs in matters of religion under Article 26 of the Constitution. The Petitioners and intervenors *inter alia* argued that even if the prohibition on their entry was protected as an essential practice under Article 26(b), it could not violate the basic concept of dignity and other fundamental rights enshrined in the Constitution.[7] They argued that Article 26 cannot be read in an isolated manner merely because it has not explicitly been subjected to the constraints of other fundamental rights.[8] They sought a harmonious reading of Articles 25 and 26 to argue that the respondents' rights to manage their own affairs is subject to women's right to worship in a public temple.[9] The respondents on the other hand insisted on the textual difference between Articles 25 and 26 to argue that the latter is not subject to other fundamental rights including equality.[10]

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6 Sabarimala Case (n 4) [441.19] (Malhotra J).
7 Sabarimala Case (n 4) [21] & [60] (Misra CJ).
8 Sabarimala Case (n 4) [39] & [59] (Misra CJ).
9 Sabarimala Case (n 4) [37] (Misra CJ).
10 Sabarimala Case (n 4) [441.19] (Malhotra J).

Justice Nariman in passing observed that a wide reading of the term "constitutional morality" in Article 26 would subject it to other fundamental rights, which it textually has not been subjected to.[11] At the same time, he noted that Article 26 will have to be harmoniously construed and balanced with other fundamental rights; however, this would be done on a case-to-case basis without subjecting Article 26 to other fundamental rights.[12] Justice D.Y. Chandrachud, on the other hand, propounded that Article 26, irrespective of the absence of a proviso subjecting it to other fundamental rights, must be read holistically with other rights enumerated in Part III of the Constitution.[13]

In a 4:1 opinion, the majority ruled the exclusion of women aged 10-50 years to be unconstitutional and violative of their fundamental rights, while also noting that the practice was not protected as "essential" under Article 26.[14] A review petition against this judgement referred the matter to a larger bench. One of the questions before the bench concerns the "interplay between the freedom of religion under Articles 25 and 26 of the Constitution and other provisions in Part III, particularly Article 14".[15] This question will be addressed in detail in Part II of the paper, where the authors argue in favour of reading Articles 25 and 26 holistically with other fundamental rights.

B. Pitfalls of the ERP Test

Despite its vast jurisprudence in matters of religion, the Supreme Court has never grappled with this question in detail. This is in part due to the application of the ERP Test by the Court. In dealing with religion-based matters, the Supreme Court has evolved

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11 Sabarimala Case (n 4) [176.7] Footnote 59 (Nariman J).
12 ibid.
13 Sabarimala Case (n 4) [216] (Chandrachud J).
14 Sabarimala Case (n 4).
15 *Kantaru Rajeevaru vIndian Young Lawyers Association*, (2020) 3 SCC 52.

the ERP test, wherein only the religious practices that are determined to be *essential* to a religious denomination are given constitutional protection. The ERP test has enabled the Court to define religion in a manner that conforms to its reformist notions.[16] In doing so, the Court has rarely dealt with conflicts that may arise between the right to religious freedom and other rights. This leads to concerns that not only does the Court assume a theological mantle, but it also avoids grappling with intra-rights and inter-rights conflict by rejecting claims at the threshold level itself.[17] Definitional tests such as the ERP test preclude the courts from ascertaining the balance between competing rights and interests by allowing them to read the claim out of the purview of constitutional protection.[18]

Moreover, it militates against the religious community's constitutionally guaranteed autonomy to decide its essential practices.[19] The ERP test fails to account for the fact that religions and cultures are not homogenous, especially in cases as Sabarimala

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16 Deepa Das Acevedo, 'Temples, Courts, and Dynamic Equilibrium' (2016) 64 The American Journal of Comparative Law 578; Rajeev Dhavan and Fali S. Nariman, 'The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities' in B.N. Kirpal et al (eds) *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (OUP 2000). 259; Sabarimala Case (n 4) [408] (Chandrachud J); Ronojoy Sen, 'Secularism and Religious Freedom' in Sujit Choudhry and Madhav Khosla (eds.) *The Oxford Handbook of the Indian Constitution* (OUP 2016) 914.

17 Dhavan and Nariman (n 16) 261; Mary Kavita Dominic, "Essential Religious Practices' Doctrine as a Cautionary Tale: Adopting Efficient Modalities of Socio-Cultural Fact-Finding' (2020) 16(1) Socio-Legal Review 48.

18 Jaclyn L Neo, 'Definitional imbroglios: A Critique of the Definition of Religion and Essential Practice Tests in Religious Freedom Adjudication' (2018) 16 International Journal of Constitutional Law 574-595.

19 Sabarimala Case (n 4) [408] (Chandrachud J); Gautam Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority, and Religious Freedom Under the Indian Constitution' in *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins India 2019); Faizan Mustafa and Jagteshwar Singh Sohi, 'Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy' (2017) Brigham Young University Review 918.

that involve highly localized temple rituals.[20] The Court still forces them into narrow categories of "essential/non-essential" and "exclusive/non-exclusive denominations" according to its own understanding of religion and discounts any differences before testing them against constitutional values.[21]This creates a gap between the judges' cultural understanding and the religious devotees.[22] The test then also furthers a static conception of religion, which is incapable of self-reformation.[23]Finally, the Court's exposition that social reforms cannot obliterate essential religious practices[24] may allow for "essential" discriminatory religious practices that violate individual rights to continue. Thus, effectively, the ERP test renders the effect of Articles 25 and 26 nugatory in its failure of both recognising religious autonomy and allowing for social reform measures within a religion.

These pitfalls are exemplified in the *Sabarimala* case as well. Chief Justice Mishra's (as he was then) and Justice Khanwilkar's opinion proceeds on the assumption that religion is inherently non-discriminatory and that allowing women to enter temples is an "essential practice" of Hinduism.[25]In doing so, the judges relied on their own understanding of religion rather than perceiving the devotees' religious practices as they presented them.[26] More importantly, an opinion presuming religion to be non-discriminatory, presumes that there cannot be any conflict between religious practices and equality, which then obviates the possibility of the

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20 Keerthik Sasidharan, *The Churning of Tradition*, The Hindu (6 Feb. 2019) <https://www.thehindu.com/opinion/columns/the-churning-of-tradition/article25274079.ece>. Accessed: 01 July, 2021.

21 Deepa Das Acevedo, 'Just Hindus' (2020) Law and Social Enquiry 1, 19.

22 Dominic (n 17) 61.

23 Dominic (n 17) 58.

24 *Riju Prasad Sarma v State of Assam*, (2015) 9 SCC 461 [61].

25 Sabarimala Case (n 4) [4] & [122] (Misra CJ).

26 Acevedo (n 21).

Court deciding the fate of discriminatory religious practices in terms of the Constitution.[27] The acknowledgement of the conflict between denominational rights to religious freedom and the right to equality and dignity came only in Justice Chandrachud's opinion.[28]

Moreover, the practice of not conducting actual fact-finding in matters involving the ERP test has allowed the Court to selectively rely on religious texts and affidavits that often reflect the majoritarian view within a religion, to fashion religion in the way it suits its opinions. A case in point is the *Sabarimala* case. The Court held that the record that was placed before the Kerala High Court in 1991 against which the appeal was filed, to be sufficient evidence.[29] However, the Kerala High Court had relied solely on the Tantri's (head of the temple) opinion which solidified and extended the ban on women's entry to the entire year,[30] despite contrary evidence to show that previously women had entered the temple outside the pilgrimage season.[31] Thus, it was the hegemonic religious view that found space in the Kerala High Court's judgment and women were absent for the most part.[32]

Similar folly is repeated in the Supreme Court's opinion in the *Sabarimala* case where the devotees' perception of their religion did not find adequate space in the judgement. More crucially, the Court did not delve into assessing factual claims of discrimination. Albeit on a conceptual level, the exclusion would end up being discriminatory and antithetical to women's dignity, but substantiating this on factual grounds would have strengthened the Court's decision

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27 Deepa Das Acevedo, 'Pause for Thought: Supreme Court's Verdict on Sabarimala' (2018) 53(43) Economic & Political Weekly 12, 14.

28 Sabarimala Case (n 4) [291] (Chandrachud J).

29 Sabarimala Case (n 4) [199-200] (Nariman J).

30 *S. Mahendran v Secretary, Travancore Devaswom Board, Thiruvananthapuram and Others*, AIR 1993 Ker 42 [25] and [36-37].

31 ibid [7].

32 Acevedo (n 21) [7].

and may have enhanced its acceptance among the devotees. This gains importance in light of the fact that there were female Ayyappan devotees who defended the exclusionary practice of the temple in furtherance of their religious beliefs and were "Ready to Wait".[33] Court's pronouncement has been perceived by the devotees to be an external imposition,[34] which is aggravated by the fact that a petition in this case was filed by a non-Ayyappan devotee.

This section discussed the interpretational conflict between Articles 25 and 26 and their interplay with other fundamental rights enumerated in Part III of the Constitution. This question arose recently in the context of the *Sabarimala* dispute, where Justice Chandrachud acknowledged this conflict and sought to resolve it. The question is currently pending before a larger bench of the Supreme Court. The authors argue that the application of the ERP test has allowed the Supreme Court to avoid dealing with this conflict by resolving religious matters at a definitional level. The next section will delve deeper into this conflict and argue in favour of limiting the right to religious freedom by other fundamental rights.

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33 Niranjana Jayakrishnan, 'I am a Woman from Kerala. Here's Why I am Against the Sabarimala Verdict', News18.Com (29 Sept. 2018) <https://www.news18.com/news/buzz/i-am-a-woman-from-kerala-heres-why-i-am-against-the-sabarimala-verdict-1893197.html>; '#ReadyToWait: These Kerala Women Devotees Campaign against Women Entering Sabarimala Shrine', Indian Express (29 Aug. 2016) <https://indianexpress.com/article/trending/trending-in-india/women-devotees-in-kerala-say-readytowait-to-enter-sabarimala-shrine-3002027/>.

34 Rajeev Chandrasekhar, 'I oppose Sabarimala verdict because this is not about women's discrimination at all', The Print (18 Oct., 2018) <https://theprint.in/opinion/i-oppose-sabarimala-verdict-because-this-is-not-about-womens-discrimination-at-all/136444/>; 'Tens of thousands protest in India over Sabarimala temple', Al Jazeera (1 Jan. 2019) <https://www.aljazeera.com/news/2019/01/tens-thousands-protest-india-sabarimala-temple-190101140533525.html>; DNA Web Team, 'Ready to Wait: Women Explain Why They are Willing to Delay Their Entry into Sabarimala', Daily News Analysis (29 Aug. 2016) <https://www.dnaindia.com/india/report-women-devotees-of-lord-ayappa-say-they-are-readytowait-to-enter-sabarimala-2249993>.

III. INTERPRETATION OF ARTICLES 25 AND 26: A CONSTRUCTIVIST COHERENCE APPROACH

Prof. Richard H. Fallon Jr., a renowned constitutional law scholar proposed the constructivist coherence theory of constitutional interpretation in response to what he calls the "commensurability problem" of constitutional law.[35] This is the problem of ascertaining how different types of constitutional arguments are "appropriately combined and weighed against each other within our constitutional practice."[36] He describes the five types of "modalities"[37] or arguments of constitutional interpretation, which are generally relied on by the courts to arrive at the meaning of a constitutional provision. These include: arguments from the text, arguments about the framers' intent, arguments of constitutional theory, arguments from the precedent, and value arguments.[38]

However, questions regarding, for instance, the interrelatedness between the theories and which theory should gain precedence over others in case of a conflict have not been adequately answered.[39] To answer this query, Fallon recommends the constructivist coherence theory. According to Fallon, various types of constitutional interpretation techniques, though distinct, are sufficiently interconnected.[40] Fallon posits that there are two strands to his theory. The first strand aims at achieving coherence since the

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35 Fallon (n 5) 1189.

36 Fallon (n 5) 1285.

37 Philip Bobbitt, *Constitutional Interpretation* 11 (OUP 1991). Professor Philip Bobbitt, another constitutional law scholar, defines modalities of constitutional interpretation as "the way in which we characterize a form of expression as true."

38 Fallon (n 5) 1238. For other typologies of constitutional arguments, *see* Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (OUP 1982).

39 ibid.

40 Fallon (n 5) [1189].

different types of argument are interactive and not autonomous.[41] Even when there is a conflict in the result while assessing the various arguments, he argues that conflicting arguments could be reconsidered to achieve a common interpretation or result.[42] The second strand of his theory stipulates that when the various arguments point irreversibly to different results the arguments will have to be ranked hierarchically.[43] Thus, it is possible to achieve constructivist coherence, which he defines as a "reflective equilibrium in which arguments of all five types, following a process of reciprocal influence and occasional reassessment, point toward or at least are not inconsistent with a single result."[44]

In the Indian judicial landscape, Fallon's theory was most recently referred to by Justice Dipak Mishra in *Government ofNCT of Delhi* v. *The Union of India and Ors.*[45] The authors rely on Fallon's theory in this paper since the textual interpretation of Article 26 in juxtaposition with Article 25 creates an anomalous situation in which Article 26 exists in isolation from other rights enumerated in Part III of the Constitution. However, as the authors show below, all other modalities of interpretation suggest a holistic reading of Article 26 with other fundamental rights. Using Fallon's theory, the authors seek to arrive at a coherent understanding of this issue by employing various modalities of constitutional interpretation to arrive at a common result.

This section builds on each of these typologies to argue for a holistic interpretation of Articles 25 and 26 with other fundamental rights.

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41 Fallon (n 5) [1286].
42 Fallon (n 5) [1189].
43 ibid.
44 ibid.
45 *Government ofNCT of Delhi vThe Union of India and Ors.*,(2018) 8 SCC 501.

A. Arguments about the Framers' Intent

Arguments about the framers' intent or historical arguments look at the meaning of constitutional provisions by inquiring into the original understanding of the constitutional drafters.[46] This section looks at the Constitutional Assembly Debates and its historical circumstances to argue for a harmonious reading of Articles 25 and 26 with other fundamental rights. It traces the background in which the Constituent Assembly's understanding of religion came about and reads the Constituent Assembly Debates in that light. It also addresses the difference in the phrasing of the two Articles to understand if the omission of the phrase "other provisions of Part III" was deliberate or not.

It has often been noted that Indian Constitution serves as a distinct break not only from the despotism of our colonial past, but also from the social hierarchies such as caste and patriarchy put in place by the 'private' realm of religion and customs.[47] In the 1920s and 30s, alongside the independence struggle, Dr. Ambedkar marshalled the cause of "untouchable" castes to enter Hindu temples.[48] These issues eventually found place in our Constitution in Articles 15, 17, and 25(2)(b).

It has been argued that religion plays a *thicker* role in the Indian society as compared to Western liberal jurisdictions.[49] Practices of religious communities are interlinked with individuals' access to basic goods. Discrimination employed within religion reflects and reinforces discrimination in the 'public' realm.[50] These

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46 Fallon (n 5) 1198; Bobbitt (n 37) [9].

47 Bhatia (n 19).

48 Anupama Rao, *The Caste Question* (University of California Press 2009) [81].

49 Bhatia (n 19).

50 Gautam Bhatia, 'The Sabarimala Judgement-III: Justice Chandrachud and Radical Equality' (*Indian Constitutional Law and Philosophy*, 29 Sept. 2018)<https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-

ideas together underpin the Constituent Assembly's understanding of religion. The Constituent Assembly was acutely aware of the "thick" nature of religion in India and the hierarchies it created. It is precisely this thick nature of religion that prompted the Constituent Assembly to allow for State intervention in religion.[51] The clearest enunciation of this comes from Dr. B.R. Ambedkar's remarks in the debates wherein he observed that:

> *I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, so full of inequalities, discriminations and other things, which conflict with our fundamental rights. It is, therefore, quite impossible for anybody to conceive that the personal law shall be excluded from the jurisdiction of the State.*[52]

A similar exposition was made by KM Munshi who observed that for the nation's unity and progress, religion had to be divorced from personal law and the role of religion was to be limited in the longer run.[53] Further, in the context of demands made for incorporation of a specific right guaranteeing the exercise of personal

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judgment-iii-justice-chandrachud-and-radical-equality/> accessed 01 July, 2021; Bhatia (n 19).

51 Bhatia (n 19).

52 Constituent Assembly of India Debates, 2 December 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C02121948.html > accessed 01 July, 2021.

53 Constituent Assembly of India Debates, 23 November 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C23111948.html> accessed 01 July, 2021.

laws, some framers envisaged a role for legislature in making progressive changes to such personal laws.[54]

For these reasons, the Fundamental Rights Sub-Committee's suggestion to subject religious freedom to other fundamental rights was accepted.[55] Further, the legislature was empowered to legislate social reforms even where the matter fell within the realm of religion. Munshi explained that the Drafting Committee did not want the practice of any religion to impede the legislature's power to make laws on social questions, for which reason, Article 25(2)(a) was added.[56] This was in pursuance of the concerns raised by some members. Alladi Krishnaswami Ayyar had written to B.N. Rau expressing his concerns about the wide import of the term 'religion', which could prohibit all existing and future social reform legislation.[57] Rajakumari Amrit Kaur also wrote to B.N. Rau on her and Hansa Mehta's behalf, with similar apprehensions that the draft clause, as it then were, would not allow the legislature to eradicate religious customs such as child marriage, polygamy, discriminatory inheritance laws, and untouchability.[58] To allay these concerns the Drafting Committee added an explanation saving the power of the legislature to enact laws for social welfare and reform.[59] There was

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54 M. Ananthasayanam Ayyangar remarked: "A time may come when members belonging to the particular community may feel that in the interests of the community progressive legislation has to be enacted." Constituent Assembly of India Debates, 2 December 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C02121948.htm> accessed 01 July, 2021.

55 Rochana Bajpai, *Debating Difference: Group Rights and Liberal Democracy in India* (OUP 2015) 60.

56 Constituent Assembly of India Debates, 1 May 1947, vol III <164.100.47.194/Loksabha/Debates/cadebatefiles/C01051947.html> accessed 01 July, 2021.

57 B. Shiva Rao, *TheFraming of India's Constitution* (Universal Law Publications 2006) 259.

58 ibid [260].

59 Rao (n 48) [261].

some opposition to this from the Asthika Sabha of Madras who saw this as an infringement of their religious freedom. However, B.N. Rau rejected their representations, noting that the explanation was essential to pursue social reform.[60]

They were equally concerned with ensuring access of all classes of Hindus to Hindu temples, which led to the addition of Article 25(2)(b) of the Constitution. Some framers even sought to widen the scope of this Article to include religious institutions of all religions.[61]

Crucially, several members of the Constituent Assembly were aware of the possible conflict between religious freedom and gender equality. Thus, in discussions surrounding the directive principle relating to a uniform civil code, a few members sought inclusion of a proviso guaranteeing protection of personal laws.[62] In this context, KM Munshi noted that if any religious practice that is discriminatory to women is given unbridled protection under personal law, the ideals of non-discrimination would not be achieved.[63] He noted that a

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60 Rao (n 48) [266].

61 Prof. K.T. Shah said: "Sir, I do not see why this right or obligation should be restricted only to Hindu Religious institutions to be thrown open to the public. I think the intention of this clause would be served if it is more generalised, and made accessible or made applicable to all the leading religions of this country, whose religious institutions are more or less cognate, and who therefore may not see any violation of their religious freedom, or their religious exclusiveness, by having this clause about throwing open their places of worship to the public.", Constituent Assembly of India Debates, 6 December 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C06121948.html> accessed 01 July, 2021.

62 Constituent Assembly of India Debates, 23 November 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C23111948.html> accessed 01 July, 2021.

63 KM Munshi noted: "I know there are many among Hindus who do not like a uniform Civil Code, because they take the same view as the Honourable Muslim Members who spoke last. They feel that the personal law of inheritance, succession etc. is really a part of their religion. If that were so, you can never give, for instance, equality to women. But you have already passed a

fundamental right guaranteeing equality to women had already been passed and therefore any protection of discriminatory religious practices would run afoul of it.[64] Eventually the Constituent Assembly rejected the motion to add such a proviso.[65] Similarly, albeit in a different context, Lakshminarayan Sahu noted that religious freedom was not absolute and that religious freedom to practice sati, for instance, was abolished in the country.[66] The fact that the personal reforms undertaken often forewent religious beliefs for gender equality further show that the dominant view of the Constituent Assembly was to protect equality as a constitutional value and limit religious freedom to that extent.[67]

Further, some members of the Constituent Assembly itself read the right to freedom of religion with other rights. Thus, K. Santhanam remarked that the right to freedom of speech and expression and to form associations and unions under Article 19 includes the right of religious expression and forming religious

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Fundamental Right to that effect and you have an article here which lays down that there should be no discrimination against sex. Look at Hindu Law; you get any amount of discrimination against women; and if that is part of Hindu religion or Hindu religious practice, you cannot pass a single law which would elevate the position of Hindu women to that of men." Constituent Assembly of India Debates, 23 November 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C23111948.html> accessed 01 July, 2021.

64 ibid.

65 Constituent Assembly of India Debates, 23 November 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C23111948.html> accessed 01 July, 2021.

66 Constituent Assembly of India Debates, 24 November 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C23111948.html> accessed 01 July, 2021.

67 Ananya Mukherjee Reed, 'Religious Freedom Versus Gender Equity in Contemporary India: What Constitutions Can and Cannot Do' (2001) 25(2) Atlantis 45.

associations.[68] Reading this way he emphasised that Article 25 was more about religious toleration limited by public order, morality, health and other rights.[69] Beyond the Constituent Assembly, other leaders of the time also echoed the view that the right to religious beliefs and freedom of both individual and community had to be limited by other rights. For instance, Lala Lajpat Rai believed that religious rights had to be "adjusted and correlated that they might be exercised without doing injury to each other."[70]

From this discussion, it emerges that the framers conceptualised religious freedom to be limited and for it to not impede any social reform measures. The Constituent Assembly sought to uphold the principles of equality, non-discrimination, human dignity, and liberty, which underpin other provisions of Part III. The Constituent Assembly did not qualify this concern when it came to group rights under Article 26. It sought to limit the right to religious beliefs and freedom in principle, irrespective of the right being held by individuals or by a community.

The draft of Article 25 initially did not contain any proviso, which, as Dr. B.R. Ambedkar explained, was a mere omission. Thus, the phrase "subject to public order, morality, and health" was added to the draft in line with the principle that rights in the matter of religion cannot be absolute.[71] This underlying reasoning of ensuring that religion does not become absolute would apply equally in case of a group's right to religious freedom.

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68 Constituent Assembly of India Debates, 6 December 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C06121948.html> accessed 01 July, 2021.

69 ibid.

70 Madhav Khosla, *India's Founding Moment* (Harvard University Press 2020) 129.

71 Constituent Assembly of India Debates, 7 December 1948, vol VII <164.100.47.194/Loksabha/Debates/cadebatefiles/C07121948.html> accessed 01 July, 2021.

It has been argued that the textual difference between Articles 25 and 26 i.e., the omission of the phrase "other provisions of Part III" from Article 26 indicates that the group rights under Article 26 are not subject to other fundamental rights. However, based on the discussion in the Constituent Assembly debates, it emerges that there was no discussion and deliberation in the Constituent Assembly on the omission of the phrase "other provisions of Part III". There is nothing in the debates to suggest that Article 26 was intentionally not subjected to other rights enumerated in Part III. Given that the Constituent Assembly's underlying concerns about limiting religious freedom to eliminate pernicious religious practices applies to both rights of individuals and groups, from a historical perspective, this textual difference ought not to be considered critical.

This is also substantiated by the fact that it was individual liberation that was given primacy to by the Constituent Assembly over group rights.[72] In both caste and religious questions, the Constituent Assembly sought, through the Constitution, to limit the hierarchies created by groups and to liberate individuals.[73] Social reform movements that preceded the framing of the Constitution focused on individual choice within communities and were often

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72 Rochana Bajpai, 'Multiculturalism in India: An Exception' in *Multiculturalism in the British Commonwealth: Comparative Perspectives on Theory and Practice* (University of California Press 2019) 137; *See also* Pandit GB Pant observed: "There is the unwholesome and to some extent a degrading habit of thinking always in terms of communities and never in terms of citizens. But it is after all citizens who form communities and the individual as such is essentially the core of all mechanisms…that are adopted for securing progress and advancement. So, let us remember that it is the citizen that must count…It is the citizen that forms the base as well as the summit of the social pyramid…." Constituent Assembly of India Debates 24 January 1947, vol II <http://loksabhaph.nic.in/writereaddata/cadebatefiles/C24011947.html> accessed 01 July, 2021.

73 Khosla (n 70) [111], [142] & [152]; Satya Prasoon & Ashwini Tallur, 'Rescuing Individual Rights from the Chokehold of Groups Rights' The Wire (3 Dec. 2017) <https://thewire.in/law/constitution-individual-group-rights-religion>.

framed in the language of individual rights against these communities.[74] Ambedkar in the above quoted Constituent Assembly speech also recognised the inequalities created by the social system and noted that the basic unit of the Constitution was indeed the individual.[75] The Constituent Assembly's rejection of explicitly saving personal law, which would have strengthened group rights, also shows that it was the individual that was the normative unit of the Constitution whose right to equality was to be protected.[76] This indicates that while the Constituent Assembly recognised group rights to religious freedom, they were to be read with the right to equality of individuals.[77] Thus, the framers envisaged the State to both exercise restraint to protect religious freedom and to undertake reforms at the same time,[78] for, left to its own, they were concerned that oppressive religious practices could limit the transformative impact of independence.[79]

Drawing on the understanding that the Constituent Assembly was cognisant of the "thick" nature of the religion which often threatened the exercise of individual rights, and the primacy it gave to individual liberation, it is clear that the framers had sought to limit religious freedom of both individuals and groups. These limitations are informed by other rights enumerated in Part III which guarantee equality and dignity to individuals. That Article 25 specifically

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74 Bhatia (n 19).

75 Constituent Assembly Debates, 4 November, 1948, Vol. VII <http://164.100.47.132/LssNew/constituent/vol7p1.html> accessed 01 July, 2021.

76 Gautam Bhatia, 'How Courts Decide on Matters of Religion' LiveMint (5 Mar. 2019), <https://www.livemint.com/news/india/how-courts-decide-on-matters-of-religion-1551715822881.html>. accessed 01 July, 2021.

77 Bajpai (n 72) [137].

78 Deepa Das Acevedo, 'Temples, Courts, and Dynamic Equilibrium' (2016) 64 The American Journal of Comparative Law 579.

79 PN Bhagwati, 'Religion and Secularism Under the Indian Constitution' in Robert Baird (ed) *Religion and Law in Independent India* (2nd ed., 2005) [35], [43].

subjects religious freedom to other fundamental rights and that the omission of such a proviso in Article 26 was not deliberate, leads one to conclude that Articles 25 and 26 must be read harmoniously with other fundamental rights. The framers envisaged discriminatory religious practices to be foregone for gender equality, thus, should any group practice its religion in a manner that is discriminatory on grounds of sex or excludes an individual from accessing public goods,[80] such a practice is not likely to stand the test of the law.

B. Arguments from Constitutional Theory

Arguments from constitutional theory are concerned with interpreting the Constitution as a whole and assessing the purpose and values it espouses.[81] This is similar to the structural argument typology proposed by the constitutional law scholar Professor Philip Bobbitt, which draws inferences from structures of and relationships between constitutional provisions.[82] This argument also builds on and borrows from the argument about the framers' intent discussed above.

Articles 25 and 26 form part of the fundamental rights chapter of the Constitution contained in Part III. Article 14 is the primary source of the principle of equal protection of law which then is manifested in protection against horizontal discrimination based on religion, race, caste, sex or place of birth in Article 15; equality in matters of public employment (Article 16); abolition of untouchability (Article 17); and abolition of titles (Article 18). This extends to other provisions guaranteeing freedoms and personal liberty inasmuch as they apply to *all* individuals. It can even be found in Articles 25 and 26 inasmuch as they guarantee equal right to

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80 Sabarimala Case (n 4) [217] (Chandrachud J). On anti-exclusion test, see Bhatia (n 19).

81 Fallon (n 5) [1200].

82 Bobbitt (n 37) [74].

religious freedom to *all* individuals and groups. The Constitution guarantees formal equality and endorses substantive equality by empowering the State to enact laws that may impinge upon religious autonomy, in order to eradicate discriminatory religious practices.[83] It is within this constitutional scheme that the right to freedom of religion finds space and it must be interpreted within such a scheme.

The freedom of conscience and religion has been enlisted with other freedoms that together form various facets of liberties to be realised by an individual and by the society. These freedoms are exercised together and not in disjunction from each other, meaning that all freedoms exist in harmony.[84] The underlying values of each provision informs others and together they contribute to the human personality.[85] Thus, Articles 25 and 26 cannot be read as self-contained code but must be read in conjunction with other fundamental rights enlisted in Part III of the Constitution.[86]

Article 25 is the only provision in this chapter that has been explicitly made subject to other fundamental rights. This is in line with the framers' intention of limiting the role of religion to ensure that religion does not become a site for perpetration of pernicious, oppressive practices that undermine the principles of equality, liberty, and dignity.[87] At the same time, Article 26 also forms part of this constitutional scheme along with other freedoms given in Part III. Given their coexistence in Part III, the freedom enumerated in Article 26 will also be read in harmony with the principles of equality,

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83 Ananya Mukherjee Reed 'Religious Freedom Versus Gender Equity in Contemporary India: What Constitutions Can And Cannot Do' (2001) 25(2) Atlantis [42], [44].

84 Sabarimala case (n 4) [217] (Chandrachud J).

85 *Justice KS Puttaswamy v Union of India*, (2017) 10 SCC 1 [260].

86 Bhatia (n 19); Suhrith Parthasarathy, 'An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in Sabarimala' (2020) 3(2) University of Oxford Human Rights Hub Journal 124.

87 See Part (II)(A) above.

liberty, and dignity espoused by other Articles including Article 25. Further, Part III is predominantly characterised with rights for individuals. This indicates that the individual is at the heart of Part III and group rights are a platform for the self-fulfilment of individuals.[88] Thus, group rights to practices and customs cannot be absolute to an extent that they impinge upon individual freedoms and dignity.[89]

This argument is best encapsulated in Justice Chandrachud's exposition in the *Sabarimala* case:

> Fundamental human freedoms in Part III are not disjunctive or isolated. They exist together. It is only in cohesion that they bring a realistic sense to the life of the individual as the focus of human freedoms. The right of a denomination must then be balanced with the individual rights to which each of its members has a protected entitlement in Part III.[90]

C. Arguments from Precedent

Arguments from judicial precedents or doctrinal arguments are those that derive principles and law laid down in previous decisions of the judiciary and apply it to the problem at hand.[91] Indian jurisprudence, over time, has moved towards the constitutional interpretation that interprets fundamental rights harmoniously. Today, there is consensus on reading constitutional provisions holistically as opposed to a disintegrated approach of interpreting each provision as a separate self-contained code.[92] Albeit initially, Indian judiciary had adopted a disjunctive interpretation of

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88 Sabarimala Case (n 4) [410] (Chandrachud J).
89 ibid.
90 Sabarimala Case (n 4) [409] (Chandrachud J).
91 Fallon (n 5) [1202]; Bobbitt (n 37) [7].
92 LH Tribe and MC Dorf, *On Reading the Constitution* (Harvard University Press 1991) [21]-[23].

fundamental rights. In *AK Gopalan v State of Madras*,[93] The majority opinion of the Court held that Article 21 cannot be read with Article 19 and thus a preventive detention law cannot be challenged for violation of Article 19. This approach was reversed later in *RC Cooper v Union of India*,[94] where the court held that fundamental rights are not water-tight silos but indeed have fluid content overlapping with other rights of Part III. This was further expounded in *Maneka Gandhi v Union of India*,[95] where the Court held that a law needs to meet the requirements of Articles 14, 19, and 21, and the procedure established by law under Article 21 must also be "just, fair, and reasonable". Similarly, in *Special Courts Bill Reference*,[96] the Court held that an overlap in a Constitution as detailed as India's is inevitable and thus, different provisions must not be construed in a manner that nullifies the effect of another.

In the context of the interplay between Articles 25 and 26, one of the earliest decisions was that of *Sri Venkataramana Devaru v State of Mysore* ["Devaru"].[97]The Court grappled with the conflict between a law passed under Article 25(2)(b) to open access to Hindu temples and the denomination's right to manage its own affairs in matters of religion under Article 26(b). The Court held that Article 25(2)(b) was an exception to religious freedom under both Articles 25 and 26 and applied equally to denominational temples.[98] Thus, Article 26(b) could not be read in a manner that rendered Article 25(2)(b) superfluous.[99] It was held that: "If the denominational rights are such that to give effect to them would substantially reduce the

93 *AK Gopalan v State of Madras*, AIR 1950 SC 27.
94 *RC Cooper v Union of India*, 1970 AIR 564.
95 *Maneka Gandhi v Union of India*, (1978) 1 SCC 248.
96 *In Re Special Courts Bill Reference*, (1979) 1 SCC 380.
97 *Sri Venkataramana Devaru v State of Mysore*, 1958 SCR 895 ["Devaru"].
98 ibid [24]-[25].
99 ibid [32].

right conferred by Art 25(2)(b), then of course, on our conclusion that Art 25(2)(b) prevails as against Art 26(b), the denominational rights must vanish."[100] This decision falls in line with the framers' objective of limiting the right to religious freedom to create leeway for reform. Crucially, by extending Article 25(2)(b), which contains the limitation of other rights in Part III, to Article 26(b), the decision effectively resulted in endorsing a reading of Article 26 with other fundamental rights.

In *Sardar Syedna Tahir Saifuddin v State of Bombay*,[101] the majority opinion followed *Devaru*. However, it read the limitation on Article 26(b) narrowly, noting that it is not subjected to the preservation of civil rights. It further construed Article 25(2)(b) narrowly to hold that a law prohibiting excommunication by a religious community is not a measure of "social welfare and reform".[102] This strict approach was also seen in *Subramanian Swamy v State of Tamil Nadu*,[103] where the Court held that Article 26 has not been made subject to other fundamental rights, and thus the right under Article 26 cannot be waived. This approach was a setback from the previous position of Court in *Devaru*. Reading Article 26 in isolation from other fundamental rights created a sharp distinction between religious freedom and other fundamental rights, which failed to account for the inextricable connection between religion and society. Such an approach also aligned with the reliance on definitional tests such as the ERP test, which allowed the court to avoid grappling with inter-rights conflicts.

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100 ibid [32].
101 *Sardar Syedna Tahir Saifuddin v State of Bombay*, 1962 SCR Supp (2) 496.
102 ibid [40].
103 *Subramanian Swamy v State of Tamil Nadu*, (2014) 5 SCC 75.

Similarly, in *Narendra Prasadji Anand Prasad Ji Maharaj & Ors. v State of Gujarat*,[104] the Court observed that Article 25 was subjected to other fundamental rights given that it coincided with Article 19(1)(a) and conferred rights on all persons. It held that the same was not needed for Article 26 which refers to religious denominations and not citizens as Article 19 does.[105] However, despite holding this difference to be critical, the Court held that Article 26 did not limit state's power to compulsorily acquire property under erstwhile Article 31(2). Crucially, it went on to hold that a fundamental right does not exist in isolated compartments but must harmoniously co-exist with other fundamental rights as well as with the reasonable power of the state to effectuate social welfare measures such as agrarian reforms.[106] Thus, there is a tacit acceptance in this case on balancing Article 26 with other fundamental rights despite the Court's acknowledgement of the difference between Articles 25 and 26.

This position was reiterated in *Riju Prasad Sarma v State of Assam*,[107] with the Court holding that Article 25(2)(b) exception applies to Article 26(b) as well. A more nuanced approach was adopted in *N Adithayan v Travancore Devaswom Board*,[108] wherein the Court held that religious practices did not enjoy absolute freedom but were limited by human rights, dignity and social equality mandated under the Constitution.[109] This approach indicated a turn towards a more harmonious approach, correcting course from hitherto

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104 *Narendra Prasadji Anand Prasadji Maharaj & Ors. v State of Gujarat*, (1975) 1 SCC 11 ["*Narendra Prasadji*"].

105 ibid [26].

106 *Narendra Prasadji* (n 104) [30]-[31].

107 *Riju Prasad Sarma v State of Assam*, (2015) 9 SCC 461.

108 *N Adithayan v Travancore Devaswom Board*, (2002) 8 SCC 106.

109 ibid [18].

textualist approach of reading the right to religious freedom as a self-contained code.

Most recently, in the *Sabarimala case*, Justice Chandrachud endorsed the approach of holistically reading Article 26 with other rights. He held that the fact that Article 26 is not explicitly subject to other provisions of Part III only means that it is not subordinate to other rights.[110] However, this does not result in discrete, overriding religious freedom for groups. It must still be read harmoniously with other fundamental rights for it is one of the facets of other freedoms that co-exist in the Constitution.[111] He thus held that Ayyapan's devotees' right to religious autonomy under Article 26 had to be balanced with the right of women petitioners to equality, dignity, non-discrimination, and liberty to worship under Articles 15, 17, 21, and 25.[112]

A survey of the judgements discussed above suggests that over time, the Supreme Court has shifted its position on the interpretation of Articles 25 and 26. It has moved from reading them as watertight compartments separate from other fundamental rights to reading them holistically within the framework of Part III of the Constitution, in conjunction with other fundamental rights. Thus, the current position of law based on these judgments favours a holistic reading of right to religious freedom with other rights. However, curiously, despite such holistic reading which paves way for the Court to engage with cases involving competing rights, it continued relying on the ERP test that allowed it to evade such engagement by rejecting claims at a threshold level.

110 Sabarimala Case (n 4) [216] (Chandrachud J).
111 ibid [217] & [410] (Chandrachud J).
112 ibid (Chandrachud J).

D. Value Arguments

Arguments that appeal to moral, political or social values or concern the normative outcomes are often used by courts to give meaning to constitutional provisions.[113] In other words, it looks at the ethos of the Constitution and polity as a source.[114] The Indian Constitution espouses the values of equality, fraternity, liberty, and justice in its Preamble. As K.G. Kannabiran posits, post-independence India relieved itself from the shackles of oppression via a new Constitution, which stipulates fundamental rights for its citizens to bring a social transformation.[115] Thus, the Indian State bears the onus to promote moral and material welfare of the people as envisaged by the Constitution.[116] This transformation that gives centrality to dignity of individuals and equality, is envisaged not only in terms of State and individual but also amongst individuals.[117] The Constitution sought to socially transform Indian society by eliminating structures of oppression to ensure liberty, equality and fraternity.[118] It recognises religious freedom of both individuals and groups and envisages this in a society that is marked with equality amongst citizens, which assures fraternity in the society and realises dignity of individuals.[119]

In other words, constitutional morality of the Indian Constitution, as inferred from the Preamble and Part III seeks to realise the dignity of the individual.[120] Thus, the protection of

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113 Fallon (n 5) [1204]; Bobbitt (n 37) [9].
114 Bobbitt (n 37) [94].
115 KG Kannabiran, *The Wages of Impunity: Power, Justice and Human Rights* (Orient Longman 2014) 64.
116 J. Patrocinio de Souza, 'The Freedom of Religion Under the Indian Constitution' (1952) 13 The Indian Journal of Political Science [62],[73].
117 *Navtej Singh Johar & Ors. v Union of India & Ors.*, AIR 2018 SC 4321 [52].
118 Dhavan and Nariman (n 16) [270].
119 Sabarimala Case (n 4) [202]-[204] (Chandrachud J).
120 Navtej Singh Johar & Ors. v Union of India & Ors., AIR 2018 SC 4321 [78].

religious freedom must be balanced with dignity of individuals to realise the values of equality, fraternity, and liberty. For this balancing to take place to fulfil the overarching value of individual dignity, the freedom of religion granted under both Articles 25 and 26 will have to be read in conjunction with other fundamental rights. Thus, religious practices of any religious denomination that impinge upon individual liberty, threaten equality, and harm individual dignity will not withstand the test of law.[121]

E. Arguments from the Text

Textual arguments rely directly on the text of the Constitution and its plain meaning.[122] As pointed out earlier, in contradistinction to Article 25, Article 26 is not subject to other fundamental rights. The only restrictions that can be placed on the rights of the religious denomination under Article 26 are public order, morality and health.[123] On a textualist interpretation, given that this right has not been made subject to other fundamental rights unlike Article 25, it could be argued that Article 26 exists in isolation to other rights mentioned in the Constitution. In other words, a strict textualist approach would suggest that the three grounds of public order, health, and morality would be the exhaustive list of restrictions. This argument could be bolstered by the fact that framers explicitly restricted Article 25 by other fundamental rights but did not do so for Article 26, indicating that it is not limited by other fundamental rights.

As discussed earlier, this reasoning has been adopted by the Supreme Court in some cases.[124] Most recently, Justice Malhotra in

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121 Sabarimala Case (n 4) [221] (Chandrachud J); Parthasarthy (n 86) [25].

122 Fallon (n 5) [1195]; Bobbitt (n 37) [7].

123 The Constitution of India, art. 26.

124 *Sardar Syedna Tahir Saifuddin v State of Bombay*, 1962 SCR Supp (2) 496; *Subramanian Swamy v State of Tamil Nadu*, (2014) 5 SCC 75.

her dissenting opinion in *Sabarimala case* observed that given the pluralist history of Indian society, the framers of the Constitution did not subject Article 26 to Part III of the Constitution.[125] State interference in religious matters has been limited to making laws for social welfare as provided under Article 25(2)(b). Thus, she noted that constitutional scrutiny of religious practices based on Article 14 and other provisions of Part III would be outside the ken of the courts, unless the practices are "social evil".[126]

However, the discussion above,[127] suggests that the framers sought a limited role for religion in order to do away with oppressive religious practices and that the omission of the phrase "other provisions of Part III" was in fact, not deliberate. Moreover, Article 26's merely not being subject to other fundamental rights does not prevent it from being harmoniously read with other fundamental rights. The phrase 'subject to' only indicates that a provision is controlled by other. Thus, whilst Article 26 is not subordinate to other fundamental rights it can still be read synchronously with other rights.[128] Further, given the "thick" role played by religion in India, religion often becomes the site of social discrimination and exclusion practiced at a broader level in the society.[129] It reflects and reinforces the injustices carried out in other spheres. As discussed earlier, the framers were acutely aware of this fact and sought to balance religious freedom with the values of dignity and equality. Thus, the constitutional commitment to religious autonomy of groups and pluralism in the text of Article 26 must be understood within the

125 Sabarimala Case (n 4) [479]-[480] (Malhotra J).
126 ibid [453] & [476] (Malhotra J).
127 See Part (II)(A) of the paper.
128 Sabarimala Case (n 4) [221] (Chandrachud J).
129 Bhatia (n 50).

framework of individual dignity and equality enshrined in Part III of the Constitution.[130]

Finally, it could be argued that the term "morality" in Article 26 refers to "constitutional morality" which would import restrictions from other fundamental rights and the Constitution as a whole. However, such an approach necessarily relies on reading the constitutional provisions holistically, which is a deviation from the textualist approach and also questions the exhaustive nature of restrictions enlisted in Article 26.[131]

Moreover, such a strict approach does not contemplate conflicts between the group's right to religious freedom and other fundamental rights. On the other hand, a conjunctive approach where rights of Part III are viewed as overlapping provisions securing principal constitutional values, balancing of competing provisions to secure constitutional values could be envisaged.[132]

Fallon stipulates that even though the five arguments exist independently, there exist numerous interconnections amongst them. Where one argument points in a different direction than those given by all other arguments, then such arguments could be re-examined to adjust results and arrive at a uniform conclusion.[133] Thus, when a textual reading leads to a vexed interpretation, the text has to be read with other arguments that lend other meanings to the text.[134] This could be informed by precedents, constitutional theory, values, or the framer's intent. In this case, whilst the text of Article 26 suggests that it is not subject to other fundamental rights, arguments about

130 Bhatia (n 19).

131 Raghav Kohli, 'The Sound of Constitutional Silences: Interpretive Holism and Free Speech under Article 19 of the Indian Constitution' (2020) 20 Statute Law Review 11.

132 ibid [9].

133 Fallon (n 5) [1240].

134 Fallon (n 5) [1241].

framers' intent, precedents, values, and the structure of the Constitution suggest that it is to be read holistically with other fundamental rights enumerated in Part III. Thus, the textual difference between Articles 25 and 26 will ultimately be rendered irrelevant.

Therefore, based on a discussion of the arguments about framers' intent, precedents, values, and the structure of the Constitution and construing the text of Articles 25 and 26 in this light, the authors conclude that the two provisions must be read in consonance with other fundamental rights enshrined in Part III of the Constitution. Thus, the right to freedom of religion will be limited to the extent it interferes with and leads to the violation of other fundamental rights, and particularly the right to equality.

IV. ANTI-EXCLUSION TEST: THE WAY FORWARD?

Section I of this paper discussed the pitfalls of the ERP test. The ERP Test has allowed the Court to determine claims based in religion at the definitional level, without having to balance competing interests of religious freedom and equality. Moreover, it militates against a religious community's autonomy to ascertain its essential practices. At the same time, by designating certain practices as "essential" could protect them from constitutional scrutiny and allow for discriminatory essential religious practices to continue.

Justice Chandrachud acknowledged these limitations of the ERP test in his concurring opinion in the *Sabarimala case*. He proposed an alternative in the form of the anti-exclusion test. The test prescribes respect for religious group's autonomy to decide its practices except where the practices lead to exclusion of individuals, impairing their dignity, and hindering access to public goods.[135] This test avoids the pitfalls of the ERP test and protects the autonomy of

[135] Sabarimala Case (n 4) [414-145] (Chandrachud J); Bhatia (n 19).

religious groups that they have been granted under the Constitution. At the same time, it aims to protect the rights of the members of the groups from pernicious religious practices of their groups. In doing so, it also allows the courts to redress historical disadvantage of groups that have been socially excluded.[136] It is also in line with the constructivist coherent interpretation of Articles 25 and 26 discussed above in as much as it reads and balances the right to religious freedom with other rights including the rights to equality, liberty, and dignity.

Thus, the anti-exclusion test will mark a remarkable shift in the jurisprudence and enable the courts to undo the harms caused by the ERP test. It will affirm the religious freedom of groups in determining their own religious practices, as opposed to the current perilous approach of the court undertaking a theological exercise and ascertaining 'essential' practices of a religion. At the same time, it will protect individual dignity and right to equality. Crucially, the principle allows the courts to engage with and balance the often-competing rights of religious freedom and equality, by harmoniously reading all fundamental rights together, which this paper has argued in favor of.

In carrying out such harmonious construction of rights, the anti-exclusion test strikes the correct balance between religious autonomy and dignity and equality. It aligns with the Benhabib's three principles for negotiating equality for reasonable pluralism – egalitarian reciprocity, voluntary self-ascription, and freedom of exit.[137] The anti-exclusion principle ensures that members in minority

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136 Lucy Vickers, 'A Common Denominator: The Role of the Anti-Exclusion Principle in Freedom of Religion Cases' (2020) 3(2) University of Oxford Human Rights Hub Journal 157.

137 S Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* 92(Princeton University Press 2002).

of a group are not granted lesser rights than those of the majority;[138] allows for self- determination rather than groups controlling the membership at the expense of individuals;[139] and allows freedom of exit to individuals.[140] This allows the religion to evolve to accommodate internal dissent and become more egalitarian, thus achieving the constitutional vision of our framers.

The anti-exclusion principle must replace the ERP test and must be applied in all cases involving religious practices and customs that conflict with the rights of the individuals within that religion. It will however not be of use in cases involving State's role in the management of religious institutional property, which will be determined based on the distinction between secular and religious practices as drawn in the Constitution.[141] Further, the principle would apply to both cases concerning validity of reformatory laws and those involving challenge to religious practices. The courts could evaluate if the impugned laws aimed at reforming religion achieve the anti-exclusion principle or if the impugned religious practices exclude individuals and violate their rights.[142] Some commentators have even argued for the application of the anti-exclusion test to all cases involving competing rights as it enables the courts to consider each right equally and carve a balance between them.[143]

At the same time, it is important to note that the standard of claim of exclusion and impingement of dignity is high and would require rigorous evaluation of factual claims. This is important to protect the freedom of religion, which is essential to the social fabric

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138 Siobhán Mullally, 'Debating Gender Equality in India: Feminism and Multicultural Dilemmas' in *Gender, Culture and Human Rights: Reclaiming Universalism* 193 & 210 (Hart Publishing 2006).

139 ibid.

140 Mullally (n 138).

141 Bhatia (n 19).

142 Bhatia (n 19).

143 Vickers (n 136).

of India given its pluralistic and secular milieu and people often derive their identity and freedoms from such communitarian existence. All religious practices cannot be easily tested against the anvil of rationality and must warrant judicial interference *only* when they exclude individuals socio-economic sphere such that it impairs their dignity or denies them access to basic public goods. Similarly, it is important that the challenge to religious practices based on anti-exclusion claims originate from the affected persons themselves unless there are significant barriers that prevent them from raising such claims.[144] This is because the claims of equality and dignity are adjudged in relation to the other worshippers of the same religion.[145] Moreover, claims at the behest of non-devotees could open floodgates of litigation, which could be perilous, especially for religious minorities.[146]

Thus, the party claiming to have been discriminated against by its religious community would need to show that the impugned religious practices lead to its exclusion or hinder its access from accessing basic goods or treat it as inherently inferior than other members of the community.[147] This would require the Court to assess the claims made by both parties on facts and verify their credibility. Hitherto, the Supreme Court and High Courts have avoided conducting a comprehensive factual analysis especially in

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144 Sabarimala Case (n 4) [446-448] (Malhotra J); Gautam Bhatia, 'The Sabarimala Judgment – II: Justice Malhotra, Group Autonomy, and Cultural Dissent' (*Indian Constitutional Law and Philosophy*, 29 September 2018) <https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-ii-justice-malhotra-group-autonomy-and-cultural-dissent/> accessed 01 July, 2021.

145 Sabarimala Case (n 4) [447] (Malhotra J).

146 ibid [448] (Malhotra J); Mukul Rohatgi, 'An Axis Shift: A Critique of the Sabarimala Case' in Saurabh Kirpal (ed) *Sex and the Supreme Court* 285-286 (Hachette India 2020).

147 Parthasarathy (n 86) 148.

writ petitions.[148] However, testing the claims of exclusion and impingement of dignity due to religious practices would require the courts to call for witnesses, permit cross-examination and take evidence on record. Aid of anthropologists with significant experience and expertise in practices of a religion could also be sought for the court to understand the underpinnings of the impugned practice.[149] A rigorous fact-finding would enable the courts to hear both sides and efficiently adjudicate competing values, which would enhance the legitimacy of their decisions.

Thus, the Supreme Court's adoption of the ERP test, which is grounded in theological concerns, turns the focus of the Court on the interpretation of religious texts. As a result, rarely have the courts dealt with discriminatory underpinnings of a vexed religious practice, which would balance religious freedom with equality and dignity. In this context, the anti-exclusion test proposed by Justice Chandrachud is indeed a welcome step in resolving conflicts between religious freedom and other rights. This would also help in tackling the religious hegemonic view which the court otherwise ascribes to in determining the essential religious practices. Marginal voices which are being discriminated against within their religion would find space in the anti-exclusion test, requiring the courts to balance the religious practice with other fundamental rights. At the same time, for a meaningful resolution, the Court must be prepared to delve into disputed questions of facts concerning discrimination or exclusion or violation of dignity.[150]

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148 Suhrith Parthasarathy, 'The Search for Truth in the Republic of Writs' (Indian Constitutional Law and Philosophy, 3 January 2019) <https://indconlawphil.wordpress.com/2019/01/03/iclp-book-discussion-rohit-des-a-peoples-constitution-ii-the-search-for-truth-in-the-republic-of-writs/>.

149 Dominic (n 17) 69.

150 Parthasarathy (n 86) 150.

V. CONCLUSION

Indian jurisprudence on the right to freedom of religion contained in Articles 25 and 26 of the Indian Constitution has witnessed a puzzling growth of jurisprudence since the inception of the Indian Constitution. On one hand the court has espoused a deferential status to practices of religious denomination even in derogation of other fundamental rights. On the other hand, it has struck down religious practices which did not conform to the reformist notions of the judges and thus were deemed not "essential". This growth of a paradoxical jurisprudence has been the result of the essential religious practices test. Sufficient literature has been devoted to the critique of this test that seeks to endorse the role of judges as religious scholars. This paper argued that given the rejection of religious claims on definitional threshold, the Court has not grappled with the issue of the interplay of fundamental rights with Articles 25 and 26. Only Justice Chandrachud's opinion in the *Sabarimala* case has tackled this question adeptly. Today, this matter stands before a nine-judge bench of the Supreme Court.

In light of the pending reference, this paper sought to resolve this interpretational conflict. It argued in favour of reading Articles 25 and 26 holistically with other fundamental rights. The paper, relying on Fallon's constructive coherence theory, has advanced this proposition based on all five typologies of constitutional interpretation. All arguments sans the textual argument lead to the uniform outcome of reading Articles 25 and 26 in conjunction with other rights contained Part III of the Constitution. In light of other four arguments, it is appropriate to interpret the text of the Constitution in this holistic manner to achieve the constitutional vision of protection of individual dignity, equality, liberty and fraternity.

The holistic reading of fundamental rights as proposed in this paper would also support the anti-exclusion test proposed by Justice Chandrachud. The test balances the right to religious freedom with the principles of equality and individual dignity. However, for the test to be meaningfully applied, Courts must be open to undertake factual inquiries into discrimination or exclusion claims, wherever necessary.

RIGHT NOT TO BE MISLED: IDENTIFYING A CONSTITUTIONAL BASIS TO FIX ACCOUNTABILITY FOR ELECTION PROMISES

Nirmalya Chaudhuri[*]

Abstract

Broken promises have been a perennial feature in elections in India, aided further by an absolute legal vacuum as far as regulation of election manifestos by political parties are concerned. This essay examines this undesirable state of affairs and argues that political processes alone cannot ensure accountability for broken campaign promises, thus necessitating the need for legal regulation. Drawing upon the interplay between the rights under Articles 19(1)(a) and 21 of the Constitution, it is argued in this essay that voters enjoy a fundamental right to make a well-informed choice. Misleading promises, it is argued, cannot be allowed to vitiate the voting choice of a voter by supplying false information and thus defeating this very right. Such a constitutional framework can be used as the foundation to make election manifestos and promises legally binding. This approach would help in promoting accountability in the electoral space, and go a long way towards ensuring that the trust reposed by the voters is not taken for granted by political parties.

I. Introduction

Elections in India have witnessed tremendous change over the years with professional strategists being tasked with the onerous responsibility of finetuning campaign strategy and door-to-door canvassing being replaced by publicity blitz on social media. Still, one thing has remained common in elections, both past and present: the disturbing tendency of political parties to make tall promises in their manifestos, and in most cases, not fulfilling them once voted to

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power. In 2015, the Supreme Court dismissed an appeal from a decision of the Delhi High Court that had held that election manifestos and its contents were not legally binding.[1] This stance effectively creates an absolute legal vacuum as far as election promises are concerned, and gives a free hand to political parties to manipulate the decision-making process of the voter.

This essay seeks to question this undesirable *status quo* and initiate discussion on how accountability can be fixed for the promises that parties make to the electorate, a topic that has received surprisingly little legal attention.[2] It is argued that a strong constitutional basis, rooted in the right to make a well-informed choice under Articles 19(1)(a) and 21 of the Constitution, exists for making election promises binding, even though certain safeguards are necessary. In Part 2 of this essay, the dangers of leaving the "political market" unregulated are assessed by showing how an absence of accountability for campaign promises can result in the fairness of the

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1 *Mithilesh Kumar Pandey v. Election Commission of India*, 2014 SCC OnLine Del 4771; upheld by the Supreme Court in *Mithilesh Kumar Pandey v. Election Commission of India*, Petition for Special Leave to Appeal (Case No. 9767/2015) decided on 28 September 2015.

2 In an ideal scenario, any reference to campaign promises should have included all promises made to the electorate on the campaign trail, irrespective of whether or not those promises are mentioned in a formal manifesto. If this were not the case, it would be extremely easy for political parties to escape accountability by disseminating misleading promises by word of mouth or other means, but not specifying them in the manifesto. However, such a broad definition would imply that an isolated promise made by even a local politician would bind the party if voted to power. Therefore, a pragmatic middle path needs to be adopted. As a result, for the purposes of this paper, any reference to "campaign promises" or "poll pledges" includes not only all manifesto promises (since they are "officially" endorsed by the party) but also promises that are made by the upper echelons of the party hierarchy, or repeated by numerous political leaders on the campaign trail, or widely disseminated by party functionaries by other means (since it may be implied that such promises have been acceded to by the party leadership, unless specifically denied or objected to). The issue of whether or not a promise that does not appear in the manifesto satisfies the above-mentioned criteria may be construed to be a question of fact.

electoral and political processes being questioned. In Part 3, the constitutional basis for holding parties accountable for such promises is analysed by arguing that a voter has the right to exercise a well-informed and meaningful choice. Part 4 contains the concluding remarks.

II. THE NEED TO REGULATE THE "POLITICAL MARKET"

The traditional, *laissez-faire* argument for letting the political forces act unhindered proceeds on the basis that voters have the option of defeating a candidate or voting a government out of office, as the case may be, if election promises have not been fulfilled.[3] As is apparent, the basic assumption underlying this argument is the belief that voting choices are subject to voter satisfaction regarding the fulfilment (or otherwise) of election promises. This assumption may hold true in some cases, as theoretical models have shown that politicians who have a positive track record of fulfilling poll pledges, enjoy a good reputation and are more likely to be believed by their constituents as far as future campaign promises are concerned.[4] However, a major problem arises when this option becomes ineffectual, that is, when the negative perception of non-fulfilment of promises cuts across party lines and applies throughout the entire political spectrum.[5] In such cases, it is possible that the need for

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3 Stephen D. Sencer, 'Read My Lips: Examining the Legal Implications of Knowingly False Campaign Promises' (1991) 90(2) Michigan Law Review 428, 430.

4 Enriqueta Aragones, Thomas Palfrey and Andrew Postlewaite, 'Political Reputations and Campaign Promises' (2007) 5(4) Journal of the European Economic Association 846, 856.

5 Suppose there are three competing parties or coalitions, A, B and C, all of which have realistic prospects of independently securing a majority of seats in the legislature and forming the government. Assuming that the extent of non-fulfilment of campaign promises by A, B and C are nearly equal, and assuming that voters vote out the government which does not fulfil its promises immediately in the next election cycle, it is apparent that after just three successive elections, voters would have no option but to elect one of the "non-performing" parties or coalitions back to power. While this argument

fulfilling election promises is relegated to the back burner, which results in lack of development and increasing voter dissatisfaction with the electoral process.

This pattern of disenchantment with campaign promises can be seen in India as well. For instance, in the recently concluded Legislative Assembly elections in Bihar in 2020, voters in three villages boycotted the election as campaign promises of construction of a bridge had not been fulfilled for a very long time.[6] This trend was also seen in parts of Uttar Pradesh, Madhya Pradesh and Rajasthan during the Lok Sabha elections in 2019.[7] Instead of voting against a particular candidate or party, the voters refused to even exercise their franchise, thus showing their disenchantment with the entire political process as such. In addition, scholars argue that Indian

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may be countered by stating that newly established political parties can provide a choice to the voter in such circumstances, such a counter-argument can possibly fail due to two reasons. Firstly, as a consequence of non-fulfilment of poll promises, the credibility of the entire political class is diminished in the eyes of the voter. See, Sencer (n 3) 434. Therefore, it is doubtful as to how receptive the electorate would be in believing the promises of "new" parties. Secondly, the burden is shifted onto the shoulders of the electorate to ascertain as to whether a "new" party will fulfil its promises once voted to power, with little information to correctly predict the outcome beforehand. In essence, the voters would be forced to resort to a game of "trial and error" in determining the prospects of fulfilment of election promises by different parties. Further, the counter-argument also ignores other political factors like the ability of a "new" party to establish a support base and compete with established parties in forming the government, which could prove to be a time-consuming affair.

6 India Today Web Desk, 'Bihar Polls: 3 villages boycott elections to protest unfulfilled development promises' (*India Today*, 28 October 2020) <https://www.indiatoday.in/elections/bihar-assembly-polls-2020/story/bihar-polls-3-villages-boycott-elections-to-protest-unfulfilled-development-promises-1735997-2020-10-28> accessed 10 January 2021.

7 Rangoli Agrawal, Saurabh Sharma and Manish Chandra Mishra, 'No roads, no water, no vote: Why villagers across Hindi heartland kept away from polls in Phase 4 of Lok Sabha election' (*Firstpost*, 29 April 2019) <https://www.firstpost.com/politics/no-roads-no-water-no-vote-heres-why-villagers-across-hindi-heartland-kept-away-from-polls-in-phase-4-of-lok-sabha-election-6539551.html> accessed 10 January 2021.

voters often use the None-of-the-Above (NOTA) option as a means to register their protest against the ills plaguing the political system in general rather than solely using it as a tool to express their discontent with the candidates contesting the election.[8] Empirical studies have shown that although the proportion of NOTA votes has consistently remained low, the number of NOTA votes exceeded the winning margins in as many as 24 out of 543 constituencies in the 2014 Lok Sabha elections, thus showing the ability of NOTA votes to influence election results at the constituency level.[9] Yet, such symbolic protests are largely ineffective in making the political class wake up from its deep slumber.[10]

Some analysts have contended, however, that voters are seldom swayed by manifesto promises, thus signifying the apparent irrelevance of election manifestos and its contents.[11] This argument is in line with judicial reasoning on this topic as well. In *ANZ Grindlays Bank*, for example, it was observed by the Delhi High Court that it is common knowledge among voters and political parties that manifestos will often contain promises that are unachievable and cannot be fulfilled.[12] Similarly, Lord Denning felt that not all voters are affected by the promises made in the manifesto, and some do not

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8 V R Vachana and Maya Roy, 'NOTA and the Indian Voter' (2018) 53(6) Economic and Political Weekly 28, 29.

9 ibid [29].

10 Even if large sections of population in a constituency boycott elections, the election of the representative is not threatened in the absence of a legally specified minimum voter turnout for an election to be regarded as valid. In such cases, while the moral legitimacy of the process may be questioned, its legal validity is beyond doubt.

11 Swapan Dasgupta, 'The manifesto and its total irrelevance in elections' (*NDTV,* 19 March 2014) <https://www.ndtv.com/elections-news/op-ed-the-manifesto-and-its-total-irrelevance-in-elections-554366> accessed 10 January 2021.

12 *ANZ Grindlays Bank Plc. v. The Commissioner, Municipal Corporation of Delhi* 1995 SCC OnLine Del 376 [107].

even care to read it.[13] While this argument might sound appealing, it fails when applied to the ground reality, considering the fact that it grossly underestimates the impact that campaign promises have on voting choice.

Firstly, it may be true that a vast majority of voters do not read the party manifestos, especially in a country like India. However, this does not imply that they are not aware of its contents since individual leaders and candidates often end up parroting those very promises to the electorate. Additionally, the increased use of social media ensures that voters are bombarded with a vast amount of information relating to election promises without having made any conscious effort to read the manifesto.[14]

Secondly, and more importantly, the supposed irrelevance of manifestos, and by implication, campaign promises, rests on a fundamental assumption that voting behaviour is not affected by poll pledges at all. Apart from anecdotal accounts, it is notoriously difficult to ascertain what influences the voting choice of an individual voter. In fact, controlled experiments on voter behaviour seem to run counter to this assumption. Studies on voting patterns show that the choice of whom to vote for is significantly shaped by campaign promises.[15] Interestingly, political support for a candidate increases with a rise in the value of promises made (that is, as the promises become more attractive and benevolent) up to a certain

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13 *Bromley London Borough Council v. Greater London Council* [1983] 1 A.C. 768.

14 For assessing the impact of social media on elections in India, see Sangeeta Mahapatra, 'India online: How social media will impact the 2019 Indian General Election' (*South Asia@LSE Blog*, 11 January 2019) <https://blogs.lse.ac.uk/southasia/2019/01/11/long-read-india-online-how-social-media-will-impact-the-2019-indian-general-election/> accessed 10 January 2021.

15 Luca Corazzini, Sebastian Kube, Michael Andre Marechal and Antonio Nicolo, 'Elections and Deceptions: An Experimental Study on the Behavioral Effects of Democracy' (2014) 58(3) American Journal of Political Science 579, 585-586.

point.[16] Beyond that threshold, political support dips as voters realise that excessively extravagant promises are not achievable and thus, not credible.[17]

If these results hold good, a further question would arise as to the ability of voters to differentiate between credible promises and mere puffery, which itself would vary among different individuals. While empirical studies do not directly deal with the question of how poll promises affect voting behaviour in India, surveys from other jurisdictions identify a link between the two. For instance, electoral surveys in Philippines have shown that voters tend to vote in favour of those who made promises that resonated with the voter's own policy preferences, thus undeniably showing that poll pledges affect voting choice.[18]

While it would be foolhardy to extrapolate laboratory results to the actual ground reality, especially in a diverse country like India, it would be equally dangerous to suggest that poll promises are absolutely irrelevant in the absence of strong evidence supporting such a stance. In fact, while the Supreme Court has refused to make election manifestos legally binding, it has accepted, in principle, that promises of doles and freebies during campaigns do have an effect upon voters and can put the fairness of the electoral process in danger.[19]

Even if we assume, for the sake of argument, that non-fulfilment of campaign promises is not widespread, or that voters do not vote on the basis of poll pledges at all, there is still a plausible ground to argue that poll promises should be regulated. In such a

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16 ibid.

17 ibid.

18 Cesi Cruz, Philip Keefer, Julien Labonne and Francesco Trebbi, 'Making Policies Matter: Voter Responses to Campaign Promises' (2018) NBER Working Paper No. 24785, 1.

19 *S. Subramaniam Balaji v. Government of Tamil Nadu,* (2013) 9 SCC 659 [85].

scenario, an analogy can be drawn between misleading electoral promises and false advertising. This comparison is possible simply because a political party would intend to "sell" its "product" to the voters in the "political market" by showcasing the policies that they would adopt if voted to power, much like companies advertise the possible benefits a consumer receives by buying its product. In the case of misleading advertising, the laissez-faire argument proceeds on the basis that consumers would choose not to buy a product in future, if it does not conform with the description shown in the advertisement.[20] However, false information offered through deceptive advertisements can potentially induce consumers to make incorrect choices, thus showing the need for some sort of regulation.[21]

It is worth noting that proof need not always be offered on the point of whether a consumer in fact relied upon the false advertisement in making the choice of buying that product. Rather, it would be sufficient to show that the advertisement had the potential to mislead the consumer and affect his or her choice.[22] As is the case with voting choices, this flexible standard is indeed a regulatory response to the practical difficulty of ascertaining whether the choice made by the consumer was dictated by the advertisement, and if so, to what extent.[23] If this legal position is applied to the electoral scene, it becomes clear that election promises need to be regulated since

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20 Charles J Walsh and Marc S Klein, 'From Dog Food to Prescription Drug Advertising: Litigating False Scientific Establishment Claims under the Lanham Act' (1992) 22(2) Seton Hall Law Review 389, 399.

21 ibid [398]-[400]. Note that in India, false or misleading advertising does not receive protection under Article 19(1)(a) of the Constitution under the garb of commercial speech. See, *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.* (1995) 5 SCC 139 [17]. The same is also made punishable under Section 89 of the Consumer Protection Act, 2019.

22 *Havells India Ltd. v. Amritanshu Khaitan,* 2015 SCC OnLine Del 8115.

23 Robert Pitofsky, 'Beyond Nader: Consumer Protection and the Regulation of Advertising' (1977) 90(4) Harvard Law Review 661, 677.

they can potentially affect the voting choice of a voter, irrespective of whether or not it actually does so. Similarly, the argument that regulation of poll pledges is justified only when their non-fulfilment is widespread would be akin to contending that false advertisements should be allowed unless it is proved that the tendency of manufacturers or suppliers to deceive has reached alarming proportions. In such a scenario, the person making the choice, be it the voter or the consumer, would have to pay a huge price before regulation is even attempted.

There is an even more serious objection to the *laissez-faire* model of the "political market". As with all other market forces, the "political market" also throws up unintended results in the absence of complete and perfect information. It is imperative for the voters in an election to carefully analyse the information that is prevalent in the "marketplace of ideas" to arrive at a well-informed choice and reveal one's preference for a party or a candidate.[24] When a voter bases his or her choice on a campaign promise that the political party does not intend to fulfil, he or she is essentially relying on false information, which only goes on to show that the choice is not well-informed.[25] On the other hand, if voters do not believe any election promises, it raises a serious question mark on the political process and public debate as such.[26] Further, in such a case where voting choice is absolutely independent of campaign promises, it is apparent that elections would not be fought on any meaningful positive platform for change, since voters would be well aware that the entire campaign narrative is designed to fool them. In the face of such voter

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24 Armand Derfner and J. Gerald Hebert, 'Voting is Speech' (2016) 34(2) Yale Law & Policy Review 471, 489.

25 Sencer (n 3) 432-433.

26 ibid.

indifference, the danger of voting based on extraneous factors cannot be ruled out.[27]

Taking the economic analogy of the "market" further, scholars have pointed out other disadvantages of not regulating election promises. It has been argued that as a result of non-fulfilment of promises, the credibility of not only the individual candidate but also that of the entire political class, is lowered in the eyes of the voter.[28] Subsequently, the costs of lying by a candidate are uniformly distributed and borne by the political class as a whole, with the consequence that the individual candidate does not have to bear the entire cost of lying.[29] This advantage gives an incentive to politicians to make misleading promises, leading to the "overproduction" of falsehood on the campaign trail, and thus, continuing the vicious cycle.[30] For example, analysts have pointed out that most of the promises and goals listed in the election manifestos of the two major national political parties in the 2019 Lok Sabha elections, the Indian National Congress (INC) and the Bharatiya Janata Party (BJP), are either fiscally unachievable or unsustainable, and no mention is made of the plans of how to finance them.[31] This is a further example of how the lack of accountability for election promises leads to a situation where politicians are incentivised to make tall claims and eventually undermine the trust placed by the electorate.

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27 Besides caste or religious loyalties, such factors may include bribery during campaigns, or even voter intimidation.

28 Sencer (n 3) [434].

29 ibid.

30 ibid.

31 A. K. Bhattacharya, 'Rosy promises, lack of credibility: Why manifestos are becoming irrelevant' (*Business Standard*, 10 April 2019) <https://www.business-standard.com/article/opinion/why-manifestos-lose-credibility-119040901459_1.html> accessed 10 January 2021.

As the above-mentioned arguments show, voters are not totally ignorant of the contents of election manifestos, and it is illogical to assume that they are never swayed by campaign promises. Further, as has been discussed, an unregulated "political market" can result in unintended consequences, thus showing that there is a pressing need to regulate election manifestos and their contents. Unfortunately, in the present legal scenario, there is a severe dearth of suitable options to hold politicians accountable. While all failed legal efforts by various petitioners would not be discussed here, the viability of identifying a constitutional basis to enforce campaign promises is explored in the next part of this essay.[32]

III. A CONSTITUTIONAL BASIS TO MAKE ELECTION PROMISES BINDING

A. The Right to Know

The role of public participation in democratic governance has been the focal point of debate since a very long time. According to

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[32] For instance, the doctrine of promissory estoppel has often been invoked by petitioners, but this argument has been (quite correctly) repelled by the Courts. For an account of the development of the doctrine of promissory estoppel in India with regard to Governmental liability, see *Union of India v. Indo-Afghan Agencies Ltd.,* AIR 1968 SC 718; *Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh*, (1979) 2 SCC 409. For a discussion on how promissory estoppel is ill-suited to make election promises and manifestos legally binding, see *ANZ Grindlays Bank Plc.* (n 12) [107]-[108]. In order to be successfully invoked, the doctrine of promissory estoppel requires the person to whom the promise is made to act upon that promise and change his or her position which he or she would not have done in the absence of that promise. In the case of secret voting, this requirement is impossible to be fulfilled, since one cannot show as to who voted for which party and thus acted upon the promise. Even if theoretically such a requirement is satisfied, it would mean that the promise would have to be fulfilled only for those who had voted for the ruling party, which militates against the basic principle of democracy and equality. Besides, it is notoriously difficult to ascertain as to which promises were actually relied upon by the individual voter in casting his vote out of a multitude of campaign promises made, since only those promises which were relied upon would come within the purview of promissory estoppel. This second ground was indeed recognised by Lord Denning in the case of *Bromley London Borough Council* (n 13).

one school of thought, the idea of citizenship in a representative democracy is confined to the exercise of voting rights in elections that are held periodically, and hence, does not extend to continuous participation in democratic decision-making.[33] This idea is vehemently opposed by those who argue that well-informed public participation is an integral aspect of democratic government, for which effective access to information becomes essential.[34] In the context of the United States, for example, James Madison believed that informed public opinion and consultation played a pivotal role even between successive and periodic polls.[35]

Thankfully, the Indian Supreme Court has clearly shown its preference for the latter position. In a continuous line of cases, it has held that the right to receive information flowed directly from freedom of speech under Article 19(1)(a).[36] Further, in *Secretary, Ministry of Information & Broadcasting,* the Court observed that meaningful public participation was contingent upon the people being well-informed about the topics on which their views, in turn, are sought.[37] This observation is relevant for our discussion not only because it can be directly applied to voting decisions where the electorate is called upon to express their views,[38] but also because it paved the way for the expansion of the "right to know" from a

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33 Barry Sullivan, 'FOIA and the First Amendment: Representative Democracy and the People's Elusive Right to Know' (2012) 72(1) Maryland Law Review 1, 59-60.

34 ibid [60].

35 ibid [34]-[35].

36 *State of Uttar Pradesh v. Raj Narain,* AIR 1975 SC 865 [74]; *S. P. Gupta v. Union of India,* AIR 1982 SC 149; *The Secretary, Ministry of Information & Broadcasting, Government of India v. Cricket Association of Bengal,* AIR 1995 SC 1236 [43].

37 *The Secretary, Ministry of Information & Broadcasting, Government of India* (n 36) [82].

38 See *People's Union for Civil Liberties v. Union of India,* (2013) 10 SCC 1 [28]. The Supreme Court observed that casting of a vote is an instance of the voter exercising his or her freedom under Article 19(1)(a).

constricted understanding of access to information from public authorities alone.

In *Association for Democratic Reforms*, the right of the voter to know about the antecedents of a candidate was held to fall under Article 19(1)(a).[39] It must be noted that the Supreme Court was not enforcing a "right to know" from public authorities, but rather a "right to know" from private individuals who aspired to be elected and hold public office. Following from its earlier decisions, the Court, in a later case, highlighted the necessity of the voter being informed on issues on which he was expected to express his opinion, in the absence of which the voting right itself was rendered futile.[40] To sum up, the "right to know", apart from being an independent right in itself, is also key to creating and sustaining informed public opinion in a democratic polity.

B. Coupling "Choice" with the Right to Know

At first sight, it might appear that privacy is absolutely incompatible with the electoral process, which by its very nature and the outcome it leads to is a "public" construct. However, on closer analysis, the voting choice of an individual can be harmonised with the rather individualistic notion of privacy. The concept of secret voting is itself designed to reserve a "private space" within the vast political realm for the voter to take an independent decision without social pressure.[41] The voter is, therefore, given the freedom to make a choice without being constrained or hindered by considerations of whether that choice is approved or supported by others.[42] Although in a slightly different context, secret voting was recognised by the

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39 *Union of India v. Association for Democratic Reforms* (2002) 5 SCC 294 [38].

40 *People's Union for Civil Liberties v. Union of India* (2003) 4 SCC 399 [26].

41 Annabelle Lever, 'Privacy and Democracy: What the Secret Ballot Reveals' (2015) 11(2) Law, Culture and the Humanities 164, 174.

42 ibid [175].

Supreme Court as the tool that ensures that the voter is not forced to disclose his or her choice before any authority, which, in turn, guarantees that the choice can be made without fear in the first place.[43] The idea of secrecy of the ballot being an essential feature of free and fair elections is also derived from this point.[44]

As has been acknowledged by the Supreme Court in *Puttaswamy*, the entire notion of privacy revolves around the right to make a choice in personal matters.[45] Consequently, privacy can be seen as a concept that enables people to protect their opinions and choices from being trampled upon by societal pressure.[46] It is indeed difficult to imagine how voting choice can be treated in the same manner as strictly "personal" choices like bodily autonomy or sexual preferences. Yet, the concept of privacy has today expanded to include a variety of rights within its fold. In Alan Westin's scheme of classification of privacy into four states, "anonymity" refers to a state where the individual acts or communicates in a public space with the expectation that he or she cannot be personally identified and is thus free from the constraints of social expectations or intrusion by the State.[47]. The need for "public privacy", according to Westin, is what drives people to seek refuge in this state of "anonymity".[48] Similarly, according to Finn, Wright and Friedewald's classification, privacy extends to one's preferences that are expressed in the public space, including political preferences.[49] Thus, it can be argued that the *freedom ofchoice* of a voter of whom to vote for, in a setting where the

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43 *S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra,* AIR 1980 SC 1362 [13].

44 *People's Union for Civil Liberties* (n 38) [56].

45 *Justice K. S. Puttaswamy (Retd.) v. Union of India,* (2017) 10 SCC 1 [297].

46 ibid.

47 Bert-Jaap Koops, Bryce Clayton Newell, Tjerk Timan, Ivan Skorvanek, Tomislav Chokrevski and Masa Galic, 'A Typology of Privacy' (2017) 38(2) University of Pennsylvania Journal of International Law 483, 497.

48 ibid.

49 ibid [502].

secrecy of ballot is scrupulously maintained, should be protected under the fundamental right to privacy.[50]

The "right to know", as outlined earlier, is inextricably linked with the element of choice in the electoral framework. The primary reason for mandating the disclosure of the antecedents of a candidate is to ensure that the voter has the necessary information in order to form an opinion as to his or her preference for a candidate.[51] This guarantees that the choice made by the voter is an intelligent and well-informed one.[52] By implication, when the voter does not have access to true information, it vitiates the *choice* that he or she has to necessarily make while voting.

As acknowledged by Justice Chandrachud in *Puttaswamy*, the idea of privacy, by carving out a "private space" for the individual and protecting individualistic choices, allows one the freedom to think and to believe in what one considers to be correct.[53] In other words, privacy includes within it the right to formulate an opinion. Further, fulfilling the rights under Article 19 is contingent upon the precondition that the individual has the right to take decisions on what his or her preferences are.[54] This is natural, because in the absence of the preliminary right to freedom of thought or the liberty to formulate one's views, the question of outward expression of views as protected under Article 19(1)(a) does not even arise. Thus, one strand of the argument goes: the preliminary right to choose and formulate one's preferences under Article 21 is essential to the expression of those views under Article 19(1)(a).

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50 This is in addition to the protection that is already granted to the voter when he or she expresses his or her voting preference under Article 19(1)(a). See *People's Union for Civil Liberties* (n 40) [97].

51 *People's Union for Civil Liberties* (n 40) [94].

52 ibid.

53 *K. S. Puttaswamy* (n 45) [298].

54 ibid.

On the other hand, another facet of Article 19(1)(a), i.e., the right to know, is an essential prerequisite in order to make the right to choose under Article 21 meaningful. For instance, a voter can only be expected to make a rational choice as to his or her voting preference after being made aware of the antecedents of a candidate.[55] Thus, in the absence of a "right to know" under Article 19(1)(a), the right to choose under Article 21 is rendered illusory. If these arguments hold good, two conclusions can be reached. Firstly, as seen above, the right to choose and formulate one's preferences under Article 21 is essential to the expression of those views under Article 19(1)(a). Secondly, the right to know under Article 19(1)(a) is a prerequisite in order to ensure that the right to choose under Article 21 is not vitiated. This tangled web attests to the interlinkage between various rights, a concept that has become firmly entrenched in Indian rights jurisprudence.[56] It is, thus, apparent that the various rights discussed above must not be read in isolation, but one can make a generalisation that the *right to exercise awell-informed choice* is inherently protected by a combined reading of Articles 19(1)(a) and 21. This conclusion, as has been highlighted, allows both the freedom of choice on one hand, and right to receive information on the other, to be given effect to, while recognising their inherent interlinkage.

Till now, as has been discussed above, the jurisprudence in India on the concept of informed voting has revolved around the

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55 *Resurgence India v. Election Commission of India,* (2014) 14 SCC 189 [20]-[22].

56 *Maneka Gandhi v. Union of India,* AIR 1978 SC 597. Although not very relevant for our discussion, the Supreme Court in another case included the right to know within the broad scope of Article 21, besides it being a part of Article 19(1)(a), thus showing how a single right can fall under multiple interconnected heads. This conclusion reached by the Court, however, was not accompanied by any extensive reasoning or discussion on that particular point, even though the Court acknowledged that access to information was necessary for a participatory role to be played by the people in a democratic system. See *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay,* AIR 1989 SC 190 [34].

right to know under Article 19(1)(a). As this paper demonstrates, the inability to make an informed voting choice is also a violation of the right to privacy under Article 21 as recognised in *Puttaswamy*. As highlighted above, there exists a fundamental interlinkage between the right to make a free choice and the right to access the means required to make the exercise of such a choice meaningful. An example may be that although the right to reproductive autonomy is protected under the right to privacy, scholars argue that the right to make a free choice on such matters is severely restricted due to the lack of safe abortion facilities for a vast segment of the female population in India.[57] This lack of access results in a potential violation of one's right to make a choice under Article 21.[58] If this argument is applied to the electoral arena, it would be clear that the right to make a choice under Article 21 is violated or at least unfairly restricted when the voter does not possess the correct information required to make the exercise of voting choice meaningful and well-informed. Simply put, the argument centred on the right to privacy showcases that misleading information, including false campaign promises, not only violates Article 19(1)(a), as has already been established in Indian jurisprudence, but also the right to make a free choice as an undeniable facet of Article 21.

The question arises as to how misleading election promises affect the right of a voter to make a well-informed choice. It is apparent that false poll pledges have the effect of reducing the amount of true information that is available to the voters by distorting the truth and filling the campaign space with half-truths

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57 Severyna Magill, 'The Right to Privacy and Access to Abortion in a Post-Puttaswamy World' (2020) 3(2) University of Oxford Human Rights Hub Journal 160, 171.

58 ibid.

and lies.[59] In such a scenario, the assumption that voters make intelligent choices based on correct information available to them itself becomes implausible.[60] Misinformation, as the Supreme Court rightly pointed out, stands on the same pedestal as lack of information, both of which create an uninformed electorate.[61] As has been discussed earlier, the very purpose for which disclosure of the antecedents of a candidate is demanded is to ensure that voters make a well-informed choice.[62] Assuming that voters are also guided by campaign promises in deciding which way to vote,[63] it is imperative for them to know whether those promises are credible or not.[64] One can equate making false promises with no intent to fulfil them with the situation of a candidate who files a false affidavit as to his or her antecedents, since both of them serve the same purpose of deception. Yet, the irony is that, while the latter is regulated by law,[65] the former is not. It is evident that deceptive campaign promises constitute false information, and any choice based on such information can never be said to be well-informed. Therefore, misleading poll pledges directly violate the right of a voter to exercise

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59 Sencer (n 3) 432-433.

60 ibid.

61 *Association for Democratic Reforms* (n 39) [38].

62 *People's Union for Civil Liberties* (n 40) [94].

63 The arguments relating to the reasonableness of this assumption have already been discussed in Part 2 of this essay.

64 One may also argue that credibility of election promises can be a far more important consideration in deciding for whom to vote, than information about certain aspects of the antecedents of a candidate, say, for example, educational qualifications. In fact, Justice Venkatarama Reddi dissented with the majority on this issue in *People's Union for Civil Liberties*, by holding that educational qualifications of a candidate did not constitute essential information that the voter ought to know as a matter of right, and thus, did not require compulsory disclosure. See *People's Union for Civil Liberties* (n 40) [122].

65 The act of filing of a false affidavit relating to the information that is to be mandatorily disclosed by the candidate, including his or her antecedents, is made punishable under Section 125A of the Representation of the People Act, 1951.

a well-informed choice. As a result, any act or omission relating to the electoral process that interferes with the exercise of this right should be declared ultra vires and unconstitutional.[66]

In other words, only those election promises should be allowed which are intended to be fulfilled by those who make them. However, this proposition presents a practical difficulty: it is almost impossible for a voter to separate grain from chaff and accurately determine beforehand which promises are credible and are made with an intent to fulfil, and which are not. In order to counter this difficulty, it must be assumed that whatever promises are made are meant to be fulfilled, since making false promises amounts to spreading false information, which in turn, negates the right of a voter to make a well-informed choice and thus, deserves to be outlawed. If the duty of disclosure only extends to disclosing the financial resources required to implement a poll promise, it is possible that parties would make promises that are financially sustainable but which they do not have any intention to implement. In such a scenario, voters would once again be forced to make a choice based on false information, thus negating the right to make a well-informed choice. Therefore, the burden must lie not on the shoulders of the voter to ascertain the viability of poll promises, but upon the parties which make those promises to fulfil them. This can ensure that the voters would at least be certain that the poll promises upon which he or she may or may not rely while voting, constitute true information.

Even if one's constitutional right is violated, one may ask as to how the remedy of fulfilling campaign promises is attracted. It is

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[66] This proposition is consistent with judicial precedent as well. For instance, the Supreme Court disallowed the practice of leaving blank spaces in affidavits by the candidates, on the ground that it rendered the right of a voter to receive information about the candidate, absolutely ineffective. See *Resurgence India* (n 55).

well known that judicial hesitation in the regulation of the electoral process stems heavily from the assumption that the political process can produce better outcomes than Court-mandated directions.[67] However, as extensively discussed in Part 2 of this paper, the political process is woefully inadequate to regulate the fulfilment of poll pledges, thus nullifying the above assumption. It is true that the Indian Supreme Court has not shied away from crafting new remedies when Fundamental Rights have been violated.[68] Yet, in this scenario, awarding damages as the preferred mode of judicial remedy is fraught with danger. Apart from the problem of quantifying the extent of damages, granting damages to individual petitioners would imply diversion of public funds towards satisfying individual claims arising out of non-fulfilment of a promise that had been made to the public at large.[69] Further, the number of such claims would possibly snowball out of control.[70] Since the affected group consists of the entire citizenry, awarding damages to the entire group would be meaningless. The only potential solution is to direct specific performance of the poll promises made, since specific performance is often preferred when no other remedy is suitable in the peculiar facts and circumstances of the case.[71] Although the dissimilarities between contract law and constitutional law are stark, one may borrow from contractual principles by deeming poll promises to have been made enforceable when the contingent event of the party assuming office is satisfied. This complicated approach is the only resort, since the alternative is leaving those affected without any remedy at all.

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67 Sencer (n 3) 440.

68 *Khatri (II) v. State of Bihar,* (1981) 1 SCC 627, 630; *Rudul Sah v. State of Bihar,* (1983) 4 SCC 141; *Nilabati Behera v. State of Orissa,* AIR 1993 SC 1960.

69 Sencer (n 3) 456.

70 ibid.

71 *Abdul Rahim v. Ma Budima*, AIR 1933 Rang 149, 150.

In other words, the onus should lie on the ruling dispensation to fulfil its campaign promises once elected, unless it can show that exceptional situations make it impossible to do so.[72] The undeniable inference flowing from this long discussion is that election promises and manifestos must be made legally binding, and that there is a strong constitutional basis to do so.

C. Looking at Politics as it is

Making election manifestos binding stumbles into a further, rather artificial, roadblock. While election promises made by a candidate can be statutorily regulated under Section 123 of the Representation of People Act ("*RPA*"), 1951, those made by a political party are immune from such regulation.[73] Courts have sought to justify this dichotomy by arguing that RPA distinguishes between an individual candidate and the party to the effect that the power of parties to make promises cannot be curtailed under the existing legal framework.[74] This artificial distinction, arising from an extremely myopic vision of electoral laws, does not conform with politics as it is practised in India.

The stranglehold of party discipline, lack of intra-party democracy and the threat of anti-defection provisions being applied if the elected representative refuses to toe the party line in India, all attest to the political reality that the directions of the party leadership must be followed even if they do not align with the preferences of those who voted for an individual representative.[75] In the face of total party dominance over the concerned individual both before and

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72 Examples of such exceptional situations are discussed below in Part 3.4 of this essay, although the instances listed must not be taken to be an exhaustive list.

73 *S. Subramaniam Balaji* (n 19) [61.1]-[61.2].

74 ibid.

75 Malavika Prasad and Gaurav Mukherjee, 'Reinvigorating Bicameralism in India' (2020) 3(2) University of Oxford Human Rights Hub Journal 96, 108-109.

after the election, seeking to distinguish between the party and the candidate who is bound by the strict rules of party discipline, makes little sense. Further, the entire aim of making campaign promises binding is to protect and enforce the right of a voter to exercise a well-informed choice,[76] and it is beyond doubt that "information" in the nature of poll pledges on the campaign trail is not only "produced" by the candidates, but also by the parties.

As for the distinction between the candidate and the party under the RPA, the Supreme Court has often gone beyond the boundaries of that statute when fundamental rights of voters were at stake.[77] Further, in a recent judgment, the Supreme Court called upon parties to disclose reasons to the people as to why they had selected candidates with a tainted past to contest the election.[78] This decision can be taken as an authority to argue that political parties are also under an obligation to disclose information that allows the voter to make an informed choice.

Another technical issue of far-reaching importance revolves around the question of equating the ruling party with the government. While it is common knowledge that the proposed policies and programmes of the ruling party are expected to have a profound impact on the policies adopted by the government, one can argue that the government should not be held legally liable for the promises made by the ruling party made before an election. However, a potential counter-argument can be identified if one critically looks at the philosophy underlying anti-defection law under the Tenth Schedule to the Constitution. Judicial opinion in India is consistent with the notion that a voter performs two distinct functions while

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76 It is worth noting that while casting a vote in favour of a candidate put up by a party, the voter not only exercises a choice for the candidate, but also for the party symbol.

77 See, e.g., *Association for Democratic Reforms* (n 39).

78 *Rambabu Singh Thakur v. Sunil Arora* (2020) 3 SCC 733.

casting a vote: firstly, he or she votes for an individual candidate and secondly, he or she expresses preference for a political party to potentially form the government.[79] Consequently, an elected representative is expected to show loyalty towards the party, using whose label or brand the election was won by him or her.[80] On critical analysis, it seems that the promise made to the electorate by an individual in his or her capacity as a private citizen running for elected office that he would support the policies and actions of a particular party, is backed by the threat of disqualification and made legally binding on the same individual in his or her capacity as an elected representative on winning the election. If this same logic is applied in the case of political parties, it would follow that the promises made by the party would become enforceable once the party is in a position to form the government after winning the election.

Even otherwise, the strict divide between the ruling party and the government of the day appears to be untenable in constitutional theory. One strand of thought in American jurisprudence has equated the State with the party in power, and considers the party system as merely being an instrumentality of the State.[81] Judicial opinion in USA, by acknowledging the close nexus between the ruling party and the State due to the former having control over the apparatus of the latter, has not entirely dismissed concerns of the actions of the State being construed as actions of the "parties-in-state's clothing".[82] Quite importantly, judicial interference in ensuring ballot access, rules to be

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79 *Kihoto Hollohan v. Zachillhu* 1992 Supp (2) SCC 651 [46].

80 ibid [47].

81 Nathaniel Persily and Bruce E. Cain, 'The Legal Status of Political Parties: A Reassessment of Competing Paradigms' (2000) 100(3) Columbia Law Review 775, 780.

82 Mark E. Rush, 'Voters' Rights and the Legal Status of American Political Parties' (1993) 9(3) Journal of Law and Politics 487, 510-513.

followed in parties' primaries and even nominations by parties, has largely hinged on the necessity of safeguarding a meaningful and effective voting right of the citizen.[83] On similar lines, Tarunabh Khaitan has argued that parties possess a public character and deserve to be regulated to a certain degree, given the fact that they effectively direct State policy.[84] As a result, public duties such as publicising the stand of the party on policy questions or governance issues, must be placed on political parties.[85] One can argue that although the Indian Constitution is silent on the question of political parties, the decision of the Supreme Court requiring parties to justify why candidates with criminal cases against them were nominated could be seen as a measure in pursuance of enforcing such public duties.[86] Although a legal fiction must necessarily be created to equate the ruling party with the government of the day, it appears that such a construct could be defended both in terms of theoretical propositions as well as pragmatic concerns.

D. Curing the Defects

The question naturally arises as to what the contours of judicial review in enforcing poll promises ought to be. One can possibly find a solution by assessing how courts have sought to enforce socio-economic rights in jurisdictions like India and South Africa. While a complete overview of judicial opinion in this field is beyond the scope of this paper, it would be sufficient to state that Courts have often not shied away from directing the State to provide for the fulfilment of socio-economic rights in the face of persistent

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83 ibid [494].

84 Tarunabh Khaitan, 'Political Parties in Constitutional Theory' (2020) 73 Current Legal Problems 89, 106-107.

85 ibid [109].

86 *Rambabu Singh Thakur* (n 78).

inaction and indifference on the part of the government.[87] This is despite the fact that much like the fulfilment of poll promises, fulfilling such rights very often involves questions of policy and budgetary allocations.[88] As evident in the Right to Food case, for instance, the Indian Supreme Court has gone into the minutest of details in order to make the fulfilment of basic socio-economic rights in the area of food security a reality.[89] There is no reason why such a proactive and enhanced standard of judicial review should not be applied in the area of enforcement of poll pledges. Quite importantly, however, certain electoral promises may involve the achievement of long-term goals, the results of which may not be immediately visible or are difficult to ascertain by the courts. In such cases as well, the Courts can borrow from the doctrine of progressive realisation as established in socio-economic rights jurisprudence, in order to hold the government accountable in cases of complete inaction and ensure that steps are taken to progressively, if not immediately, achieve the implementation of such campaign promises.[90]

One could perhaps argue that the analogy drawn between socio-economic rights and election promises is distant and remote. However, this comparison with the judicial enforcement of socio-economic rights is apt due to two reasons. Firstly, similar to the right

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87 See generally, Natasha G Menell, 'Judicial Enforcement of Socioeconomic Rights: A Comparison between Transformative Projects in India and South Africa' (2016) 49(3) Cornell International Law Journal 723.

88 ibid [727].

89 People's Union for Civil Liberties v. Union of India, Writ Petition (Civil) No. 196 of 2001.

90 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art. 2(1); 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (8 January 1987) UN Doc E/CN.4/1987/17, [21]-[24]. The doctrine of progressive realisation of socioeconomic rights is well entrenched in South African rights jurisprudence. See, e.g., the decision of the South African Constitutional Court in *Mazibuko v. City of Johannesburg*, 2010 (4) SA 1 (CC) [67].

to cast an informed vote, socio-economic rights are now being widely seen as a sub-species of political rights, including the right of political participation in a democracy.[91] This is because the fulfilment of basic socio-economic rights is seen as a mechanism for the weaker and vulnerable sections of society to protect their rightful interests and engage in political participation.[92] Secondly, similar to judicial interference in the political process, the costs of providing a remedy, irrespective of whether they are economic, political etc., become an influential factor in crafting a remedy in the field of socio-economic rights.[93] More often than not, this leads to a situation wherein the enforcement and even the content of the right in question is shaped by the cost-benefit analysis in securing a remedy, thus distorting to some extent the simplistic notion that a remedy follows whenever a right is infringed.[94]

In order to make the legal position flexible and functional, the law must permit the non-fulfilment of campaign promises in certain exceptional situations. For instance, one can envisage a situation where the underlying facts and circumstances have so drastically changed since the promise was made, that it would be unwise to force the ruling dispensation to fulfil its poll pledges. In such circumstances, Courts should be receptive to the need to balance public interest on one hand, with the breach of trust of the voters on the other, although any such judicial scrutiny must be

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91 David Bilchitz, 'Are Socio-Economic Rights a Form of Political Rights?' (2015) 31(1) South African Journal on Human Rights 86, 107-111.

92 ibid.

93 Margaux J. Hall and David C. Weiss, 'Human Rights and Remedial Equilibration: Equilibrating Socio-Economic Rights' (2011) 36(2) Brooklyn Journal of International Law 453, 461-462.

94 ibid.

extremely strict and geared towards enforcing the fulfilment of promises made.[95]

Similarly, parties other than the ruling party are often forced to make campaign promises based on insufficient information due to lack of access to official governmental data.[96] In the face of such limitations, it is difficult for them to offer a viable policy alternative, and the need might arise to reassess, once elected, whether and how the promise is to be fulfilled.[97] In such situations, the Court must call upon the ruling dispensation to show how access to official information has changed the underlying scenario such that the previous campaign promise is no longer a proper course of action to follow. Further, when a post-poll coalition government is formed, it is natural that the promises made by all parties in the ruling coalition cannot be fulfilled, although the parties should at least be called upon to justify as to why such fulfilment has become impossible.

As with any approach in general, certain incurable defects are inherent in making poll pledges binding. Firstly, poll promises may involve enactment or amendment of legislation. In such cases, judicial enforcement of such pledges will become impossible since the Courts cannot compel the legislature to enact a specific legislation.[98] Secondly, political parties in India have a disturbing tendency to make vague promises and not specify measurable goals

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95 This test is inspired from a similar exception to Governmental liability under the doctrine of promissory estoppel. See *Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh,* (1979) 2 SCC 409 [24].

96 Dasgupta (n 11).

97 ibid. The need for a dispassionate reassessment of election promises as to their viability, after getting elected, was emphatically approved by Lord Denning. See *Bromley London Borough Council* (n 13).

98 *Supreme Court Employees' Welfare Association v. Union of India,* (1989) 4 SCC 187 [51].

in their manifestos.[99] Therefore, an objective assessment of which promises have been fulfilled and to what extent, is precluded in the first place.[100] These additional problems need further thought, and cannot be resolved merely by making poll promises enforceable.

IV. CONCLUSION

In this essay, an attempt has been made to locate a constitutional basis to make election promises legally binding. A cursory look at the working of the "political market" shows that the lack of regulation of manifestos and their contents has a serious adverse impact on the electoral process, which can, quite dangerously, lead to questions being raised over the efficacy of the democratic framework itself. Therefore, it has been argued in this essay that there is a pressing need to ensure that parties are legally compelled to keep their word since the normal political processes are often insufficient and imperfect in achieving this goal. Based on a combined reading of Articles 19(1)(a) and 21, this essay has tried to fill this legal vacuum by identifying the right of a voter to make an informed choice during voting. This observation, coupled with the view that misleading promises interfere with the exercise of this right through propagation of false information, leads to the inference that the basis for making such poll pledges binding can, in fact, be located in the Constitution itself.

It must be admitted that the approach that has been outlined in the essay is meant only to serve as a broad framework to ensure accountability in the electoral arena. As a result, many grey areas and shortcomings exist which, it is hoped, would be resolved through harmonisation between conflicting perspectives. Yet, one thing is

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99 Vipul Prasad, 'Why poll manifestos in India should be measurable, accountable' (*Moneycontrol,* 2 April 2019) <https://www.moneycontrol.com/news/india/why-poll-manifestos-in-india-should-be-measurable-accountable-3745821.html> accessed 10 January 2021.

100 ibid.

certain: instead of allowing political parties to break the trust of the electorate with impunity, the time has come to make them answerable before both the court of law and the court of the people. The idea of a democratic India is inconsistent with the notion that once the votes have been counted, campaign promises do not count.

RESPONDING TO EXECUTIVE UNDER- AND OVERREACH: INDIAN SUPREME COURT AND CONSTITUTIONAL ADJUDICATION IN THE PANDEMIC

Maladi Pranay[*]

Abstract

India is one of the worst-hit countries by the COVID-19 pandemic. The pandemic has led to executive response and litigation in all possible areas. One such area has been constitutional law. This paper analyses how the Indian state reacted to the COVID-19 pandemic. I argue that the response of the Indian state is "executive-dominant," and yet, a mix of "executive underreach" and "executive overreach". Further, while much ink has been spent on the question of the role of a court during an emergency, in a public health emergency, no grand and universal answer to the question of the role of the court can be given. Rather, the analysis should account for several factors, which influences not only how courts will react, but also how quickly they do so. I then argue, based on a reading of the cases of the Supreme Court, that the court's conception of its role during the COVID-19 pandemic was informed by the nature (executive underreach or overreach) and sphere (public health, free speech, labour rights, etc.) of executive action in question. In doing so, focus is placed not just on how the Supreme Court acted, but the larger context of executive action which necessitated the judicial action. By providing a descriptive account of the case law and attempting to draw broader conclusions on the court's role from the account, this article seeks to add to the body of scholarship on democracy and judicial review during the COVID-19 pandemic.

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I. INTRODUCTION

The COVID-19 pandemic made its way to the Indian shores in January 2020. By July 2021, India was one of the worst-hit countries with the second highest number of reported infections.[1] At the time of writing, almost four lakh Indians have lost their lives to the pandemic according to official figures, although the real death toll is widely accepted to be significantly higher.[2] This article discusses the Indian state's response to the COVID-19 pandemic, particularly with respect to the issues of constitutional law.

Part I of this article discusses the state's response as the first and second waves of the pandemic swept across India. In it, I argue that the response of the Indian state was dominated by the executive, and was a mix of executive underreach and executive overreach. Part II discusses academic theorizations of the role of courts during an emergency, and reviews the decisions of the Indian Supreme Court during the pandemic. Finally, Part III offers broad reflections on the Supreme Court's role and record during this unprecedented crisis. In light of the findings, I conclude that whether the court was deferential and how deferential it was depended on the nature and sphere of the executive action in question.

II. RESPONSE OF THE INDIAN STATE

A. An Executive-Dominant Response

It is by now well documented that the COVD-19 pandemic has presented an opportunity to executive branches of countries across the world to take far-reaching measures without legislative

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1 Reuters, 'COVID-19 Global Tracker' *Reuters* (1 July 2021) <https://graphics.reuters.com/world-coronavirus-tracker-and-maps/countries-and-territories/india/> accessed 1 July 2021.

2 V Sridhar, 'India's Gigantic Death Toll due to COVID-19 is Thrice the Official Numbers' *The Frontline* (Delhi, 4 June 2021) < https://frontline.thehindu.com/cover-story/india-gigantic-death-toll-due-to-covid19-is-thrice-the-official-numbers/article34568364.ece> accessed 1 July 2021.

scrutiny.[3] The task of steering countries and their populace to safety against the pandemic has thus been taken up by the executive branch, and with it, a very broad margin of discretion.[4] The response of the Indian state does not buck the trend.[5] The executive-dominant response in India has been enabled by the invocation of two pieces of legislation: *First*, the Epidemic Diseases Act, 1897 ["EDA" hereinafter], which was originally enacted to respond to the bubonic plague,[6] and *second*, the Disaster Management Act, 2005 ["DMA" hereinafter],[7] which was enacted after a series of cyclones in the late 1990s and early 2000s, most notable of them being the 2004 Indian Ocean Tsunami.[8] Section 2(1) of the EDA empowers state governments, if it thinks that ordinary provisions of law are insufficient, to "take measures and by public notice prescribe such temporary regulations to be observed by the public". Section 2(2)(b) empowers state governments to take measures and prescribe regulations for inspection of persons "travelling by railway or otherwise and segregation… of persons suspected by the inspecting officer of being infected with any such disease". Section 3 states that

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3 T. Ginsburg and M. Versteeg, 'The Bound Executive: Emergency Powers During the Pandemic' (2020)Virginia Public Law and Legal Theory Research Paper No. 2020-52 <https://ssrn.com/abstract=3608974 or http://dx.doi.org/10.2139/ssrn.3608974> accessed 1 July 2021.

4 Elena Griglio, 'Parliamentary Oversight Under the Covid-19 Emergency: Striving Against Executive Dominance' (2020) 8 The Theory and Practice of Legislation 49.

5 Gautam Bhatia, 'An Executive Emergency: India's Response to Covid-19' (*Verfassungsblog*, 13 April 2020), <https://verfassungsblog.de/an-executive-emergency-indias-response-to-covid-19/> accessed 1 July 2021.

6 Reeta Chowdhari Tremblay and Namitha George, 'India: Federalism, Majoritarian Nationalism, and the Vulnerable and Marginalized' in Victor Ramraj (ed), *Covid-19 in Asia: Law and Policy Contexts* (OUP 2021).

7 Prashasti Awasthi, 'Centre invokes "Epidemic Act" and "Disaster Management Act" to Prevent Spread of Coronavirus' *Business Line* (Delhi, 12 March 2020) <https://www.thehindubusinessline.com/news/national/centre-invokes-epidemic-act-and-disaster-management-act-to-prevent-spread-of-coronavirus/article31049161.ece> accessed 1 July 2021.

8 Tremblay and George (n 3).

any violations of regulation or orders made under the EDA shall be punishable under Section 188 of the Indian Penal Code (i.e., disobedience to order duly promulgated by public servant). Even before a national lockdown was announced, several states had invoked the power under Section 2 of the Epidemic Diseases Act to issue guidelines.[9]

The DMA, on the other hand, as per its preamble, is "An Act to provide for the effective management of disasters and for matters connected therewith or incidental thereto". Section 2(d) defines the term "disaster" as a "catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man-made causes, or by accident or negligence," resulting in "substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area". While Chapter II of the DMA establishes the National Disaster Management Authority and delineates its scope, powers and responsibilities, Chapter III does so for State Disaster Management Authorities, and Chapter IV does so for the District Disaster Management Authority. Broadly, each chapter addresses composition of the authorities, powers and functions of the National/State/District DMA, the Executive Committees, Advisory Committees, and other sub-committees, the different levels of Disaster Management Plans (National Plan, State Plan, and District Plan), and guidelines for minimum standard of relief to be provided to persons by the DMAs. Crucially, Section 35(1) empowers the central government to take "all such measures as it deems necessary

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9 On 12 March 2020, Delhi's governor issued a notification regarding its new regulations, "The Delhi Epidemic Diseases, COVID-19"; on 13 March, Maharashtra issued "Maharashtra Regulations for Prevention and Containment of Coronavirus Disease"; on 16 March, the West Bengal legislated "West Bengal Epidemic Disease, COVID 19 Regulations".

or expedient for the purpose of disaster management," including coordination of activities between all the above authorities, committees, and ministries of the central government. On the 24th March 2020, the central government chose to invoke the DMA to enforce a nation-wide lockdown, notwithstanding little consultation with the states.[10] The *ostensible* reason for a centralised approach, despite multiple state governments issuing guidelines under the EDA, was lack of uniformity and more effective implementation.[11] The national lockdown imposed under the DMA was further extended thrice, eventually ending on the 31st May, 2020,[12] from which point a phased "unlocking" began, eventually culminating in the month of November 2020.

In all, the response to the COVID-19 pandemic has been executive dominant. Cumulatively (under the EDA, DMA and a few other statutes), the executive has passed about a thousand orders, on all possible walks of life, since the beginning of the pandemic.[13] Further, and more importantly, the Indian parliament has not played any role in either examining the measures passed for containing the virus, or seeking accountability from the executive. While several

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10 Sobhana K. Nair, 'PM Should have Consulted State Govts. Before Announcing Lockdown, says Chhattisgarh CM Bhupesh Baghel' *The Hindu* (Delhi, 29 March 2021) <https://www.thehindu.com/news/national/coronavirus-pm-should-have-consulted-state-govts-before-announcing-lockdown-says-chhattisgarh-cm-bhupesh-baghel/article31214191.ece> accessed 1 July 2021.

11 Home Secretary Ajay Bhalla's memo, DO No. 40/3/2020-DM-1(A), to all secretaries of ministries/departments of the government of India, dated 24 March 2020.

12 Utpal Bhaskar, 'India to Remain Closed till 3 May, Economy to Open Up Gradually in Lockdown 2.0' *Livemint* (Delhi, 14 April 2020) <https://www.livemint.com/news/india/pm-modi-announces-extension-of-lockdown-till-3-may-11586839412073.html> accessed 1 July 2021.

13 This is as per a tracker set up by PRS Legislative, which can be accessed here <https://prsindia.org/covid-19/notifications>.

parliaments across the world have shifted to virtual,[14] or hybrid parliament sessions,[15] the Indian parliament has not done so, with the last session at the end of March, 2020 being adjourned indefinitely.[16] As a result, the Indian executive assumed sweeping powers in the pandemic. The next subsection focuses on how the executive has used such broad powers.

B. Executive Under and Overreach

Given that the core institutional response of the Indian state was almost exclusively executive driven, how does one understand the Indian executive's actions? I argue that the Indian executive both underreached and overreached in its response to the pandemic. While underreach pertained to the scope and efficacy of the measures taken to *control* the pandemic, overreach was exemplified by claiming unchecked power, and imposing broad restrictions on legal rights.

Pozen and Scheppele define executive-underreach as "*a national executive branch's wilful failure to address a significant public problem that the executive is legally and functionally equipped (though not necessarily*

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14 Ryan Tumilty, 'COVID–19 Canada: First 'Virtual Parliament' Brings Accountability with a Few Technical Headaches' *National Post* (29 April, 2020) <https://nationalpost.com/news/politics/covid-19-canadian-politics-first-virtual-parliament-brings-accountability-with-a-few-technical-headaches>; Library of Congress, 'European Union: Parliament Temporarily Allows Remote Participation to Avoid Spreading COVID–19' *Library of Congress* (21 April, 2020), <https://www.loc.gov/item/global-legal-monitor/2020-04-21/european-union-parliament-temporarily-allows-remote-participation-to-avoid-spreading-covid-19/>.

15 Republic of Chile Senate, Protocol for Telematic Operation of Chambers and Commissions in a State of Catastrophe (17 April, 2020), <https://www.senado.cl/acuerdan-protocolo-para-funcionamiento-telematico-de-sala-y-comisiones/senado/2020-04-08/173302.html>; UK Parliament, 'Coronavirus timeline: End of hybrid proceedings in the House of Commons' House of Commons Library (8 September, 2021), <https://commonslibrary.parliament.uk/coronavirus-timeline-end-of-hybrid-proceedings-in-the-house-of-commons/>.

16 Maansi Verma, 'Parliaments in the Time of the Pandemic' (2020) 55(24) Econ. & Pol. Weekly 14.

legally required) to address".[17] Executive underreach, thus, implies that "a leader sees a significant threat coming, has access to information about what might mitigate or avert it, possesses the legal authority and practical means to set a potentially effective plan in motion, and refuses to pursue such a plan, putting the nation at risk".[18] Executive underreach is therefore both descriptive and normative, since in the face of a national crisis, the executive can and should do all it can to protect its people.[19] Contrasting Hungary's response to the pandemic to those of Brazil and USA, Pozen and Scheppele conclude that the former is a case of executive overreach, while the latter two exemplify executive underreach. In support of this, they cite Trump's threats to withdraw from WHO in the middle of the pandemic, his peddling of unscientific cures, non-implementation of the Defense Production Act of 1950, and his decision to not order the Centre for Disease Control and Prevention to prioritize COVID-management.[20] In the case of Brazil, they argue that the Brazilian president encouraged anti-lockdown protests, defied lockdown orders of his own executive, threatened to withdraw from WHO, and pushed for premature opening up of economy, among other such actions.[21] Hence, succinctly, *both* inaction (such as non-provision of basic and easily available healthcare and medical gear), and active contributions (withdrawals from WHO, public rallies breaching social distancing norms, etc) to worsening the spread of the virus constitute executive underreach. The actions (and their outcomes) of the Indian executive are not very different from what has been described above. India is,

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17 David Pozen and Kim Lane Scheppele, 'Executive Underreach, in Pandemics and Otherwise' (2020) 114(4) Am. J. Int'l. L. 608.

18 Kim Lane Scheppele & David Pozen, 'Executive Overreach and Underreach in the Pandemic' in Miguel Poiares Maduro & Paul W. Kahn (ed.), *Democracy in Times of Pandemic* (Cambridge University Press, 2020).

19 Pozen and Scheppele (n 16).

20 ibid.

21 ibid.

by official numbers, the second worst affected country.[22] It is an open secret that the official numbers are severely under-reported.[23] In some districts in India, the death toll has been reported to be under counted by as many as forty-three times.[24] The indicators – extremely low testing rate in the first wave,[25] hasty imposition and removal of lockdown,[26] lack of preparedness for the second wave in 2021 summer,[27] dire shortage of oxygen and hospital beds[28] – all point to executive underreach. However, that is not all. Holding

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22 Billy Perrigo, 'Officially, India Has the World's Second-Worst COVID-19 Outbreak. Unofficially, It's Almost Certainly the Worst' *Time* (14 April 2020) <https://time.com/5954416/india-covid-second-wave/> accessed 1 July 2020.

23 Jeffrey Gettleman et al., 'As COVID-19 Devastates India, Deaths go Undercounted' *Economic Times* (24 April 2021) <https://economictimes.indiatimes.com/news/india/as-covid-19-devastates-india-deaths-go-undercounted/articleshow/82234586.cms?from=mdr> accessed 1 July 2021.

24 Saurav Das, 'Death Count In 24 UP Districts 43 Times More Than Official Covid-19 Toll' *Article 14* (21 June 2021) <https://article-14.com/post/untitled-60cf605395758> accessed 1 July 2021.

25 PTI, 'Covid-19: India's Testing Rate Lower than Other Nations, says WHO Chief Scientist' *Economic Times* (5 August 2020) <https://health.economictimes.indiatimes.com/news/industry/covid-19-indias-testing-rate-lower-than-other-nations-says-who-chief-scientist/77358987> accessed 1 July 2021; Rajit Sengupta, 'More than half of India still not testing enough, data shows' Down to Earth (May 23 2021) <https://www.downtoearth.org.in/news/health/covid-19-more-than-half-of-india-still-not-testing-enough-data-shows-77060.

26 Nair (n 10).

27 Vineet Bhalla, 'Central Government to Blame for Lack of Preparedness to Tackle Second Covid Wave' *The Leaflet* (20 May 2021) <https://www.theleaflet.in/central-government-to-blame-for-lack-of-preparedness-to-tackle-second-covid-wave/> accessed 1 July 2021; Sumanta Roy and Saurav Bose, 'COVID-19 Second Wave: Putting India first' *Down to Earth* (25 May 2021) <https://www.downtoearth.org.in/blog/health/covid-19-second-wave-putting-india-first-77093 > accessed 1 July 2021.

28 Janhavee Moole, 'A Nightmare on Repeat - India is Running Out of Oxygen Again' *BBC* (23 April 2021) <https://www.bbc.com/news/uk-56841381≥ accessed 1 July 2021; Mayank Bhardwaj and Aditya Kalra, 'Dire Need of Beds, Oxygen: India's Capital Under Siege from COVID-19' Reuters (18 April 2021) <https://www.reuters.com/world/india/india-under-siege-covid-19-hospitals-overwhelmed-2021-04-18/> accessed 1 July 2021.

massive election rallies in the middle of a surging second wave,[29] sanctioning and promoting huge religious gatherings in the "Kumbh Mela",[30] administration of a vaccine without publication of data of phase-III trials, and which still (at the time of writing) lacks the approval from WHO,[31] as well as US and EU regulators,[32] policy of differential pricing of vaccines for states and central government (until June 2021)[33] are not merely examples of underutilisation of legal and administrative resources, but point to the executive itself actively contributing to the worsening of the crisis. Finally, the executive underreach extends to not just public health, but even economic measures during the pandemic, with the economic relief

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29 Shruti Menon and Jack Goodman, 'India Covid Crisis: Did Election Rallies Help Spread Virus?' *BBC* (29 April 2021) <https://www.bbc.com/news/56858980> accessed 1 July 2021.

30 Hassan M Kamal, 'Kumbh Mela and Election Rallies: How Two Super Spreader Events have Contributed to India's Massive Second Wave of COVID-19 Cases' *Firstpost* (22 April 2021) <https://www.firstpost.com/india/kumbh-mela-and-election-rallies-how-two-super-spreader-events-have-contributed-to-indias-massive-second-wave-of-covid-19-cases-9539551.html> accessed 1 July; Ruhi Tewari 'Poll Rallies to Kumbh Mela — Modi-Shah's Conscience Must take a Look at Latest Covid Surge' *The Print* (14 April 2021) <https://theprint.in/opinion/politricks/poll-rallies-to-kumbh-mela-modi-shahs-conscience-must-take-a-look-at-latest-covid-surge/639526/> accessed 1 July 2021.

31 The Wire Staff, 'COVID Vaccines: Without WHO Approval, Covaxin Remains Second Among Equals' *The Wire* (25 May 2021) <https://science.thewire.in/health/covid-vaccines-without-who-approval-covaxin-remains-second-among-equals/> accessed 1 July 2021; Anindita Sanyal, 'Decision On Covaxin Approval By 2nd Week Of August: WHO Chief Scientist' *NDTV* (1 July 2021) <https://www.ndtv.com/india-news/decision-on-covaxin-approval-by-2nd-week-of-august-who-chief-scientist-2477082> accessed 1 July 2021.

32 Joydeep Bose, 'Why was Bharat Biotech's Covaxin not approved in US? Here's what we know so far' *Hindustan Times* (11 June 2021) <https://economictimes.indiatimes.com/nri/study/students-headed-to-europe-in-a-fix-after-getting-covaxin-shot/articleshow/84086076.cms> accessed 1 July 2021.

33 It is pertinent to recall that the only justification the state could proffer to differential pricing was spurring private competitors to produce at a higher rate, notwithstanding which, the court observed that it was unconstitutional.

package turning out to be illusory.[34]

While executive underreach may be a novel concept, executive overreach is not. Yet, "commentators rarely take care to specify what they mean by 'executive overreach'".[35] In academic literature, the concept has been invoked in several (related) contexts ranging from the war-against-terrorism,[36] to the administrative state.[37] Daryl Levinson associates executive overreach to presidential aggrandizement and "sacrifice of rights".[38] Taken thus, several executive measures in the pandemic represent executive overreach. Take for instance the suspension of labour laws in several Indian states. While "Regulation of labour and safety in mines and oilfields" is Entry 55 of the Union List, giving the Union Parliament the legislative competence to make law, Entries 22, 24 and 25 of the Concurrent List also deal with aspects relating to labour. Particularly important is Entry 24, which reads "Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits." Thus, under the constitutional scheme, general regulation of labour welfare is a field where both the union and state legislatures can validly make law. Therefore, a state may either pass its own labour laws for the regulation of labour within that state, or amend specific provisions of central laws in their application to that specific state.

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34 Amit Mudgill, 'Show Me the Money! Analysts Say Illusory Stimulus Leaves Economy, Stocks in Big Trouble' *ET Prime* (19 May 2020), <https://economictimes.indiatimes.com/markets/stocks/news/show-me-the-money-analysts-say-illusory-stimulus-leaves-economy-stocks-in-big-trouble/articleshow/75800613.cms> accessed 1 July 2021.

35 Pozen and Scheppele (n 16).

36 Oren Gross, 'Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional' (2003) 112 Yale L. J. 1011, 1019.

37 Cass R Sunstein and Adrian Vermeule, *Law & Leviathan: Redeeming the Administrative State* (HUP, 2020).

38 Daryl J. Levinson, 'Rights and Votes' (2012) 121 Yale L. J. 1302.

During the pandemic, as many as nine states – all governed by the BJP or BJP majority alliances – relaxed labour laws.[39] These are Uttar Pradesh,[40] Madhya Pradesh,[41] Gujarat,[42]Rajasthan,[43] Haryana,[44] Uttarakhand,[45] Himachal Pradesh,[46] Assam,[47] and Goa. The suspension of labour laws extended to all factories, except in the state of Rajasthan where it extended to factories which were producing essential goods, and Uttarakhand, where it applied to factories and continuous process industries which are permitted to run by the government. The notifications and Ordinances lasted for

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39 For overview, *see:* Anya Bharat Ram, 'Relation of labour laws across states' *PRS India* (12 May 2020) <https://www.prsindia.org/theprsblog/relaxation-labour-laws-across-states> accessed 1 July 2021.

40 Ashima Obhan & Bhambi Bhalla, 'India: Suspension Of Labour Laws Amidst Covid-19' (*Mondaq*, 18 May 2020) <https://www.mondaq.com/india/employment-and-workforce-wellbeing/935398/suspension-of-labour-laws-amidst-covid-19> accessed July 1 2021.

41 The Madhya Pradesh Labour Laws (Amendment) Ordinance, 2020 (Ind), text of the Ordinance: <https://prsindia.org/files/covid19/notifications/4980.MP%20Labour%20Laws%20(Amendment)%20Ordinance%202020_May06.PDF>.

42 Notification, Labour and Employment Department No. GHR/2020/56/FAC/142020/346/M3, text of the notification: <https://prsindia.org/files/covid19/notifications/3373.GJ_Lockdown_Relaxations_Factories_Apr%2017.pdf>.

43 Order F3(15) Legal/F8-B/2020/188 dated 11.04.2020, text of the order: <https://prsindia.org/files/covid19/notifications/RJ_Increase_Working_Hours_Factories_Apr%2011.pdf>.

44 Notification No. 2/17/2020-2Lab, dated 29.04.2020, Labour Department, Haryana Government, text of the notification: <https://prsindia.org/files/covid19/notifications/5154.HR_working_hours_apr_29.pdf>.

45 Text of the Notification: <https://prsindia.org/files/covid19/notifications/5185.UK_factories%20Notification__5_May,_2020.pdf>.

46 Notification Shram (A)4-3/2017, dated 21.04.2020, Labour & Employment Department, Himachal Pradesh government, text of the notification: <https://prsindia.org/files/covid19/notifications/4997.HP_factories_rules_apr_21.pdf>.

47 Notification dated 8.05.2020, Labour Welfare Department, Government of Assam, text of the notification: <https://labour.assam.gov.in/sites/default/files/swf_utility_folder/departments/iof_labour_uneecopscloud_com_oid_76/menu/document/notification_8th_may_2020.pdf>.

two to three months in all states, and had made changes to maximum permitted weekly and daily work, and overtime pay, among other protective measures. The Uttar Pradesh notification, which was the most controversial of all, increased work hours to twelve hours a day, but was subsequently withdrawn.[48] Such a blanket de-recognition of rights, especially in a pandemic which severely affected Indian labourers,[49] undoubtedly constitutes executive overreach. Another example is that of initiating criminal proceedings against journalists. A report notes that by as early as June 2020, as many as fifty five journalists had to face some form of criminal action or threats due to their reportage.[50] By the end of July 2020, dozens were even arrested.[51] Suppression of speech and journalistic freedom only worsened with time, especially during the second wave in the summer of 2021, when criminal charges were even filed against citizens for speaking to the press.[52] These actions are a gross violation of right to

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48 Yogima Seth Sharma, 'Uttar Pradesh Govt Withdraws Controversial Order of 12-hour Shifts for Workers in Industrial Units' *Economic Times* (16 May 2020) <https://economictimes.indiatimes.com/news/politics-and-nation/uttar-pradesh-govt-withdraws-controversial-order-of-12-hour-shifts-for-workers-in-industrial-units/articleshow/75772375.cms?from=mdr> accessed July 1 2021.

49 The Hindu Data Team, '96% Migrant Workers did not get Rations from the Government, 90% did not Receive Wages During Lockdown: Survey' *The Hindu* (20 April 2020) <https://www.thehindu.com/data/data-96-migrant-workers-did-not-get-rations-from-the-government-90-did-not-receive-wages-during-lockdown-survey/article31384413.ece> accessed 1 July 2021.

50 The Wire Staff, '55 Indian Journalists Arrested, Booked, Threatened for Reporting on COVID-19: Report' *The Wire* (16 June 2020) <https://thewire.in/media/covid-19-journalists-arrested-booked-report> accessed 1 July 2021.

51 Daniz Raza, 'India Arrests Dozens of Journalists in Clampdown on Critics of Covid-19 Response' *The Guardian* (31 July 2020) <https://www.theguardian.com/global-development/2020/jul/31/india-arrests-50-journalists-in-clampdown-on-critics-of-covid-19-response> accessed 1 July 2021.

52 The Wire Staff, 'COVID-19: FIR Against UP Villagers Who Complained of Poor Medical Facilities to Media' *The Wire* (18 May 2021) <https://thewire.in/government/covid-19-fir-up-mewla-gopalgarh-complained-poor-medical-facilities-media-neem-tree> accessed 1 July 2021.

free speech and expression, guaranteed under Article 19(1)(a) of the Constitution. Furthermore, the "mandatory" requirement for all citizens to install the phone-application "Aarogya Setu" with no anchoring legislation[53] and despite the privacy concerns,[54] along with the controversial "private" PM Relief Cares fund, used to source more than a billion dollars for COVID-relief,[55] being claimed by the Prime Minister's Office as exempt[56] from the ambit of the Right to Information Act, 2005, are other prominent examples of gross executive overreach.

Therefore, the Indian executive's response to the COVID-19 pandemic is both underreaching and overreaching. The Indian example thus shows that an executive can underreach and overreach simultaneously, and that politically strong executives can consider underreach to be a possible option, despite blatant overreach. The response of the apex constitutional court is examined in the next section.

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53 Gautam Bhatia, 'Coronavirus and the Constitution – XXI: The Mandatory Imposition of the Aarogya Setu App' (IndConLawPhil, 2 May 2020) < https://indconlawphil.wordpress.com/2020/05/02/coronavirus-and-the-constitution-xxi-the-mandatory-imposition-of-the-aarogya-setu-app/> accessed 1 July 2021.

54 Meryl Sebastian, 'Aarogya Setu's 6 Major Privacy Issues Explained' *Huffpost India* (5 December, 2020) < https://www.huffpost.com/archive/in/entry/aarogya-setu-app-privacy-issues_in_5eb26c9fc5b66d3bfcddd82f> accessed 1 July 2021.

55 Anoo Bhuyan and Prachi Salve, 'PM CARES Received At Least $1.27 Bn in Donations--Enough To Fund Over 21.5 Mn COVID-19 Tests' *India Spend* (1 October, 2020) <https://www.indiaspend.com/pm-cares-received-at-least-1-27-bn-in-donations-enough-to-fund-over-21-5-mn-covid-19-tests/> accessed 1 July 2021.

56 Akanksha Kumar, 'Modi's office says PM Cares Fund isn't Covered by RTI Act. His IT Ministry Seems to Disagree' *Newslaundry* (26 October, 2020) <https://www.newslaundry.com/2020/10/26/modis-office-says-pm-cares-fund-isnt-covered-by-rti-act-his-it-ministry-seems-to-disagree> accessed July 1 2021.

III. PANDEMIC JURISPRUDENCE OF THE SUPREME COURT

In the first sub-section, I discuss the existing literature on the role of a court during an emergency or crisis. While several theories have been floated, there is a lack of coherent understanding of the court's role, especially during a public health emergency such as COVID-19. In the second subsection, I analyse the decisions of the Supreme Court, and attempt to situate its jurisprudence within larger theoretical frameworks outlined in the first sub-section.

It is important to note that this paper only analyses decisions of the Indian Supreme Court till the end of June, 2021. Further, while both the High Courts (under Article 226) and the Supreme Court (under Article 32) exercise writ jurisdiction to examine violations of rights under the Indian Constitution, this paper is restricted to analysing the decisions of the Supreme Court. This is a limitation of the article. The Indian Supreme Court, one of the busiest in the world, hears hundreds of legal matters a day. Almost all legal issues, especially those pertaining to constitutional law,[57] find their way to the Supreme Court. Thus, the following study aims to understand patterns of pandemic-induced adjudication in the Supreme Court, and extract lessons for future on adjudication in emergencies – pandemic related or otherwise.

A. Judicial Review and Emergencies

Much ink has been spent on the question of judicial review in emergencies. Academic literature has debated what courts can and cannot, and should and should not do, during emergencies. While a comprehensive survey of literature is too ambitious to be undertaken here, three broad models emerge as possible options for

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57 Amal Sethi, 'Taking the Constitution Away from the Supreme Court' 33 National Law School of India Review (Forthcoming 2021). A draft of the paper can be accessed here: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3812918>.

constitutional courts during emergencies.[58] First is the *business-as-usual* model.[59] As the name suggests, this model argues that judicial review should not be any different during emergencies. The same standard of judicial review during emergencies, if anything, should be *more rigorous*, since it is during emergencies that rights are most threatened and abridged.[60] In the specific context of the COVID-19 pandemic, it has been argued that the Irish courts have adopted the business-as-usual model, continuing to apply "the generic legal tools of procedural and substantive administrative and constitutional law with their typical cautious, but not supine, attitude to reviewing political branch action".[61] On the other hand, the *deference* model argues that during emergencies, courts should defer to the executive.[62] This model recognises that the executive is better suited to take judgements and decisions on constitutional trade-offs induced by the emergency due to its resources, power, and flexibility.[63] The more extreme argument from the *deference* model argues that the executive can act beyond and extra-legally during emergencies if required, with

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58 The following analysis can be found in: Gilad Abiri and Sebastián Guidi, 'The Pandemic Constitution' (2021) 59 Columbia Journal of Transnational Law (forthcoming) 9-15; For a thorough literature review, see Amal Sethi, 'Judging Under Extreme Conditions: A Court's Role During a National Crisis' (2021) 2 Keele Law Review 5-11; Yaniv Roznai, 'Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy' (2020) 29 William and Mary Bill of Rights Journal 341-348.

59 Gross (n 36).

60 David Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2003) 101 Mich. L. Rev. 2567.

61 Conor Cassey, 'Business as Usual? Irish Courts, The Constitution, and Covid 19' (2021) Percorsi Costituzionali/ Constitutional Paths (forthcoming) 1.

62 Samuel Issacharoff and Richard H. Pildes, 'Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime, (2004) 5 Theoretical Inquiries 4.

63 Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts*, vol. 4 (OUP, 2007).

no judicial review.[64] While the model relies on the reassertion of constitutional norms once the emergency comes to an end,[65] it is unclear when such a reassertion of constitutional norms should commence and how sweeping it should be. Indeed "we are (still) post 9/11 (even) now".[66] The third model is that of *emergency constitutionalism*, the middle ground between the above two models.[67] The argument under this model is that though judicial review as in the normal times is not desirable (practically and theoretically), *certainprinciples* and *institutional* features both can and should be protected by courts during emergencies. In the specific context of the polity of USA, Ackerman proposes to achieve this through an institutional rearrangement (delegation of congressional power to the President, which with time requires higher and higher supermajority margins) immediately after a terror attack, and *temporarily* recognising the "very real loss of fundamental rights" which can, in the "middle run" be protected more aggressively than they might [be] otherwise".[68] The immediate institutional rearrangement reassures public that the next terror attack would be prevented, and thus could lead to the acceptance of a staunch defence of rights in the middle run. While there are numerous critics of Ackerman's proposal,[69] the important takeaway for the current purposes is that emergency constitutionalism seeks to strike a middle-ground between complete deference on the one hand, and complete non-recognition of

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64 Gross (n 36); Mark Tushnet, 'Defending Korematsu?: Reflections on Civil Liberties in Wartime' (2003) Wis. L. Rev. 273, 306.

65 Gross (n 36);Posner and Vermeule (n 63).

66 Kim Lane Scheppele, 'We Are All Post-9/11 Now' (2006) 75 Fordham L. Rev. 607; Frank Gardner, 'Will the 'War on Terror' ever end?' *BBC* (24th June 2020) <https://www.bbc.com/news/world53156096> accessed 1st July 2021.

67 Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in The Age of Terrorism* (Yale University Press 2006) 7.

68 ibid [114].

69 David Cole, 'The Priority of Morality: The Emergency Constitution's Blind Spot' (2004) 113 Yale L. Jour. 1773.

executive-primacy on the other hand. Rather, the overarching goal is to "tailor constitutional responses to the exigencies of particular types of emergencies,"[70] and to facilitate "continued faithful adherence to the principle of the rule of law and fundamental democratic values while at the same time providing the state with adequate measures"[71] to respond to the emergency. In this vein, other scholars too have argued for an intermediate role of the court, moving from one pole to another, attempting to protect rights, while ensuring executive discretion. Federico Fabbrini, for instance, argues that courts move from a stage of complete restraint to full and assertive review, with an intermediate stage of pragmatism and manifest-error review, which helps the court make the shift.[72] Sandra Fredman argues that the role of the court is to foster dialogue with the political branches and elicit explanations for their actions.[73]

All in all, there seem to be differing accounts of what a court ought to do during an emergency. However, fundamentally, Sethi argues that it is impossible to make a case for a single normative theory of the court's role during an emergency.[74] This is especially the case in the context of the COVID-19 pandemic, since courts all across the world lacked a coherent understanding of their role during a public health emergency.[75]

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70 Abiri and Guidi (n 58).

71 Ackerman (n 67) 89.

72 Federico Fabbrini, 'The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice' (2010) 28 Yearbook Eur. L. 664. Fabbrini's point, however, seems descriptive rather than normative.

73 Sandra Fredman, *Comparative Human Rights* (OUP, 2018) 79-114.

74 Sethi, 'Judging Under Extreme Conditions: A Court's Role During a National Crisis' (n 58).

75 Abiri and Guidi (n 58) 2.

B. Examining the Supreme Court Jurisprudence

At the outset, it has to be noted that the pandemic also affected the functioning of physical courts in India. As the pandemic reached Indian shores, the Supreme Court issued new operating procedures.[76] The Court announced that it would only take up "urgent" matters and limited the numbers of persons in courtrooms. By mid-March 2020, the Court began hearing urgent matters through video conferencing too. A few weeks later, the Court began hearing "short category matters, death penalty matters and matters related to family law."[77] And by July, video-conferencing for constitution-bench matters was underway as well.[78] The Court thus had to quickly embrace technological change to adapt to the crisis.

From March 2020 to July 2021, the Court heard thousands of matters on all areas of law, directly or indirectly connected to the pandemic. Even if one were to limit oneself to constitutional law, the court adjudicated on healthcare, labour rights, prisoner's rights, free speech and expression, and religious freedom among other areas of constitutional law. The nature of the pandemic and its widespread impact has meant constitutional litigation in diverse areas. A comprehensive survey of *all* judgements and orders, united only by

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76 Standard Operating Procedure for Ld. Advocate/Litigant-in-person for Attending Urgent Hearing of a Matter Through Video Conferencing, text of the SOP: <https://scobserver-production.s3.amazonaws.com/uploads/beyond_court_resource/document_upload/483/SOP_032020.pdf>.

77 Supreme Court Observer Editorial Team, 'COVID Coverage: Court's Functioning' (*SCC Observer*, 1 May 2021) <https://www.scobserver.in/the-desk/covid-coverage-court-s-functioning? accessed 1 July 2021.

78 Abraham Thomas, 'Supreme Court holds First 'Virtual' Constitution Bench Hearing' *HindustanTimes* (15 July 2020) <https://www.hindustantimes.com/india-news/supreme-court-holds-first-virtual-constitution-bench-hearing/story-6OIJDbbzpliujLFjz1z3mI.html> accessed 1 July 2021.

the common thread of the pandemic but scattered otherwise, is practically not feasible.

In the previous section, I argued that the Indian state's response to COVID-19 consisted elements of both executive underreach and overreach. I argued that the executive had significantly underreached in matters of public health and economy, and that it had overreached in matters of rights, such as by suspending protections under labour law, restricting right to free speech and expression of media and citizens under Article 19(1)(a), and obstructing rights-based transparency challenges. In this section, I attempt to analyse how the Court reacts to such under and overreach. Cases have thus been categorised on the basis how the executive acted. In matters of both underreach and overreach, I attempt to examine the standard of review, and the basis of such a standard, if any, that the court has adopted.

A preliminary caveat applies: it is by now abundantly clear that mechanisms which seek executive-accountability have *systematically* been undermined by the Indian government since 2014.[79] The COVID-19 pandemic has thus only furthered the democratic-deconsolidation. In this process, the Supreme Court has not been an exception.[80] While Khaitan writes of the executive capturing the Court, there has – to my knowledge – been no single comprehensive academic study of the decline of constitutional adjudication since 2014. Bhatia, however, has constantly written about *judicial evasion* by the court.[81] The annual posts,[82] and those

79 Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India' (2020) 14 Law & Ethics of Human Rights 49-95.

80 ibid [73]-[77].

81 Gautam Bhatia, 'Judicial Evasion and the Electoral Bonds Case' (*Indconlawphil*, 13 April 2019), <https://indconlawphil.wordpress.com/2019/04/13/judicial-evasion-and-the-electoral-bonds-case/> accessed 1 July 2021; Gautam Bhatia,

examining the term of the last few chief justices,[83] have constantly reminded us of the state of constitutional adjudication in the Supreme Court. While examining this in any level of detail is beyond the scope of this article, it is important to note that constitutional adjudication relating to the pandemic has happened (and is happening) alongside systemic judicial evasion, suppression of *habeas corpus* petitions, and extreme deference to the executive.[84]

'The (Continuing) Doctrine of Judicial Evasion in the Aadhaar Case' (*Indconlawphil*, 9 May 2017) <https://indconlawphil.wordpress.com/2017/05/09/the-continuing-doctrine-of-judicial-evasion-in-the-aadhaar-case/> accessed 1 July 2021; For all other posts on the topic, refer here: <https://indconlawphil.wordpress.com/?s=judicial+evasion>.

82 The posts can be accessed here: < https://indconlawphil.wordpress.com/?s=ICLP+turns+8>.

83 Gautam Bhatia, 'Evasion, Hypocrisy, and Duplicity: The Legacy of Chief Justice Bobde' (*Indconlawphil*, 23 April 2021) <https://indconlawphil.wordpress.com/2021/04/23/evasion-hypocrisy-and-duplicity-the-legacy-of-chief-justice-bobde/> accessed 1 July 2021; Gautam Bhatia, '"A little brief authority": Chief Justice Ranjan Gogoi and the Rise of the Executive Court' (*Indconlawphil*, 17 November 2019) <https://indconlawphil.wordpress.com/2019/11/17/a-little-brief-authority-chief-justice-ranjan-gogoi-and-the-rise-of-the-executive-court/> accessed 1 July 2021; Gautam Bhatia, 'Ends Without Means, Outcomes Without Reasons: A Look Back at Dipak Misra and the Constitution' (*Indconlawphil*, 1 October 2018) <https://indconlawphil.wordpress.com/2018/10/01/ends-without-means-outcomes-without-reasons-a-look-back-at-dipak-misra-and-the-constitution/> accessed 1 July 2021.

84 In his latest annual review on August 1, 2021, Bhatia has this to say about the supreme court: "I suppose it is unsurprising that the tone of those posts has grown steadily bleaker and more pessimistic. As another year comes around, I find that I have very little to say: as far as civil rights and State impunity is concerned, nothing much has changed from the last time around, nor are there any significant indications that anything will change in the near future. Indeed, for the reasons that I outlined in the seventh-anniversary post, "A Constitutionalism Without A Court", I find myself writing less frequently about the Court(s), and with minimal enthusiasm. To analyse "normal" judgments about – say – the Delhi legislative assembly's summons to Facebook, in the normal course of things, as if everything was normal, while those jailed for 3+ years without trial in the Bhima Koregaon case are repeatedly denied bail by the same judicial system, creates a contradiction that I find increasingly difficult to overcome." Gautam Bhatia, 'ICLP Turns 8 ||

For the purpose of analysis, and as argued above, cases dealing with public health and economy/commerce form one category, where the court responds to executive underreach. The other category of cases involves matters of rights,[85] where the court responds to executive overreach.

Judicial Response to Executive Underreach

The court adjudicated on both the areas of executive underreach identified above – economy/commerce, and public health.

After the onset of the second wave, the Court was faced with two cases related to economic measures by the Indian state during the pandemic: *Small Scale Industrial Manufacturers Association v. Union of India*,[86] and *Vishal Tiwari v. Union of India*.[87] In the former case, the petitioners prayed that the court direct the government to grant economic relief packages on account of the second wave, including extension of moratorium, waiver of interest, sector specific reliefs etc. In the latter case, the petitioner's prayer was similar but narrower: to direct the government to take measures to redress the financial stress and hardships faced specifically by borrowers due to the pandemic.

What Dreams May Come' (Indconlawphil (1 August 2021), <https://indconlawphil.wordpress.com/2021/08/01/iclp-turns-8-what-dreams-may-come/>, accessed 2 August 2021.

85 This is, of course, not to say that healthcare is not a legal right. While the exact contours of such a right are debatable, it is difficult to argue that right to healthcare is not a part of right to life under Article 21. Indeed, the supreme court has stated so in several cases. However, for the purpose of categorization and analysis, matters of healthcare have been analysed separately, due to their importance in a public health emergency, and the extent of executive underreach in the response of the state to the COVID-19 pandemic. For a survey of right to healthcare cases of the supreme court, *see* Sharanjeet Parmar and Namita Wahi, Citizens, 'Courts and Right to Health: Between Promise and Progress', in Alicia Ely Yamin and Siri Gloppen (ed.), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (HUP, 2011).

86 2021 SCC OnLine SC 246.

87 2021 SCC OnLine SC 423.

However, in both these cases, the court noted that the provision of any financial relief packages is a policy matter within the (exclusive) domain of the executive, and hence it is for the executive to decide upon them. Accordingly, it refused to interfere and grant any relief. It is clear that the Court chose to defer to the executive in this area. However, this is not so for healthcare.

Cases relating to healthcare formed a significant part of the Court's pandemic adjudication. A model of judicial deference in adjudication on public health and healthcare, being a socio-economic right, and especially in a pandemic, would not be surprising. However, as I shall attempt to argue below, that has not been the case, especially with the onset of the second wave, or rather, the executive underreach that brought about the second wave.

In the first wave, the court passed a few important orders, including an order stating that COVID-19 tests in private labs should, similar to government-run labs, be free of cost.[88] A few days

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88 Shashank Deo Sudhi v. Union of India, (2020) 5 SCC 132. This order drew sharp reactions, mostly since the court did not clarify that the costs incurred by private labs would have to be reimbursed for by the government. For analysis of the order and the arguments for and against its tenability, see: Gautam Bhatia, 'Coronavirus and the Constitution – XI: The Supreme Court's Free Testing Order' (*Indconlawphil*, 9 April 2020) <https://indconlawphil.wordpress.com/2020/04/09/coronavirus-and-the-constitution-xi-the-supreme-courts-free-testing-order/> accessed 1 July 2021 [Bhatia defends the order, presuming that costs incurred by private labs will be reimbursed, and responds to counter-arguments]; Bastian Steuwer & Thulasi K. Raj, 'Coronavirus and the Constitution – XII: The Supreme Court's Free Testing Order – A Response (1)' (*Indconlawphil*, 9 April 2020) <https://indconlawphil.wordpress.com/2020/04/09/coronavirus-and-the-constitution-xii-the-supreme-courts-free-testing-order-a-response-1-guest-post/> accessed 1 July 2021; Goutham Shivshankar, 'Coronavirus and the Constitution – XIII: The Supreme Court's Free Testing Order – A Response (2)' (*Indconlawphil*, 10 April 2020) <https://indconlawphil.wordpress.com/2020/04/10/coronavirus-and-the-constitution-xii-the-supreme-courts-free-testing-order-a-response-2-guest-post/> accessed 1 July 2021; Gautam Bhatia, 'Coronavirus and the Constitution – XVII: The Supreme Court's Free Testing Order – Some

later, in *Sachin Jain v. Union of India*,[89] the order was modified to the extent that only those under the Ayushman Bharat health policy are eligible for free testing. However, the constitutional question is whether a blanket right to free testing *for all* flows from articles 14 and 21 of the Constitution. While the Court initially suggested that it does, it walked back on its order only a few days later.

The most pertinent case on healthcare, in the context of the Court responding to executive underreach is that of *In Re: Distribution of Essential Supplies and Services during the Pandemic* ["Essential Supplies"]. With the onset of the second wave, there was a total collapse of healthcare infrastructure, resulting in, at its peak, about five lakh (five hundred thousand) cases in one day.[90] A severe shortage of oxygen resulted in thousands of death.[91] Several state high courts had taken *suo motu* cognisance and began to pass prompt orders on allocation of oxygen, availability of ICU beds, and supply of essential medicines, among other such issues.[92] On 22nd April, a three judge bench headed by Chief Justice Bobde took *suo motu* cognisance of the matter, stating "a certain amount of panic *has been*

Concluding Remarks' (Indconlawphil, 11 April 2020) <https://indconlawphil.wordpress.com/2020/04/11/coronavirus-and-the-constitution-xvii-the-supreme-courts-free-testing-order-some-concluding-remarks/> accessed 1 July 2021.

89 Sachin Jain v. Union of India, 2020 SCC OnLine SC 1085.

90 Krishna N. Das and Ankur Banerjee, 'India's COVID Death Rate Hit Record in June after Calls for Better Data' *Reuters* (6 July 2021)<https://www.reuters.com/world/india/indias-covid-death-rate-hit-record-june-after-calls-better-data-2021-07-06/> accessed 1 July 2021.

91 Moole (n 28); Bhardwaj and Kalra (n 28).

92 Umang Poddar and Nikhil Iyer, 'As Supreme Court Sat Out The Pandemic, High Courts Filled The Gaps' *Article-14* (3 may 2021) <https://www.article-14.com/post/as-supreme-court-sat-out-the-pandemic-high-courts-filled-the-gaps> accessed 1 July 2021; Scroll Staff, 'From Anti-viral drugs to Oxygen: How High Courts Responded to Covid-19 Second Wave' *Scroll* (23 April 2021) <https://scroll.in/article/993008/from-antiviral-drugs-to-oxygen-supply-how-high-courts-have-responded-to-the-covid-19-second-wave> accessed July 1 2021.

generated and people have invoked the jurisdiction of several High Courts…The High Courts have passed certain orders *which may have the effect of accelerating and prioritising the services to a certain set of people and slowing down the availability of these resources to certain other groups* whether the groups are local, regional or otherwise".[93] After stating so, without reference to any high court orders,[94] the Court issued notice to all states to submit affidavits explaining the state of supply of oxygen and essential drugs, vaccination, and the declaration of lockdown. The necessity of this was widely questioned,[95] with a fear that the high courts will be barred from hearing these pressing and important matters. Between the second and the third order under this matter, Chief Justice Bobde retired. The matter was now heard by a bench headed by Justice DY Chandrachud. In the third order,[96] the court made it clear that high courts shall continue to adjudicate and should not be restrained as they had a more "robust understanding of ground realities". The jurisdiction of the court, it was clarified, is *complementary* and will only extend to matters *beyond state boundaries*.

From the third to the fifth order, it is clear that the Court adopted the business-as-usual model, posing several questions to the executive. In the third order, the Court asked the central government to clarify the projected requirement, rate and method of vaccination,

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93 2021 SCC OnLine SC 339.

94 Gautam Bhatia, 'Evasion, Hypocrisy, and Duplicity: The Legacy of Chief Justice Bobde' (n 83).

95 Sruthisagar Yamunan, 'Why India May be Better off if High Courts hear Covid-19 Cases Instead of Supreme Court' *Scroll* (27 April 2021) <https://scroll.in/article/993356/why-india-may-be-better-off-if-high-courts-hear-covid-19-cases-instead-of-supreme-court> accessed 1 July 2021; Special Correspondent, 'Supreme Court's Move on COVID-19 Cases is Wrong: Congress' *The Hindu* (New Delhi, 23 April 2021) <https://www.thehindu.com/news/national/congress-hits-out-at-supreme-courts-intervention-on-covid-19-management/article34390830.ece> accessed 1 July 2021.

96 2021 SCC OnLine SC 372.

procurement of other vaccinations (apart from Covaxin and Covishield), and finally, the basis of differential pricing. In the fourth order,[97] the Court examined the central government's policy on medial infrastructure, allocation of oxygen, vaccines and vaccine pricing. After doing so, it passed recommendations on the need for a national policy on hospital admissions, centre-state cooperation in allocation of oxygen, import of medical oxygen, supply of essential drugs, etc. Importantly, after examining the central government's rationale for differential pricing (which was to create incentives for private vaccine manufacturers to increase production of vaccines),the Court also made a *prima facie* observation that the differential pricing policy, and the mode procurement of vaccines is violative of articles 14 and 21 of the Constitution, on the ground that the price is beyond affordability and thus to the serious detriment of several citizens. Thus, the court noted that the "central government should consider revisiting its current vaccine policy". Finally, the Court made three important observations: *first*, the Court suggested compulsory licensing under sections 66, 92, and 100 of the Patents Act, 1970 to augment domestic production.[98] *Second*, the Court cautioned governments against restricting spread of information related to the virus. This was particularly important, given the practice of initiating criminal action against citizens, for speaking to the press, and journalists for covering the government's handling of the virus.[99] *Third*, the Court suggested that the government must impose

97 2021 SCC OnLine SC 355.

98 The Patents Act, s 66, 92, 100.

99 The Wire Staff, 'COVID-19: FIR Against UP Villagers Who Complained of Poor Medical Facilities to Media' *The Wire* (18 May 2021) <https://thewire.in/government/covid-19-fir-up-mewla-gopalgarh-complained-poor-medical-facilities-media-neem-tree> accessed 1 July 2021.

a ban on social gatherings.[100] In the fifth order, the Court addressed the "*digital divide*" caused by the CoWin portal, which is the mode to book vaccination slots.[101] Citing empirical studies and data from government surveys, the Court notes that there is a huge disparity between urban and rural India, in access to internet and infrastructure necessary to book a vaccination slot. Resultantly, "a significant population of this country between the ages of 18-44 years would be unable to meet its target of universal immunization owing to such a digital divide". The Court also noted that the impact of this policy would be to make vaccinations harder for those from the marginalised communities. Finally, the Court ordered the central government to place on record any further steps taken to curb the virus, and other modalities of the vaccination drive, along with a national policy on hospital-admissions within two weeks (from April 30th).

The same bench continued this enquiry in *Union of India v Rakesh Malhotra*.[102] Two orders were passed under this matter, which were regarding lack of oxygen in Delhi. In the first order, the Court ordered the central government to produce a comprehensive plan "indicating the manner in which the direction for the allocation of 700 MT of Liquid Medical Oxygen [LMO] to Delhi shall be complied with". The Court also stated that the plan shall include sources of

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100 It is pertinent to recall that the government itself was holding election campaign rallies in the middle of the second wave.

101 Shruti Dhapola, 'India's Covid-19 Vaccine Rollout Strategy has a Digital Gap; Here are Those Struggling to Plug it' *Indian Express* (Chandigarh, 2 June 2021) <https://indianexpress.com/article/technology/tech-news-technology/india-covid-19-cowin-portal-vaccine-rollout-strategy-has-a-digital-gap-those-trying-to-fix-it-7338250/> accessed 1 July 2021; Manjesh Rana, 'Explained: How Digital Divide Impacts Young India's Covid-19 Vaccination Chances' *Indian Express* (New Delhi, June 7 2021) <https://indianexpress.com/article/explained/how-the-digital-divide-impacts-young-indias-vaccination-chances-7347012/> accessed 1 July 2021.

102 2021 SCC OnLine SC 391; 2021 SCC OnLine SC 375.

supply, method of transportation, and other logistical aspects. In the second order, examining the plan submitted by the government, the Court noted that "except for a bare assertion that an increase of 210 MT to Delhi would result in a corresponding reduction to other States, *no material* has been produced on the record by the Union of India." Thus, the Court again ordered daily allocation of 700 MT of LMO to Delhi.

It is amply clear from the above analysis that there was no deference accorded to the executive. From the third order in *Essential Supplies*, to *Union of India v Rakesh Malhotra*, the Court asked the central government to produce justification for all measures in issue. From allocation of oxygen, to pricing of vaccines, to mode of booking vaccination – all traditionally regarded as matters where the judiciary should respect the trade-offs made by the executive – the Court questions policies, records observations, suggests changes and most importantly, continuously demands justifications. About a week from the passing of the fifth order in *Essential Supplies*, the central government announced free vaccinations for all citizens above eighteen years of age, with the central government taking over procurement, moving away from the previous policy examined and noted as unconstitutional by the Supreme Court.[103] Thus, the major shift from the initial order in *Essential Supplies*, and thus in healthcare adjudication in general, to the subsequent orders lies in the Court clearly delineating its jurisdiction as complementary to the high courts, and examining the matter with a rights-based focus. The third, fourth, and fifth orders, in addition to Union of India v. Rakesh Malhotra (all given by benches headed by Justice Chandrachud), place

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[103] The Wire Staff, 'Free Vaccine for 18+, States Don't Need to Buy Shots': PM Announces Partial Rollback of Earlier Policy' *The Wire* (7 June 2021) <https://thewire.in/politics/narendra-modi-address-free-vaccine-state-procurement-centre-vaccination-policy> accessed 1 July 2021.

the government-policy vis-à-vis fundamental rights, and conceptualise this analysis as the purpose behind the matter, rather than merely addressing "generated panic" or supervising high court orders.

The difference between the first two orders, and the third and subsequent orders is stark. The "Court" shifts its stance from stating that *suo motu* jurisdiction *had* to be exercised to address the "generated panic" by the ostensibly inconsistent high court orders, to stating that the Supreme Court jurisdiction will only extend to matters over which the high courts do not have jurisdiction in the first place. This, to be clear, is a huge shift. In a *suo motu* petition, there is no petitioner who moves the court. Thus, the justification for exercising jurisdiction is important, and goes to the very root of the matter, for if not for such a justification, the case should not exist in the first place. However, despite the complete *volte face* (for the better), and the importance of the justification, there is no explicable reason behind the shift, besides that of the change in the bench. Further, the approach of the Court also resulted in a favourable change in government policy. This exemplifies the potential of court-induced change, through rights-based review of government policy, in the specific context of public health. While such an argument does not by the very fact extend to other aspects of a pandemic/emergency (such as national security), the limited point here is that the Indian example does show that lack of judicial deference in healthcare – a crucial part of managing a public health emergency – can potentially bring about favourable results, when responding to an underreaching executive.

This conclusion is bolstered by a reading of the set of orders that the Court passed on rights of prisoners and juvenile convicts during the pandemic, and *suo motu* petition on welfare schemes such

as the mid-day meal. In *Re: Contagion in COVID-19 Prisons*,[104] the Court noted the dangers of the pandemic spreading into prisons, and directed the formation of prison readiness and response plans and the constitution of a high-powered committee in each state/union territory to determine which class of prisoners can be released on parole or interim bail and for what period of time. In its subsequent orders, the Court was forced to issue more directions for matters that ideally should have been obvious from the initial direction itself, such as non-release of COVID-19 positive prisoners and transportation arrangements for released prisoners. Later, the Court also extended its directions to all correctional homes, detention centres and protection homes. From herein, the case become dormant until further directions by the Court in the second wave. In the second wave, the court passed additional orders directing strict control and restraint at the time of arrest itself, automatic release of prisoners who had been released during the first wave, and transparency on the part of state governments on occupancy rate in jails.

In *Re: Contagion of COVID-19 in Children Protection Homes*,[105] the Court issued several directions to the government, and bodies under the statutory framework of the Juvenile Justice (Care and Protection of Children) Act, 2015. These directions included preventive as well as reactive guidelines to combat COVID-19, such as proper monitoring, social distancing, disinfection and hygiene, psychological well-being of the children etc.[106] In subsequent orders, the Court has called for more details on the government schemes, and issued interim directions containing step by step instructions for

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104 2020 SCC OnLine SC 344; 2020 SCC OnLine SC 356; 2020 SCC OnLine SC 365; 2021 SCC OnLine SC 376.

105 (2020) 15 SCC 280; (2020) 15 SCC 289.

106 Immediately thereafter, in *Rishad Murtaza v. Union of India*,(2020) 15 SCC 288, the court directed the government to consider adopting the aforementioned directions to *nari niketans* if it found feasible to do so.

the government, viz., identification, establishing immediate contact, determining whether the child's guardian is able and willing to take care, ensuring continuance of education etc. Further, in *Dipika Jagatram Sahani v. Union of India*,[107] the Court dealt with problems caused by closure of anganwadi centres during the pandemic. While the Court did not provide any interim directions despite the hearings going on for five months, it directly came out with a detailed judgment in January 2021. During the pandemic, this judgment is one of the few that contains detailed discussion on states' positive obligations to fulfil people's right to a dignified and healthy life guaranteed under Article 21 of the Constitution in a real and meaningful sense. Ultimately, after detailed consideration of the governments' submissions, the Court directed the reopening of all anganwadi centres outside containment zones unless the state disaster management authority cited specific reasons against such reopening.

Finally, in *Dr. Ashwani Kumar v. Union of India*,[108] the petitioner moved an application in a pre-existing writ petition praying for directions for the welfare of senior citizens during the pandemic. The Court provided the reliefs prayed for by passing several directions such as priority for senior citizens in government and private hospitals, proper sanitisation of old age homes, protective equipment for old age home caregivers, and adequate access to masks etc. Along with passing these directions, the Court also directed state governments to submit affidavits detailing measures taken for senior citizen welfare.

Overall, it is seen that the Court has passed the directions for the protection of prisoners, children, senior citizens, and beneficiaries of anganwadi centres. It is obvious that these measures should have,

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107 2020 SCC OnLine SC 1070; (2021) 2 SCC 740.
108 2020 SCC OnLine SC 620.

in the first place, been taken by the executive. Hence, in mandating these measures, basic as they are, the Court was responding to underreach and has not deferred to the executive.

Judicial Response to Executive Overreach

The identified areas of overreach were labour rights, free speech and expression, and transparency. Each of these was adjudicated upon by the Supreme Court.

The pandemic has marked a tumultuous time for the domain of labour law, right from the onset of the migrant crisis, to enmasse relaxation and even suspension of labour laws. The Supreme Court's first labour law judgment during the pandemic came in light of India's first labour crisis in the pandemic: the migrant crisis. In *Alakh Alok Srivastava v. Union of India*,[109] two advocates filed a public interest litigation praying for directions to be passed to provide food, water, shelter etc. to migrant workers walking thousands of kilometres home post the announcement of an overnight lockdown. In response to the notice in this petition, the government filed a status report and made oral submissions before the court highlighting the various measures taken. In its judgment, the Court cited extensively from this status report, which it accepted at face value, to note "*we are satisfied with the steps taken by the Union of India for preventing the spread of corona virus at this stage*." It then went on to make minor observations about treating migrants in humane manner, and ensuing they have access to "*trained counsellors and/or community group leaders belonging to all faiths*" to help their mental health. Significantly, the Court accepted the government's submission that the migrant crisis was triggered by fake news and then went on to make the following much-criticised observation:

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109 (2018) 17 SCC 291.

"In particular, we expect the Media (print, electronic or social) to maintain a strong sense of responsibility and ensure that unverified news capable of causing panic is not disseminated. A daily bulletin by the Government of India through all media avenues including social media and forums to clear the doubts of people would be made active within a period of 24 hours as submitted by the Solicitor General of India. We do not intend to interfere with the free discussion about the pandemic, but direct the media refer to and publish the official version about the developments."

About a month postthis judgment, in *Jagdeep S. Chhokar & Anr. v. Union of India*,[110] the petitioner prayed that the government make appropriate transport arrangements for those migrant workers who wished to go home. The Court accordingly asked the government to place on record the protocol, if any, for inter-state movement of migrant workers. The government cited two executive orders to claim that all necessary and appropriate steps are being taken. Interestingly, with regard to ticket fair for the transport, the government submitted, "*no such statement can be made as to what amount is being taken from the migrant workers*." Yet again, the court took the government's submissions at face value and disposed the petition on grounds that the relief had already been substantially granted, without making any observations about the ticket fair taken from the workers. In this manner, the Supreme Court's initial labour judgments set a tempo of judicial deference,[111] which gradually diminished over subsequent judgments, more so in the second wave.

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110 2020 SCC OnLine SC 435; 2020 SCC OnLine SC 404.

111 Anuj Bhuwania, 'The Curious Absence of Law in Migrant Workers' Cases' *Article 14* (16 June 2020) <https://www.article-14.com/post/the-curious-absence-of-law-in-india-s-migrant-workers-cases> accessed 1 July 2021.

The first dent to the tempo of deference was the case of *In re Problems and Miseries of Migrant Labourers*,[112] which was a *suo moto* writ petition taken up by the Court on the basis of newspaper reports, letters and representations highlighting the continued plight of migrant workers well into the lockdown. Specifically, the Court observed, "*Although the Government of India and the State Governments have taken measures yet there have been inadequacies and certain lapses. We are of the view that effective concentrated efforts are required to redeem the situation.*" This marked the beginning of a long proceeding during which the Court heard submissions of the centre, several states, and over 75 interveners, and passed periodic orders over the duration of several months, even extending to the second wave.

A reading of the orders passed in the first wave makes it clear that the court was cognizant of the urgency of the situation: it issued its first set of interim direction within 2 days, set strict deadlines for implementation of its directions and affidavit submissions, and strongly questioned state governments, particular Maharashtra, for delays. This continued till July 2020, post which the matter become dormant with the subsiding of the first wave.[113] In this manner, the Court's orders in this case in the first wave itself set the stage for departure from its initial deferential standpoint.

Subsequent case laws built upon this departure. The beginning of these cases was *Ficus Pax Private Limited & Ors. v. Union of India and Ors.*,[114] wherein private employers invoked articles 14, 19(1)(g) and 21 of the Constitution to challenge the vires of government orders mandating them to pay full wages to their workers during lockdown despite closure of their establishments.

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112 2021 SCC OnLine SC 398; (2020) 7 SCC 181; (2020) 7 SCC 226; 2020 SCC OnLine SC 618; 2020 SCC OnLine SC 613; 2020 SCC OnLine SC 1196

113 It again became active in the second wave, which will be dealt with below.

114 (2020) 4 SCC 810.

However, the impugned order was withdrawn during the pendency of the suit. Resultantly, the Court was left to adjudicate only upon the payment of wages for the 50-odd days the orders were in operation. The matter regarding the vires of the orders is still pending as on date. However, in its interim order, the court noted, "*the lockdown measures enforced by the Government of India under the Disaster Management Act, 2005,hadequally adverse effect on the employers as well as on employees…. a balance has to be struck between these two competitive claims.*" Subsequently, it effectively nullified the effect of the impugned orders by directing that *first,* employers shall be protected against any coercive action; and *second,* employers and employees shall be permitted to enter into settlements regarding wages without regard to the impugned order. In this manner, the non-deference worked against the workers.

The next two decisions at least partially favoured the workers. In *Gujarat Mazdoor Sabha & Anr. v. State of Gujarat*,[115] the petitioners challenged a Gujarat government notification exempting factories from observing some of their obligations towards workers under the Factories Act, 1948 on account of the pandemic. This notification had been issued under section 5 of the act which permitted the government to exempt any factory or any class of factories from complying with any or all provisions of the act in the event of a "public emergency". In a landmark judgment, the court struck down the impugned notification on grounds that the pandemic and its resultant financial exigencies did not constitute a "public emergency" under the act. Specifically, it noted, "*A blanket notification of exemption to all factories, irrespective of the manufactured product, while denying overtime to the workers, is indicative of the intention to capitalize on the pandemic to force an already worn-down class of society, into the chains of servitude.*"

115 (2020) 10 SCC 459.

Subsequently, the case of *State of Andhra Pradesh & Anr. v. Dinavahi Lakshmi Kameswari*[116] arose in response to the Andhra Pradesh Government's decision to withhold salaries, honoraria and pensions of its employees on account of financial stress caused due to the pandemic. Previously, the Andhra Pradesh High Court had directed the government to pay the employees' dues forthwith along with interest at 12% per annum. Now, the government approached the Court solely challenging the award of interest. In its judgment, the Court repeatedly noted that the High Court's direction for the payment of the salaries is unexceptionable, and directed the government to implement it expeditiously. However, it reduced the interest payable to 6% per annum on grounds that such interest cannot be used to penalise the government. Overall, this judgment shows that the government cannot cite pandemic related financial problems to deny the payment of salaries to its employees. This was the court's last decision before the second wave.

In the second wave, the Court has heard just one labour law related case, the previously dormant *In re Problems and Miseries of Migrant Labourers* case. The onset of the second wave made the Court consider this case with renewed seriousness. In the two substantive orders that have been passed to date, the Court has issued interim directions to the government to provide dry ration without demanding an identity card, organise community kitchens, ensure adequate transport arrangements, and ensure that the registration of all migrant workers is complete so that they can benefit better from welfare schemes. One can thus conclude that the Court moved away from its initial position of deference to a more engaged role of *examining*, rather than merely *accepting*, the claims of the state vis-à-vis rights of the workers.

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116 2021 SCC OnLine SC 237; 2020 SCC OnLine SC 1166.

If in labour rights, the court moved away from an original position of deference, no such clear position can be evinced from the cases on free speech and expression. Several matters involving the right to speech and expression under Article 19(1)(a) of the Constitution came before the Court. These cases arose due to various implications of the pandemic, and state action in response to the pandemic. In two such cases, the Court, instead of adjudicating constitutional issues, tried to broker solutions by creating commissions. First, in *Foundation of Media Professionals v. Union Territory of Jammu and Kashmir*,[117] the petitioners prayed for quashing of orders which restricted internet services in Jammu and Kashmir to only 2G broadband. The petitioners laid particular emphasis on the importance of internet for healthcare during the pandemic. Further, the petitioner also argued that the blanket restriction covering all parts of the union territory violated the proportionality standard, which was recognised in *Anuradha Bhasin v. Union of India*.[118] The state responded by arguing that the restrictions were necessary for national security, and combating militancy. The court accepted that the petitioners' arguments would have merited consideration under ordinary circumstances. However, citing the "compelling circumstances of cross border terrorism," the Court deferred to the blanket ban of 4G broadband in all parts of the union territory. While stating that the Court needs to balance the competing interests of right bearers and the existing law and order situation, the Court does not engage with the arguments of the petitioner on the *effect* of the restrictions on healthcare and education during a pandemic. Thus, while ostensibly adjudicating in the framework of balancing, the Court in reality does not. Instead, it constitutes a "Special

117 (2020) 5 SCC 746.
118 (2020) 3 SCC 637.

Committee" headed by the Secretary of the union ministry of home affairs, and other members of the executive, to determine the necessity of the restrictions.

Second, in *Rakesh Vaishnav v. Union of India*,[119] there were batches of petitions clubbed into a single matter: petitions which challenged the constitutionality of the "farm laws,"[120] petitions filed by individuals praying that the protests against the farm laws be prohibited on grounds of the pandemic, and (strangely) petitions filed for the enforcement of the farm laws. The Court stayed the operation of the farm laws. However, it does so, on the ground that staying the operation of laws would "assuage the hurt feelings of the farmers" and give them confidence while negotiating with the government. No precedent is cited for 'assuaging hurt feelings' being a ground of staying parliamentary law. Further, by the cases that the court itself cites, *prima facie* finding of unconstitutionality is a pre-requisite for staying parliamentary law. However, no such finding is recorded in the order. Instead, the Court constituted a committee of experts to hear the parties involved and submit a report to the Court. Thus, in both the cases, the Court does not engage in constitutional adjudication through analysis of legal arguments and reasoning. Rather, the Court passes the buck to a committee.

The other set of cases involving the right to expression are concerned with media-reportage of the pandemic, and in one instance, reportage of court proceedings. In the three cases related to media reportage, the court consistently upholds the right of press, and grants protection to journalists against coercive state action. In all

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119 (2021) 1 SCC 590.

120 The phrase 'farm laws' is used to collectively refer to three enactments by the Parliament: (1) Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020; (2) Essential Commodities (Amendment) Act, 2020; and (3) Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020.

these cases, the Court first grants interim protection to the petitioner by prohibiting coercive state action, and then proceeds to adjudicate on whether the FIR is to be quashed. In *M/S Aamoda Broadcasting Company Private Limited & Anr v. The State of Andhra Pradesh*,[121] two media houses filed Article 32 petitions praying for quashing FIRs which have been registered for sedition, promoting enmity between different groups, inciting commission of offences under Sections 124, 153A, and 505 read with 120B of the Indian Penal Code ["IPC"]. The allegation was that these channels broadcasted a program in which a member of parliament criticised the government of the state. While stating that the sections of the IPC require interpretation to determine whether the offences have been made out, the Court granted interim protection by prohibiting the state from taking any coercive measures till the trial proceeds.[122]

In *Arnab Goswami v. State of Maharashtra*,[123] the court first granted interim protection to the petitioner.[124] Subsequently, the question of whether the multiple FIRs are to be quashed came before the Court. Following precedents,[125] the Court stated that multiplicity of FIRs on the same or related set of actions amounts to abuse of process and harassing the accused, and thus, quashed all FIRs except the first one filed in the place of the commission of the offence. In doing so, the Court also underscored the importance of the right to speech and expression in Article 19(1)(a), and noted that successive FIRs impinge upon the exercise of the right, and thus violate Article 19(1)(a). In *Vinod Dua v. Union of India*, an FIR was registered for sedition, public nuisance, defamation, and incitement under Sections 124A, 268, 501 and 505 of the IPC. The petitioner prayed for

121 2021 SCC OnLine SC 407.
122 At the time of writing, the matter was still pending.
123 (2020) 14 SCC 12.
124 2020 SCC OnLine SC 450; (2020) 14 SCC 51.
125 TT Anthony v. State of Kerala (2001) 6 SCC 181.

quashing of the FIRs under an Article 32 petition. The Court, relying on precedents such as the *Arnab Goswami* case, quashed the FIRs. The Court, relying on *Kedar Nath v. State of Bihar*,[126] reasons that mere critical comments passed on the handling of the pandemic cannot constitute sedition under the IPC. Further, the court found that no offence is made out under the other sections mentioned in the FIR. Thus, the court quashed *all* FIRs in this case. Crucially, this remedy goes one step beyond that of *Arnab Goswami*, since even the original FIR was quashed in this case. In *Arnab Goswami*, only the *subsequent* FIRs were quashed as they constituted an abuse of process. Justifying the power of the court to quash even the original FIR under Article 32, the Court relied upon the case of *State of Haryana v. Bhajan Lal* for the grounds on which FIRs could be quashed, along with citing other instances in the past where FIRs were quashed under Article 32.[127]

Finally, in *Chief Election Commissioner v. Vijayabhaskar*,[128] the petitioner filed an appeal against an oral observation made by the Madras High Court, praying for a directive that media report only what is a part of the written judicial order. While hearing a case, the Madras High Court had stated that the Election Commission was "singularly responsible for the second wave of COVID-19," and must be charged for murder. Rejecting the prayer, the Court stated that citizens have a right under Article 19(1)(a) to know what transpires in a judicial proceeding, and that the legal system is founded on public faith for which transparency is essential. Further, the Court also noted that unless proceedings are live streamed, lack of recorded oral proceedings might continue to raise issues as the

126 AIR 1962 SC 955.

127 Rini Johar v. State of Madhya Pradesh (2016) 11 SCC 703; Priya Prakash Varrier v. State of Telangana (2019) 12 SCC 432; Laxmibai Chandaragi B. v. State of Karnataka, (2021) 3 SCC 360; Mahendra Singh Dhoni v. Yerraguntla Shyamsundar, (2017) 7 SCC 760.

128 2021 9 SCC 770.

instant one. Finally, the Court's observations regarding importance of dissemination of news in *Essential Supplies* also merit a mention in this category.

All in all, the Court's record in matters of speech and expression is chequered at best. In politically sensitive cases, such as internet in Jammu and Kashmir and constitutionality of (and protests against) the farm laws, the Court does not engage in any rigorous precedent-based legal analysis and examination of arguments, choosing to delegate adjudication to committees, one of which consisted of the executive itself. Further, the Court's orders favouring the media, progressive as they are, must be viewed in the larger context of the Court's recent jurisprudence of delayed, or lack of, adjudication in *habeus corpus* cases,[129] and denial of bail under the Unlawful Activities Prevention Act, 1967.[130]

The third area of overreach was transparency, specifically regarding the PM Cares fund, which was claimed to be exempt from Section 12(h) of the Right to Information Act, 2005 by the Prime Ministers' Office.[131] In *Centre for Public Interest Litigation v. Union of India*,[132] the petitioner prayed for a transfer of all funds from the unaudited PM Cares Fund,[133] to the National Disaster Relief Fund

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129 AG Noorani, 'Habeus Corpus Law: A Sorry Decline' *Frontline* (25 October 2019) < https://frontline.thehindu.com/cover-story/a-sorry-decline/article29604480.ece> accessed 1 July 2021.

130 Apurva Vishwanath, 'Reading Section 43D(5): How it Sets the Bar for Bail so High under UAPA' *Indian Express* (New Delhi, 9 July 2021) <https://indianexpress.com/article/explained/section-43d5-how-it-sets-the-bar-for-bail-so-high-under-uapa-7390673/> accessed 1 July 2021.

131 Scroll Staff, 'PM-CARES "controlled by government", but Doesn't Come under RTI Act, says Centre in New Response' *Scroll* (25 December 2020) <https://scroll.in/latest/982310/pm-cares-controlled-by-government-but-doesnt-come-under-rti-act-says-centre-in-new-response> accessed 1 July 2021.

132 2020 SCC OnLine SC 652.

133 BBC Team, 'Coronavirus: Secrecy Surrounds India PM Narendra Modi's '$1bn' Covid-19 Fund' *BBC* (30 June 2020), <

(NDRF) under Section 46 of the DMA, which is audited by the Comptroller and Auditor General [CAG], an independent constitutional institution under Article 148 of the Constitution. The Court stated that the PM Cares Fund is a separate public fund, not a government fund, and thus does not hamper the operation of the NDRF under Section 46 of the DMA. Agreeing with the central government that "financial planning is in the domain of the Central Government," the Court dismissed the petition without ordering for any relief. A fund of the size of PM Cares Fund with the specific purpose of combating a public health emergency should be subject to audit by the independent office of the CAG. While this context could have informed the analysis of the Court, it simply deferred to the executive citing "financial planning".

All in all, the court was initially deferential in matters of labour rights before moving away from such a deferential position. On the other hand, in cases of right to free speech and expression, and transparency, the Court by and large defers to the executive.

IV. ANALYZING THE RESPONSE OF THE SUPREME COURT

How, then, do we understand the record of the Supreme Court during the COVID-19 pandemic? While the Court completely deferred to the executive in cases involving economic matters, that was not the case with public health, especially in the second wave. In labour rights, the Court gradually moved away from deference to reviewing the government's claims, though that was not the case in matters of free speech and transparency.

The limited point that the above analysis suggests is that in a pandemic, constitutional courts can gradually move away from the position of deference to one of full rights-based review.[134] This is

https://www.bbc.com/news/world-asia-india-53151308> accessed 1 July 2021.

134 Abiri & and Guidi (n 58) 56.

especially true in cases of public health and healthcare, which are the primary axes of constitutional litigation in a pandemic. The cases on public health thus support Abiri and Guidi's argument of "gradual reintroduction of rights-based revision". Abiri and Guidi posit three reasons for such a reintroduction: *first*, with time, the executive loses its primacy as legislatures and courts become more familiar with the pandemic; *second*, with time the negative effects of emergency measures taken by the executive need to be checked from becoming the constitutional norm; *third*, as the pandemic slows down, restrictive measures taken to deal with the pandemic need different forms of legitimation and judicial review could be one such form.[135] The unique point that I seek to make is, *first*, that such a shift away from deference to gradual reintroduction of rights-based review could be easier to justify in the context of executive underreach, rather than overreach. This is so since courts are pushed into acting promptly when faced with imminent loss of life and little executive action to prevent it. *Second*, the time taken to shift away from deference to rights-based review depends on the extent of underreach. To be clear, the Indian executive *massively* underreached and worsened the COVID-19 situation, especially during the second wave, resulting in India being one of the worst-hit countries by the pandemic. The impact of the virus had been unprecedented globally.[136] Understood in this context, the quick shift from deference to rights-based review was not only unsurprising, but also necessary.

However, the above analysis also suggests that the ability of courts, though crucial in extreme (life-threatening) situations, is still limited in several others. While courts can respond to executive

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135 ibid.

136 Smriti Mallapaty, India's Massive COVID Surge Puzzles Scientists, *Nature* (21 April 2021), <https://www.nature.com/articles/d41586-021-01059-y> accessed July 02, 2021.

underreach by demanding answers and passing directions, case law shows that the courts have been hesitant to do the same in matters where rights are restricted and curtailed by executive overreach. Other mechanisms to enforce executive accountability, including civil society, thus have to step up to ensure right to free speech, transparency and other such rights are protected in a pandemic.

Therefore, the role of the court, i.e., whether a court should defer to the executive in a pandemic or conduct business as usual, depends on the nature (executive underreach or overreach) and sphere (public health, free speech, labour rights, etc) of executive action in question, and its extent. In a public health emergency, no grand and universal answer to the question of the role of the court can be given. Rather, the analysis should account for several factors adverted to above, which influence not only how courts will react, but also how quickly they do so.

V. CONCLUSION

This article attempts to study the case law of the Indian Supreme Court during the COVID-19 pandemic. By providing a descriptive account of the case law and attempting to draw broader conclusions on the court's role from the account, this article seeks to add to the body of scholarship on courts, democracy, judicial review, and the pandemic. In doing so, focus is placed not just on how courts have acted, but the larger context of executive action which necessitated the judicial action in the first place.

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