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NALSAR UNIVERSITY OF LAW ♦ HYDERABAD

Prof. (Dr.) Ranbir Singh
Vice-Chancellor

Vice Chancellor's Message

It gives me great pleasure to present the inaugural issue of the Indian Journal of Constitutional Law (IJCL), a publication that has been conceived by the Constitutional Law Society, Nalsar, which was started in September 2004. The Society is an initiative of students of Nalsar, with the goal of promoting interest in the field of Constitutional law through varied activities that include lectures by eminent scholars, discussions and competitions. Hoping to make a more lasting contribution, the Society has decided to launch the IJCL with the aim of remedying the lack of authoritative academic writing devoted to the analysis of Constitutional law. The scope of this exercise is not limited to exploring issues related to the Indian Constitution alone, but also to undertake a keen examination of various other constitutions, keeping in mind the continual evolution of constitutional doctrines in the face of the various imperatives faced by democracies around the world.

This first issue of the Indian Journal of Constitutional Law, we hope, will be a trendsetter; both in terms of its significance to the field of study as well as the direction it provides for future initiatives. The Journal will undoubtedly increase and encourage scholarship, especially amongst students, and I sincerely believe it will prove invaluable to academics and practitioners alike. I wish the Journal and the Editorial Board success in all their endeavours and hope that they will keep up their good work. On behalf of the students and faculty of NALSAR, I wish to express my gratitude to Mr. K.K. Venugopal, Senior Advocate, Supreme Court of India and the M.K. Nambyar SAARCLAW Charitable Trust for wholeheartedly supporting this student initiative.


VICE-CHANCELLOR

EDITORIAL

Constitutionalists today are increasingly becoming comparativists. In this era of rapid globalisation, Constitutional borders need to be, and have indeed become more permeable than ever. A substantial presence of private players in fundamental issues relating to governance has resulted in a transformative approach towards the Constitution, Constitutional law and Constitutionalism. Amplified judicial activism, human rights abuses, secessionist movements, Constitutional breakdowns, governmental lawlessness and minority rights are concerns that Constitutional lawyers and academicians agitate across the globe. Debates on the traditional doctrines of rule of law, sovereignty, separation of powers, secularism, etc. are being revived with new vigour. It then becomes imperative that we create avenues where such interests can be raised and debated. This, along with the absence of a dedicated Constitutional law journal in India prompted us to conceptualise and bring out the Indian Journal of Constitutional Law.

This editorial is divided into three sections. The first part summarises some key constitutional developments that took place in India during 2006-07. The second, briefly introduces the contributions to this issue of the Journal, and the third section contains our expressions of gratitude to everyone who helped us in this endeavour.

Constitutional Developments – 2006-07

Speaking at a seminar on Constitutional politics in 2002, Prof. Ran Hirschl, a Canadian scholar, coined the term '*juristocracy*' to describe the significant role that the Judiciary, equipped with unprecedented power in many Constitutional democracies, has come to play in the governance of those polities. This transformation in Constitutionalism, he argued, has led to the displacement of the exclusive prerogative that the Legislature and the Executive enjoyed to determine a range of matters.

The Supreme Court of India is an institution that has come to fit this account perfectly, utilising its good sense in issues ranging from town planning, forest management, rent control, multipurpose dams, and special economic zones to defections, parliamentary privileges, reservations and review over Constitutional amendments. That being so, India has witnessed institutional struggles over the custody of the Constitution. The period 2006-07 has been no exception.

The year began with the passing of the 93rd Amendment to the Constitution by the Parliament in January, introducing Article 15(5) to undo the effects of the Apex Court's *judicial structural adjustment programme* (to

borrow Prof. Upendra Baxi's terminology) in *P.A. Inamdar v. State of Maharashtra*¹. The amendment enabled the State to subject private unaided educational institutions to its reservation policies exempting the minority run institutions from the same. The Supreme Court in *Inamdar* had failed to come to terms with the fact that there was a steep decline in Governmental spending in higher education and an increase in private presence in the sector. Consequently, it failed to appreciate the ramifications of relieving the private players of this important Constitutional commitment and was driven by the World Bank perspective of higher education as a private 'good' and not a social 'good'. It remains to be seen whether this amendment will eventually be tested against the 'doctrine of basic features'.

The Government's decision to extend reservations in favour of Other Backward Classes (OBCs) in institutes of higher education maintained out of Central Government funds (including premier institution like the IITs, IIMs etc), sparked massive public demonstrations both from the anti and pro-reservation quarters. Noteworthy was the role of the media in projecting and characterising these demonstrations as largely anti reservations ones. The Court, while hearing a set of petitions challenging the Government's policies in this regard, asked the Additional Solicitor General to place before it the Report of the Parliamentary standing Committee on the Draft Bill. Was it exercising powers of review before the Bill became law? The Supreme Court went on to stay the implementation of the OBC Quota in these institutions and the matter has now been referred to a Constitutional Bench for final hearing

In the context of reservations in public employment, the Supreme Court in *M. Nagaraj v. Union of India*² was called upon to review the validity of a set of amendments to Article 16 and Article 335 of the Constitution, which nullified some parts of the Court's decision in *Indra Sawhney v. Union of India*³. Though a comprehensive review of this pronouncement is out of the scope of this editorial, we would like to highlight a few points dealing with the judgement. First, the characterisation of Articles 16(4), 16(4A) and 16(4B) as merely enabling provisions implies that reservation programmes in India would be dependent on political largesse instead of constituting a part of the Right to Equality, which is slightly discomfiting, to say the least. It might be pertinent to recall the Dworkinian distinction made between the right to equal treatment and the right to treatment as an equal in terms of viewing the right to equality. To compound the problem, the judgment also spoke about the need to bring in the concept of a 'creamy layer' in relation

1 (2005) 6 SCC 537.

2 (2006) 8 SCC 212.

3 (1992) Supp (3) SCC 217.

to the Scheduled Castes and Tribes, a concept hitherto used only in the context of the OBCs. This ignited another set of political protests until the Attorney General clarified that it was merely another obiter dictum!

The institutional struggle between the Legislature and Judiciary is far from over as indicated by *I. R. Coelho v. State of Tamil Nadu*⁴, in which the Supreme Court was called upon to decide its powers of review vis-à-vis the laws placed in the Ninth Schedule (which as per Article 31-B are exempted from judicial review). In a loquacious and repetitive opinion, the Court reaffirmed its powers of judicial review over constitutional amendments, and held that amendments to the Ninth Schedule would be tested on the touchstone of the 'doctrine of basic features'. The judgment, often portrayed as a 'judicial' 'activism' v. 'progressive' 'legislation' debate, is a response to the misuse of Article 31B and the Ninth Schedule by the Parliament. However, it must be understood that it is one thing to say that the Ninth Schedule has been misused and quite another to say that it has outlived its utility. In its conclusion, the Court seems to indicate that only Articles 14, 19 and 21 and the principles underlying these form part of the Constitution's basic features in Part III. Does that mean that minority rights, right to conscience and religion, and other fundamental rights are not basic features? The Court ought to have been more cautious, given that fact that the constitution of smaller benches to interpret and translate such lengthy opinions is not unknown in India. Moreover, according to the Court legislation in the Ninth Schedule could be indirectly tested for violation of basic features, a measure which will definitely raise a few eyebrows for those who believe in a strict hierarchy of norms.

Another area which has preoccupied the Court over the years has been the use of Article 356 to impose President's Rule in the States. The Supreme Court in *Rameshwar Prasad v. Union of India*⁵, while striking down the notification dissolving the Bihar State Legislative Assembly as unconstitutional, justified its stand based on *constitutional guarantees* and *principles of democracy*. *Rameshwar Prasad* draws extensively from the verdict in the *Bommai* case⁶ in order to determine the extent of judicial review permissible with respect to a notification under Article 356. Since the House in this case was dissolved before its formation(!), the ratio of *Bommai* that declared a floor test to be the exclusive test to determine majority support enjoyed by a party within the House had limited or no application here. The Court did not hold that the Governor's report in all circumstances would be insufficient to direct the dissolution of the House, but that in the event of

4 (2007) 2 SCC 1.

5 AIR 2006 SC 980.

6. SR Bommai v. Union of India, AIR 1994 SC 1918.

such a Report lacking credibility due to the lack of adequate supporting records, it could not form the sole basis for the satisfaction of the President. The decision once again raises questions of whether such issues are beyond judicially determinable standards, and as to the effectiveness or otherwise of political processes to act as checks on arbitrary use of power. Even though, the Court in *Rameshwar Prasad* was steered towards its stand by the mandate of constitutional democracy, the order was rendered otiose by the fact that it came after the Election Commission had notified the elections in Bihar.

If the Court in *Rameshwar Prasad*, found it necessary to preserve values of constitutional democracy, it acted to the contrary in *Kuldip Nayyar v. Union of India*⁷, where it decided to turn a blind eye towards gross misuse of domicile requirements by political parties, in getting their party candidates elected to the Upper House of Parliament. An amendment to the Representation of Peoples Act 1951 removed domicile in a particular State as a requirement to get elected to the Rajya Sabha from that State. Though it was contended that this would violate the principle of federalism, this argument found no favour with the Court. The distinction drawn between a *constitutional requirement* under Article 80 (4) and a *prescribed qualification* under Article 84 forms the crux of this decision. Since domicile does not fall into the former category, the Legislature is given the power to determine the same as per the latter provision. The Court further clarified that the applicability of the basic features standard in testing the validity of legislations, affirming that this particular test could be used only against constitutional amendments.

As for holding that the right to secret ballot of an elected representative is not hamstrung by disclosing the manner of exercise of franchise to the authorized party agent, the Court seems to have the larger public interest in consideration. At the same time, the adverse impact this approach could have on the candidate's freedom of expression guaranteed to her under Article 19(1)(a) and privileges under the Constitution cannot be overlooked.

The remaining two issues which captured constitutional imagination were ones related to the integrity of the elected representatives. Both the 'office of profit' issue and 'the cash for query' scam were indicative of the degenerative state of Indian politics.

Article 103, which gives the President the authority to decide upon the disqualification of Parliamentarians, emerged as a contentious issue when the President returned the Parliament (Prevention of Disqualification)

⁷ (2006) 7 SCC 1.

Amendment Bill 2006 for reconsideration by the Houses. One of the key objections raised by the President with respect to the bill was its retrospective character. Certain offices of profit that had been declared as Offices of Profit by the President have been removed from this category by the Bill. The reconsidered Bill, which received the President's assent, was assailed as being in conflict with Articles 14, 102 and 103 of the Constitution, as no specific criterion had been followed while identifying the 40-odd exempted offices. The Union Government sought to defend this Law by calling it *past precedence* and denied its arbitrariness. This case is now pending before the Supreme Court of India.

The Supreme Court's intervention was also sought after the expulsion of some Members of Parliament who were found guilty of taking bribes to pose questions during the Question Hour in the Parliament. The judgment in *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha*⁸ entails a thorough analysis of the contours of the immunity granted to the members of a House under Article 105 of the Constitution. By holding that the power to expel a member can be validly granted to the House as a power outside that of Articles 101 and 102, and by further restricting the extent of judicial review on the exercise of this power, the Court has endorsed the freedom of the House to regulate its own proceedings. The distinction that the Apex Court has drawn between penalising on one hand and ensuring unobstructed proceedings within the House at the other could go a long way in curbing unethical practices within the house and furthering the true notion of democracy.

The Court could have gone either way while deciding the power of the House to expel a member, but the decision has welcome undertones of the Court's endeavour to shield the rights of the electorate.

Institutional conflicts have been a defining feature of the Indian Constitutional polity. One way of viewing this experience would be, that both the judiciary and the legislature seem to be performing what they think are their constitutionally ordained roles, showing very little deference to each other. If the Court must take an active stand in the governance of the country, and if it chooses to qualify the tension between the various organs of the State as a necessary element of a constitutional polity, then, it must definitely exhibit a reasonable depth of judicial accountability, failing which the exercise of power will always remain circumspect. Given that the sphere of appointments to the higher judiciary have been hijacked by the Supreme Court, fresh thought will have to then be devoted towards working out a new model of judicial accountability.

8 Writ Petition (Civil) No. 1 of 2006, Transferred Case Nos. 82 to 90 of 2006 and Writ Petition (C) No. 129 of 2006

The Contributions

With contributions from four continents and half a dozen countries, the first issue of the Indian Journal of Constitutional Law best depicts our objective to bring together writings from varied constitutional cultures on a single platform. These have been divided into four categories.

For purists, the varied styles of referencing in this issue of the Journal may be discomfoting, but as this issue contains contributions from different legal cultures, we thought it was necessary to maintain diversity in styles as well as the originality of the contributions. However, all efforts have been taken to give complete details of references made.

In Retrospect

What better way to begin than by acknowledging the contributions of two stalwarts in the field of Indian constitutional law?

In the first tribute, Prof. Amita Dhanda celebrates “*the best in Indian legal scholarship*” by reviewing the works of the Late Prof. S. P. Sathe, an astute constitutional scholar, a fascinating teacher and a great humanist. Prof. Sathe was well known not only for his analytical and critical approach towards administrative law, judicial activism and the right to information, which is evident from his writings, but also for translating thought into practice by actively campaigning against corruption and for the rights of the disadvantaged. His ability to write in a simple, yet effective and convincing manner, earned the respect of practioners and academics alike. His demise, a year ago, is truly a great loss to the Indian legal fraternity. While tracing his scholastic evolution, Prof. Amita Dhanda highlights his ability to see both sides of an issue and rightly points out that his scholastic integrity lay in not only taking positions but also in changing them when required. Writing in a lucid style, Prof. Dhanda is indeed at ease while tackling issues on constitutional and administrative law.

Mr. Soli Sorabjee then succinctly recounts the contribution of the Late Mr. M. K. Nambyar, one of India’s finest constitutional lawyers and legal luminaries. Mr. Nambyar’s interpretation of Article 21 of the Indian Constitution in *A.K. Gopalan v. State of Madras*⁹, the first ever constitutional case heard by the Supreme Court of India, was to be accepted as law only in 1978 and later went on to galvanise Fundamental Rights litigation in the country. Perhaps his most memorable contribution would be the introduction of the basic feature doctrine¹⁰ as a ground for reviewing the validity of Constitutional amendments in India in *I. C. Golak Nath v. State of Punjab*¹¹,

9 AIR 1950 SC 27.

an achievement that students of constitutional law seldom recognise.

Articles and Essays

The first article titled 'The Unbearable Wrongness of Bush v. Gore' by Prof. Laurence Tribe forms a part of a series of comments on the infamous case exchanged between Prof. Tribe and Prof. Nelson Lund.¹² We chose to include this previously published article in the first issue of the Journal for a variety of reasons. Firstly, the case itself characterises the (over)active role played by the Judiciary, a phenomenon that an increasing number of constitutional democracies across the world have to grapple with. Secondly, pointing to the misuse of the equal protection doctrine, Prof. Tribe successfully exposes the nakedly biased approach of the American Supreme Court. His pungent criticism of the Court for practicing Constitutional elitism and its inability to engage the people in a conversation about the Constitution's commands, its aspirations, and its shortcomings is particularly noteworthy. More importantly, we hope that his approach to constitutional politics will inspire students of Indian Constitutional Law to abandon pedantic approaches to this wonderful discipline.

Prof. Randal Graham's essay on 'Price Theory and Constitutional Adjudication' raises very significant and thought provoking questions. This is perhaps the first time that a work on Price Theory and Constitutional interpretation has been introduced to the Indian legal fraternity and Prof. Graham deserves due credit for this. As he builds up a novel theory of Constitutional adjudication, he explodes the myth that existing theories of Interpretation like the Originalist, Dynamic, Realist & Postmodernist offer sufficient explanation for the manner in which judges come to their decision. Writing in an effective style, he elucidates on two of the many costs judges may incur while adjudicating: reputation and time, constraints which may not only influence the decisions but also the justification for the decisions. Conceding that the Critics and the economists use different languages to describe judicial behaviour, he nevertheless concludes that both of them tell the same story: of constrained judicial preferences, and finally urges them to work together.

Mr. Arvind Datar has written his article on various amendments that have been made to the Constitution of India. Datar, a practitioner in the Madras High Court and the Supreme Court of India, outlines the

10 See Granville Austin, *WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF INDIAN EXPERIENCE* 199, 201 (1999, OXFORD UNIVERSITY PRESS, NEW DELHI).

11 AIR 1967 SC 1669.

12 See Laurence Tribe, *EROG V. HSUB AND ITS DISGUISES: FREEING BUSH V. GORE FROM ITS HALL OF MIRRORS*, 115 HARV. L. REV. 170(2001) and Nelson Lund, "EQUAL PROTECTION MY ASS!?" *BUSH V. GORE AND LAURENCE TRIBE'S HALL OF MIRRORS*, 19 CONSTITUTION. COMMENT 543(2003).

amendments that he calls, borrowing from Chief Justice Hughes of the United States Supreme Court, 'self-inflicted wounds.' The Constitution of India has been amended more than 90 times ever since it was adopted in 1950. He descriptively takes us through a number of Constitutional Amendments, and attacks them as being primarily unfaithful to the original Constitution. He notes how through the years, Constitutional amendments have been affected for the sole purpose of overturning judgments of the Supreme Court and points out that the purported reasons for Constitutional amendments have been largely farcical and driven by motives, in his view, that are primarily political and populist. In conclusion, he laments that it is not the Constitution of India that has failed its people of India but the elected representatives who have failed the Constitution. Through the eyes of a legal practitioner, the article provides us with an interesting perspective on how the Indian Constitution has survived 56 years of its operation despite repeated amendments.

The violence perpetrated by the law during times of Emergency has always been a contentious issue, especially from the point of view of the negotiation between rights and power. Prof. Alexander N. Domrin explores the 'limits of Russian Democratisation' by capturing the evolution of emergency laws in Russia in his essay. The essay also gives us comparative perspectives on the nature and working of the norms of 'constitutional dictatorship'. Written in a refreshing pattern, the essay traces how emergency laws were structured and implemented in post 1991 Russia struggling amongst the *Duma*, the Party and the Constitutional Court. Further, Prof. Domrin finds the 1993 Constitution to be a step backward from earlier Soviet emergency laws and advocates thorough reforms.

Reason and Reach..., is an introspective work where Prof. Suri Ratnapala measures the reach of the *ex post facto* objection and examines the reasons behind it. Prof. Ratnapala ruminates over two decisions of the High Court of Australia in *Fardon* and *Baker* that exposes the tenuous nature of the protection enjoyed by the Australian public from *ex post facto* law. This expansive work aims to arrive the determination of a doctrinal means to be employed by lawyers in a constitutional system to restrain the enactment of *ex post facto* laws. In order to arrive at this end, Prof. Ratnapala considers historically significant theoretical and judicial objections to *ex post facto* laws. At the core of Prof. Ratnapala's work lies the attempt to defeat 'novel devices' that may, in the future be generated by legislators to undermine the Rule of Law and Separation of Powers, two cardinal principles of constitutional law, to which this piece is a tribute.

Aptly christened '*A Constitution in Search of its Limits*', the essay by

Prof. Rick Lawson explores the development of a European Constitutional order in relation to the reach of the European Convention on Human Rights. He traces the development of the law relating to extra-territorial reach of the ECHR and concludes that Court has distanced itself from its decision in *Bankovic*. As students of Constitutional law, this shift is significant in terms of its effects on the war against terror and is perhaps a good starting point to rethink traditional notions as to the nature and content of constitutionalism. The study of a transnational instrument in inspiring and enforcing Constitutional values is indeed a welcome development.

Notes and Comments

The Right to Private Property as embodied in the Chinese Constitution has been subject to amendments a fair number of times which has resulted in increasingly broadening its scope. This move is perhaps a measure to fortify China's metamorphosis from a socialist polity into a free market economy. The protection of the right over private property is perceived as a prerequisite to encourage investment and wealth creation which are the driving forces of a free market economy. A discord between Constitutional principles and economic policy is averted through bringing the former in tune with the latter. In his note, Professor Han Dayuan has enumerated the Constitutional take on the 'Right to Private Property' highlighting the recent amendment to the same in the year 2004. He has then examined the causes that spurred this shift in determining the sphere of the right to private property in China. Socialism exists as a preambular goal in the Indian Constitution as well. It is also one of the reasons that justified the repeal of the Fundamental Right to Property from the Indian Constitution. Also, the Indian economic policy has undergone a similar transformation in the recent past thus enabling a comparison between the Indian and the Chinese situations.

The comment by Dr. Martin Buzinger is a critique of a recent decision of the Constitutional Court of the Slovak Republic that declares affirmative action policies to be inherently at variance with the Constitutional mandates of Rule of Law, Equality and Non-discrimination. The author tests the rationale of this interpretation against the principles of Equality and Corrective justice within Slovak Constitutional Law as well as within a range of related international instruments. It is pertinent to contrast the assertion of the Court with the Indian experience where the State is empowered to initiate affirmative action policies under the Constitutional scheme. Though the text of Article 12 of the Slovak Constitution is analogous to Article 15(1) of the Indian Constitution, Article 15(4) of the latter, which carves out affirmative action as an exception to the first clause, finds no parallel provision in the former. This leads to a divergence in the approach that Prof. Buzinger has traced from the decision of the Court along with the ratio and the

ramifications of the same, in a style that is concise and articulate.

In the comment on curative petitions, the decision of the Supreme Court of India in *Rupa Ashok Hurra v. Ashok Hurra and Anr*¹³ is examined in detail. In this case, the Supreme Court of India allowed ‘curative petitions,’ which the author argues, are very similar to ‘second review petitions.’ He has attempted to locate the jurisprudence behind ‘curative petitions’ and argues that the *ex debito justitiae* obligation invoked by the Court in earlier cases was unduly whittled down by the Court in *Rupa Ashok Hurra*. Comparing the present decision with the one in *A.R. Antulay v. R.S. Nayak*¹⁴, the author points out how the Court misconstrued the *ex debito justitiae* obligation as understood in *A.R. Antulay*. Further, the author also points at the practical difficulties with complying with the guidelines laid down by the Supreme Court with respect to curative petitions.

The last two case comments are centered on the Right to Privacy under the Indian Constitution and seek to explore the subtle fallacy behind the fairly consistent approach the Courts have chosen to adopt in relation to this particular right. The first piece is a comment on the decision of the Apex Court in the case of *Kharak Singh v. State of Uttar Pradesh*¹⁵, wherein the author looks at the current status of this right, the existence of which within the ambit of Article 21 was expressly denied in the aforementioned case. The second is a comment on a recent decision of the Supreme Court on the Right to Privacy where the Court has recognized this right as a component of Article 21. The implication of this and certain other pronouncements on the same issue has been tested against the doctrine of *stare decisis* which is spelt out in Article 141 of the Indian Constitution.

Though both of the aforementioned pieces are comments on cases that delved deep into the conception of the Right to Privacy, the tenor of each is sufficiently distinct from the other. The comment on *Kharak Singh* probes into the tenability of reading the Right to Privacy, an unnamed right, into the expressly enumerated Right to Personal Liberty. The second critique draws upon a whole range of Supreme Court decisions germane to the present discourse in order to demonstrate the non-adherence of the Court to the doctrine of *stare decisis* while holding Right to Privacy to be part of Article 21.

Book Review

The final write up in the first issue, is a book review of Gary Jacobsohn’s *Wheel of Law: India’s Secularism in Comparative Constitutional Context*. Writing in his inimitable style, Prof. Upendra Baxi problematizes comparative

13 (2002) 4 SCC 388.

14 (1988) 2 SCC 602.

15 AIR 1963 SC 1295.

constitutional studies (COCOS). Observing that the moderation of hegemonic intent in fashioning comparative narratives is never an easy task, he commends Jacobsohn for developing an alternate vision to COCOS in comparison to the Euro-American model. Prof. Baxi provides interesting comments on Jacobsohn's use of Constitutional iconography in studying secularism and reminds us of the fact that secular teachings may not just subvert hierarchies but also reinforce it. Lauding the author's efforts in bringing fresh perspectives into analysing Indian secularism, Prof. Baxi makes a distinction between governance oriented secularism and rights oriented secularism. He remarks that the book "constitutes a remarkable COCOS genre" and concludes by highlighting novel pedagogical tools that Jacobsohn has introduced in his work.

Acknowledgments

It is for the first time in India that an effort of this scale is being undertaken and we have been helped in our endeavour by many enthusiasts.

Firstly, we profess our sincere thanks to Prof. Ranbir Singh, Vice-Chancellor, NALSAR University of Law and Prof. Ghanshyam Singh, Registrar for their untiring support and encouragement in bringing out the Journal. The generosity of Mr. K. K. Venugopal and the M. K. Nambyar SAARCLAW Charitable Trust has been instrumental in supporting this initiative. The Advisory Board of the Journal has been a source of inspiration as well as a constant guiding light; our gratitude is due to them also. We wish to thank Constitutional Commentary, University of Minnesota, Minneapolis, United States for giving us the relevant permissions to reprint Prof. Tribe's article.

The Faculty at NALSAR has always lent us a helping hand. We express our sincere gratitude to Prof. Kalpana Kannabiran for having actively encouraged and supported this initiative. Our special thanks to Ms. M. Maithreyi and Mr. Gopal Sankaranarayanan for their support and imaginative ideas. We would also need to thank the administrative staff for assistance they have rendered. Finally, we express our gratitude to all those students and alumni of NALSAR University of Law, especially Mr. R.V. Yashas and Mr. Pritam Baruah, for having wholeheartedly supported our efforts.

The first issue of the Indian Journal of Constitutional Law is dedicated to all the defenders of constitutional values in India.

Board of Editors
June '07

POWERING RESPONSIBILITY, CONSCIENCE KEEPING IN PUBLIC LAW: THE SCHOLARSHIP OF S. P. SATHE

*Amita Dhanda**

§ Introduction

Good wine, one is told, ripens with age. Similar claims are not always made about ageing scholars who are often described as burnt out or repetitive. Prof. Sathe was one of those who falsified this opinion, as in him, youthful exuberance combined with the glowing confidence of wisdom and maturity. It was this *joie de vivre*, which makes his sudden departure so difficult to take, though one cannot but notice that even the final exit bore his characteristic trademark of unassuming grace.

I am not a formal student of Prof. Sathe but have learnt from him in collegial conviviality. As ours was a work mediated relationship, this piece in tribute and remembrance is being written by reviewing his writings. In revisiting his books and articles I hope to highlight the major concerns of his scholarship, and learn from his scholastic evolution. Prof. Sathe was a prolific writer and it is not possible within the space of one article to do justice to his prodigious scholarship. In fact his colleagues at ILS Pune are hard put to compile a comprehensive list of his writings¹. In this article therefore I have primarily limited my attention to five of his major books² in the realm of public law. The overarching theme of each of these books is the relationship between power and accountability. This concern is constant, irrespective of which of the power wielders he studies. Where he alters, is in devising different mechanisms of accountability, for different occupants of the seat of power.

§ Document to Analyse: The Tribunal System in India

As a scholar of public law Prof. Sathe had a natural interest in institutions of adjudication and conflict resolution. This interest was kindled and fuelled by the large scale employment of tribunals to perform dispute resolution functions. There are, he informed “ 95 tribunals set up under 88

* Professor of Law, NALSAR University of Law Hyderabad India.

1 Remembering S.P. Sathe 79-81 (ILS Law College Pune 2006).

2 These are *Constitutional Amendments 1950-1988 Law and Politics* (Tripathi Bombay 1989); *The Tribunal System in India* (Tripathi Bombay 1996); *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press New Delhi 2002); *Administrative Law* (Seventh Edition Lexis Nexis Butterworths New Delhi 2004) and *Right to Information* (Lexis Nexis Butterworths New Delhi 2005).

central statutes³". Such widespread use was not accompanied with reasoned literature informing the general public on the need to employ these adjudicatory institutions. Thus, whilst "(t)he tribunals have grown up sporadically⁴" through ad hoc legislations there is "no official document regarding the general principles applicable to the tribunals⁵". It is this informational vacuum which caused him to take up the study on Tribunals "to find out the common principles and policies that appear in the central statutes under which tribunals are set up"⁶. This exercise he contended was necessary to undertake if tribunals were to be inducted as a deliberated component of legislative design.

In order to appreciate the situations which are better managed through tribunals it was necessary to define a tribunal. He defines a tribunal for the purpose of the study as those institutions which are set up under statutes for discharging the judicial function and are structurally independent of the government⁷. Insofar as tribunals along with courts and special courts are "formally structured adjudicative bodies with judicial function"⁸ Sathe found it necessary to ponder on those conceptual distinctions which differentiate special courts and tribunals. A special court, he informed, was set up to deal with a specific subject matter, however, except for some minor variations to promote speedy disposal it followed the same procedures as the courts. Special courts are not "expected to possess any expertise or policy commitment⁹". Instead the judges are required to be neutral and independent. The speciality thus lies in the particular subject matter or the special procedure¹⁰.

In order to lay the foundational base required for the study Sathe elaborates on the test of "trappings of a court" devised by the Supreme Court to identify tribunals in the context of Articles 227 and 136. A body he pointed out had trappings of a court if it had certain powers of a court such as summoning of witnesses, taking evidence on oath, compulsory production of documents¹¹. Insofar as such powers were conferred on several quasi-judicial bodies these bodies could not be viewed as tribunals but "are mere investigating commissions which can either recommend or report or initiate some action in court"¹². Consequently the Supreme Court has also made it

3 The Tribunal System in India at 1.

4 Ibid.

5 Ibid.

6 Ibid.

7 Id at 2.

8 Ibid.

9 Ibid.

10 Id at 3.

11 Id at 8.

12 Id at 9.

clear that in order to be a tribunal for the purposes of judicial review “the body must in addition to having trappings of a court, be vested with judicial power of the State”¹³. Since a quasi-judicial authority could fulfil this requirement, hence for the purposes of this study Sathe clarifies, along with these two requirements a body would be termed a tribunal if it is conferred with judicial powers only, which it can exercise independent of the Department or Government.¹⁴ Each of these aforementioned requirements Sathe demonstrates have to be cumulatively present for a body to be termed a tribunal. Thus the Election Commission was independent of the government but not a tribunal and as a Lokayukta was not conferred only with judicial power it was not a tribunal but a quasi-judicial body¹⁵.

The reason why I have dwelled on these distinctions introduced by Sathe in such detail is to show the integral connection between the conceptual categories and the objective of the study. If the purpose of the study is to unearth common policies and principles prompting the creation of Tribunals then it is necessary that there should neither be incorrect inclusion nor wrongful exclusion. If Sathe has not included a body merely because it was described as a tribunal; he has also not excluded an institution solely because it was not so named¹⁶. And if the substance and not the form was to dictate the collation of facts on various kinds of adjudicatory bodies, it was essential that the process of definition should be a rigorous one.

Subsequent to this elaborate definitional exercise Sathe has comprehensively described various kinds of tribunals set up under central statutes. On the evidence collected from this examination he provides information on: the appointment process, qualifications, and service conditions, tenure of appointment, powers and procedures¹⁷. The study finds that there is wide but unnecessary variations in the legislative designs on tribunals. On the strength of this evidence he recommends the enactment of “a common law on tribunals prescribing the procedures, powers, mode of appointment, qualifications of members and provisions for appeal or review”¹⁸. And “if special provisions are required for any tribunal they alone could be provided in the statute of incorporation”¹⁹.

13 Ibid.

14 Ibid.

15 Id at 12.

16 See for example chapter 11 from 205-14 where he has treated arbitrators appointed under various statutes as tribunals.

17 See chapter 12 of the study.

18 Id at 221.

19 Ibid.

Sathe had undertaken the exercise in the belief that there are situations and circumstances in which tribunals are the appropriate decision-making body. Therefore he wanted that their establishment as adjudicatory bodies should be a considered and not a mechanical exercise. As he did not think that Tribunals per se endangered the independence of the judiciary he questioned the decision of the Delhi High Court²⁰ whereby they found the Debts Recovery Tribunal as well as the Debt Recovery (Appellate) Tribunal to be ultra vires the Constitution. In fact as he believed that tribunals could be useful alternatives to courts, and could facilitate access to justice, he expresses the hope that the decision of the Delhi High Court be overruled by the Supreme Court²¹. And “Parliament should legislate on tribunals with a view to establishing them as an alternative system of justice on sound principles of openness, fairness and independence²²”

Indian legal scholars have often been criticised for the fact that their writings are heavy on collation of information but weak on analysis. A possible reason could be that the exercise of collation is carried out without sufficient thought being devoted on the objective of the collection. The Tribunal System in India provides useful insights on how to collate and document information without compromising analysis. Or rather the study shows what kind of inquiry necessarily requires extensive documentation and how such documentation should be undertaken.

§ Law in Context: Constitutional Amendments 1950-1988

Another charge which is often levelled against Indian legal scholars is of undertaking the study of law divorced from the socio-political context. In failing to appreciate the connection between law and society they propagate superficial and acontextual legal understanding. Prof Sathe’s treatise on constitutional amendments belies this popular charge. In fact his study successfully shows how it would be impossible to understand the legal process of constitutional amendments divorced from the political process. It is the necessity of appreciating this connection, which explains why “law and politics” is the second title of the book.

Sathe has undertaken a detailed narration of all amendments to the Constitution from 1950-1988²³. In undertaking this narration, he has shown

20 *Delhi High Court Bar Association v. Union of India* AIR 1995 Del 323.

21 The Supreme Court in *Union of India v. Delhi High Court Bar Association*, Case Appeal (civil 4679) of 1995 decided on 14.3.2002 has fulfilled this wish but not perhaps in consonance with the reasoning proffered by Sathe as the court has been greatly influenced by the amendments introduced in the impugned law.

22 *Supra* note 3 at 221.

23 Incidentally this book was published nearly seven years before the Tribunal study. Thus the research technique of creating an information base before voicing opinion or undertaking analysis

how a number of the early amendments²⁴ were prompted by the need to overturn certain judicial decisions. Thus the first amendment was introduced, according to the objects and reasons, because “the citizen’s right to freedom of speech and expression guaranteed by Article 19(1)(a) has been held by some courts ...to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence”²⁵. And the Fourth and the Seventeenth amendments were introduced “to remove roadblocks to social and economic reconstruction”. To exemplify this contention, Sathe points out how whilst by the fourth amendment new categories of laws were accorded the immunity of Article 31A, this immunity unlike the original article,²⁶ protected these laws only from any challenge under articles 14, 19 and 31. This shows, he opines that “(t)he Constitution makers were not against the right to property. They were against unequal distribution of property”²⁷. He finds further confirmation for this opinion, by the second proviso of Article 31-A introduced by the Seventeenth amendment, which required that full compensation was to be paid for land held within the ceiling limit²⁸. By referring to the circumstances surrounding the textual changes, Sathe demonstrates, how this round of amendments was prompted by ideological differences between the legislature and the judiciary.

In order to ensure a political understanding of the process of amendment he distinguishes between the Nehruvian amendments and those mooted during the governance of Indira Gandhi. And here too he makes a distinction between the amendments which were introduced before²⁹ and after her unseating by the Allahabad High Court. The Constitution (thirty eighth) Amendment was the first amendment made during the emergency and it “started the trend towards authoritarianism”³⁰ as it amended Article 123 to provide that the President’s satisfaction on the necessity of promulgating an Ordinance shall not be questioned in any court. This trend was carried further by the thirty-ninth amendment which he describes as “a very

seems to be an integral part of Sathe’s writing style. This finding is confirmed by his other books. Thus for example in his treatise on Administrative Law he voices his opinion with regard to the different writs after outlining how the jurisdiction has been exercised by the High Courts and the Supreme Court. And the monograph on Right to Information carries a comprehensive description of the various state statutes legislating upon information rights before analyzing the central statute.

24 See especially the descriptions surrounding the First, Fourth and Seventeenth amendment of Constitutional Amendments, supra note 2 from pp.7-16.

25 Id at 15.

26 The original article made the included laws immune from the challenge of all fundamental rights. *Constitutional Amendments* at p.15.

27 Ibid.

28 Id at 16.

29 He describes the amendments introduced by the 31st to the 37th Constitutional Amendment Act from 1973 to 1975 id at pp.24-25 to show their routine nature.

30 Id at 25.

personalised amendment”³¹. Again in true Sathean style he informs that the amendment added *inter alia* the Representation of Peoples Act 1951 with the 1974 amendments; the Maintenance of Internal Security Act 1971; the Foreign Exchange Regulation Act 1973. And then explains that “we are mentioning the names of these Acts because they were totally alien to the culture and pattern of the IX Schedule as it had emerged since 1951”³². These inclusions showed that “(o)riginal thematic loyalty as well as discretion to include minimum number of laws seemed to have deserted the decision-makers”³³.

Sathe was a great believer in institutional integrity³⁴. He was of the opinion that every institutional entity was suited to perform a particular function, and responsible public functioning required that no public entity should trench into the role of another. Thus whilst he did not believe that the power of constitutional amendment was uncontrolled, he believed that the control should be exercised by the political instead of the judicial process³⁵. It was due to this belief that he took issue with the basic structure doctrine. However he had little hesitation in reconsidering his views when he found the political process providing what he called a command performance. It was as he said not the substance but the speed with which the 39th Constitutional Amendment barring prime-ministerial elections from being challenged in Court was passed,³⁶ which caused him to question, whether the political process should be viewed as the sole guarantor of the responsible exercise of constituent power.

It is scholastic integrity which causes him to view an amendment shorn of its populist perception. Thus whilst evaluating the 52nd Amendment, he acknowledges that the anti-defection legislation was welcomed because the country was so fed up with defections. This popular endorsement does not

31 Id at 28.

32 Ibid.

33 Id at 29. In tune with this contention of original thematic loyalty he continually presses for the Supreme Court to weed out those laws, which have been included in the 9th schedule after *Kesavananda Bharti* if they have no connection with articles 31-B and 31-C. Id at 83-84. The ruling of the Supreme Court in *I R Coelho v. State of Tamil Nadu* Civil Appeal 134445 of 1976 decided on 11.1.2007 seems to be a step in this direction.

34 The above discussion on tribunals shows that he took issue with requiring any one kind of body to perform the function of another. And to that end it was necessary for him to continually probe into the core functions of each institution of governance.

35 On the implied limitation on the constituent power of amendment see S.P. Sathe, *Fundamental Rights and Amendment of the Indian Constitution* (1968) as cited in *Constitutional Amendments* id at 72.

36 The 39th Amendment was introduced and passed in the Lok Sabha on 7th August. The Rajya Sabha passed it on 8th August. It was ratified by the requisite number of State legislatures on 9th August and received the assent of the President on 10th August. And Mrs. Gandhi's appeal against Allahabad High Court was to come up for hearing on the 11th of August.

prevent Sathe from pointing to the severe restrictions on freedom of speech and expression imposed by the anti-defection legislation. It could prevent a member from voting in accordance with his conscience, as the cost of such voting could be that he loses his membership of the house. This anomalous situation causes him to comment that “(d)efections have to be banned but that should be achieved without sacrificing an individual’s freedom to vote. Otherwise the anti-defection legislation instead of liberating democracy would make it more crippled”³⁷. The fact that the proposal to appoint jurists to the High Court was proposed in the infamous 42nd Amendment did not prevent Sathe from applauding the proposal as “well conceived³⁸” however he simultaneously conceded that “such was the low stock of the government with the people that it was misunderstood. It was felt that it was meant to facilitate politically motivated appointments”³⁹.

The ability to see both sides of an issue was an integral feature of Sathe’s scholarship. It was this ability which caused him to both interrogate and accept the basic structure doctrine which he said was a mechanism to save democracy from democracy. However this endorsement was not absolute and uncritical. Thus whilst holding that “(t)he basic structure doctrine if used with farsight and judiciousness could lend stability to the Constitution without robbing it of its dynamism”⁴⁰. He took care not to give the judiciary a free hand in discerning these basic features and consequently opined:

“What is basic structure will depend upon what is vital to Indian democracy and that cannot be determined except with reference to history, politics, economy and social milieu in which the constitution functions. The Court cannot impose on society anything it considers basic. What judges consider to be basic structure must meet the requirement of national consciousness about the basic structure.”⁴¹

With this formulation, Sathe whilst recognising the need for judicial intervention and activism, introduced a caveat against its indiscriminate use. Thus the people and their will were put forth as the check to balance the power of the Court. This theme of who shall judge the judges he pursued in greater detail in his book entitled “Judicial Activism in India”. And perhaps to foreground his concern with questions of institutional integrity the second title of the book is “Transgressing Borders and Enforcing Limits”.

37 Id at 56.

38 Id at 35.

39 Ibid.

40 Id at 75.

41 Id at 94.

§ Responsive and Responsible Exercise of Power: Judicial Activism in India

In this book, which in many a way can be termed Sathe's *magnum opus*, one encounters all the various features of Sathe's scholarship, albeit in a more evolved form. Thus as in Constitutional Amendments, he undertakes his discussion of judicial activism, by firstly putting in place the conceptual building blocks. Since the monograph is about the role of judicial review in a democracy, he begins his exegesis of judicial activism by defining judicial review, and then showing how in the constitutional construction of judicial review lie the seeds of judicial activism.

Sathe defines judicial review to mean "overseeing by the judiciary of the exercise of power by other coordinate organs of government with a view to ensure that they remain confined to the limits drawn upon their powers by the Constitution⁴²."

This power of oversight he next informs differs from jurisdiction to jurisdiction. As in England, Parliament has been accorded absolute supremacy; the English courts have no power to review legislation enacted by the Parliament. Thus the power of review is limited to ensuring that the executive acts in accordance with the dictates of the legislation. This tenet of parliamentary supremacy was not extended to the British colonies, and courts here were given the power to both review legislative and executive acts in the light of the Constituent Acts, enacted by the British Parliament. However because these Constituent Acts had no bill of rights, the power of review was limited. The courts in countries ruled by Britain, had imbibed the mother country's culture of legislative deference and maximum restraint.

However once a country adopts a written constitution with a Bill of Rights, it is difficult to confine judicial review within these narrow contours. Judicial Review under such a constitution cannot remain technocratic, because a number of expressions in the bill of rights are open-textured, which change meaning as the society grows and develops. "A constitutional court therefore cannot remain a technocratic court forever"⁴³. And a court "giving new meaning to a provision so as to suit the changing social or economic conditions or expanding the horizons of the rights of the individual is said to be an activist court"⁴⁴.

The above delineation is an effort to show how Sathe proceeds brick by brick to pave the connection between judicial review and judicial activism.

42 S.P. Sathe, *Judicial Activism in India* (Oxford University Press 2002) at p.1.

43 Id at 4.

44 Id at 5.

This basic building blocks method continues through the study as Sathe introduces the distinction between negative⁴⁵ and positive activism⁴⁶ and then between judicial activism, populism⁴⁷, excessivism⁴⁸ and adventurism. With these categorisations, which he only illustratively explains, Sathe does not enter into the dichotomous dialogue of activism and restraint, but plots the interventions of the Court on a more complex matrix.

It is possible to appreciate this nuanced analysis, if we recognise that for Sathe the responsible exercise of power was more important than, which body had assumed the responsibility. Thus he was no fetishist who viewed separation of powers as good for its own sake. He wanted the separation to be observed to the extent possible, provided the body on which the power has been conferred exercises it responsibly. He was agreeable to assumption of power by another organ, if circumstances so warranted, provided the intervention was reflexive and not a reflex exercise. He was thus neither an ardent votary of judicial activism nor a compulsive critic. This finding is confirmed again and again, as Sathe painstakingly evaluates judicial decisions from 1950 to 2002, to assess whether the choices of the Court strengthened the democratic polity⁴⁹ or assisted the disadvantaged⁵⁰.

As already mentioned Sathe did not seek the due observance of technical rules for their own sake. In *Basheshwar Nath v. Commissioner of*

45 Negative activism results when the court uses its ingenuity to maintain the status quo. Id at 5.

46 In positive activism the court is engaged in altering the power relations to make them more equitable. Ibid.

47 He refers to the *Unnikrishnan* decision (1993) 1 SCC 645 as an example of judicial populism, as it merely amounted to conversion of a non enforceable directive principle into a non enforceable fundamental right. For a discussion on judicial populism see id at 118-120. Also see pp 143-44.

48 In *All India Judges Association v. Union of India* AIR 1992 SC 165 the Supreme Court issued directions to the Government to create an all India judicial service. The Court, says Sathe, "clearly exceeded its authority". Id at 127.

49 Thus he applauds *Sakal Newspapers Private Ltd v. Union of India*, AIR 1962 SC 305 as the first instance of judicial activism by the Supreme Court because it held that "certain fundamental rights the existence of which was prerequisite to the operation of the democratic process needed to be given greater judicial protection". Id at 54-55. Dwells on the relative merit of *Kesavananda* AIR 1973 SC 1461 and *Golaknath* AIR 1967 SC 1643 to opine "the basic structure doctrine is an improvement over the *Golaknath* doctrine insofar as it is not located in any specific provision such as Article 13(2). Therefore it becomes difficult for Parliament to override it through another constitutional amendment". Id at 78. And is unequivocal in stating that the majority decision in *P.V. Narasimha Rao v. State* (1998) 4 SCC 626 is wrong. This is because "freedom is given to a member of the legislature in his capacity as a representative of the people. He can neither barter it away for a bribe nor be deterred from exercising it due to fear of expulsion from the party. Prosecution for taking bribe does not restrict his freedom on the contrary it enhances it." Id at 91. In *Bommai*, AIR 1994 SC 1918 he adopts a more complex position where whilst conceding that the court could be criticised for acting politically he is quick to point out "that the courts politics has helped the politics of governance become more principled and democratic." Id at 158.

50 Herein of interest is the chapter on public interest litigation (ch 6) where Sathe shows how the Supreme Court made a "subtle shift from a neutralist adversarial judicial role to an inquisitorial affirmative" one. Id at 210.

Income Tax,⁵¹ the Court ruled that fundamental rights could not be waived. The point of dispute in the case could have been decided without going into this question of waiver. Sathe unlike Seervai⁵² does not disapprove, because the court in making this pronouncement was protecting the people against themselves.⁵³ He is impatient with judicial inability to utilise technical rules, where reliance on them, could result in a more socially just or politically astute decision. For example in *State of Rajasthan v. Union of India*,⁵⁴ he was of the opinion that the Court could have refused to intervene on the reasoning that the President's action was not justiciable. "But after saying that the matter was justiciable, its endorsement of the action which was palpably the worst possible abuse of article 356 was indefensible."⁵⁵

At several points in the book, Sathe does desire that the Court should not be trigger happy with the basic structure doctrine, but use it with the utmost restraint. At the same time he also commends the doctrine as a counter-majoritarian check on temporary legislative majorities. He thus neither wants the court to be overly activist nor needlessly passive. Whilst pronouncing upon the Constitution (Fifty Second Amendment) Act, the Supreme Court used the doctrine of severability to save the Anti Defection law, whilst striking down paragraph 7. Sathe points out that when a law is not enacted in accordance with the prescribed procedure, it must fall as a whole. Thus the doctrine of severability did not apply. In tune with his line of matching cure to illness, he forcefully opines "that this was the most deserving case for using the basic structure and the judicial restraint was misplaced".⁵⁶

Sathe evidently believed that to create a political culture of intellectual rigour and honesty, it was necessary that scholars practised what they preached. A standard which he himself did not compromise. Thus he has no hesitation in admitting that in condemning the adoption of the basic structure doctrine he had not understood how the controls exercised by political power needed to be supplemented with judicial power. And whilst analysing the *Mohd Hanif Qureshi v. State of Bihar*⁵⁷ decision he firstly demonstrates how a politically charged issue was converted into a legal issue by the court. The Court tried to satisfy the majority's religious sentiment by upholding the ban on cow slaughter, at the same time, it ruled that the slaughter of cattle other than cows should not be banned, if they are neither

51 AIR 1959 SC 149.

52 H.M. Seervai *Constitutional Law of India* 2nd ed Vol 1, p 94 (1976) as cited in supra note at 198 refers to *Basheshar Nath* "as an example of extreme undesirability of a Court pronouncing on large constitutional questions which do not arise"

53 Supra note at 198.

54 AIR 1977 SC 1361.

55 Id at 150.

56 Id at 93.

57 AIR 1958 SC 731.

capable of yielding milk nor useful for insemination. Sathe had in a piece he wrote in the sixties⁵⁸ criticised the decision as a compromise with the concept of the secular state. Commenting on the decision nearly 40 years later, he most disarmingly opines “today I look at that decision as an act of statesmanship. Judicial decisions cannot be doctrinaire. A court is always negotiating between reality and idealism”.⁵⁹ Sathe who at another point in the book, bemoans that legal education in India seldom looks to law as a process,⁶⁰ shows that scholastic integrity is not in just taking positions but in changing them if events so require you to do.

Even whilst he sees merit in judicial activism, as in his study on Constitutional Amendments, Sathe is anxious about the huge power that the judiciary has acquired. His anxiety is exacerbated by the fact that the Supreme Court through a process of interpretation has also usurped the power of judicial appointments to itself. It is this situation, which causes Sathe to exasperatedly exclaim, “I do not know of any democratic country in which the power of appointing the judges vests in the judiciary itself”.⁶¹ By this act, he holds, the Court has under the guise of interpretation changed the basic structure of the Constitution. The basic structure consists of division of powers between the legislature, executive and the judiciary.⁶²

However despite this anxiety Sathe cannot see an escape from judicial activism. In fact he unequivocally states that even if the political establishment were to perform its job with due efficiency, judicial activism would be required, to give voice to the most marginalised of communities.⁶³ Having conceded the need for activist intervention by the Court, he then finds it necessary, to devise suitable mechanisms of accountability. Here again, as in the monograph on Constitutional Amendments, he sees the power in the will of the people. It is the faith of the people, he holds, that constitutes the legitimacy of the court and judicial activism. By the will of the people, Sathe does not mean that the court should bow down to populist pressures, but he does require the court to have the pulse of popular expectations. And for the court to forge a healthy and vibrant relationship with the polity, he asks it to be less sensitive and more inviting of criticism.⁶⁴ “Criticism of judicial decisions” he asserts “serves as feedback to the judges”⁶⁵. And to allow for

58 S.P. Sathe, “Cow Slaughter: the Legal Aspect” in A.B. Shah (ed), *Cow Slaughter Horns of a Dilemma*, 69 (Lalvani Bombay 1967) as cited in supra note at 271.

59 Id at 271.

60 Id at 173.

61 Id at 126.

62 Id at 126-27.

63 Id at 279.

64 Id a 286.

65 Id at 290.

this criticism to be available without fear he seeks amendments to the law of contempt.⁶⁶

§ Peoples Power and Accountability: The Right to Information⁶⁷

The descriptive analysis made above, shows the importance Sathe accorded to the citizen in obtaining accountability from the governors of power and authority. In this book, he turns his attention to the means and mechanisms by which, the citizens can perform these vigilance duties. Sathe had, in an earlier publication, whilst elaborating on how the Indian Supreme Court had read the right to know in the right to freedom of speech and expression, and asserted, that the right to education should predate the right to information.⁶⁸ As without education, people would be hard put to exercise the right to information. Subsequent to those lectures, the right to education has been inducted as a fundamental right, in the Constitution. He notes this enhanced importance accorded to the right to education, but points to the equivocation in the constitutional provisions, and hence alerts that “considerable amount of social pressure will be needed to make education for all children below 14 years free and compulsory”. Sathe continues to lay stress, on the connection between education and information, which he had made in the earlier study, but also informs that the crusade for the right to information has been spearheaded, by workers and peasants who lacked formal education but had acquired grass roots consciousness of their entitlements as citizens.⁶⁹ This reality again brings home the fact that literacy should be only viewed as one of the components of the right to education.

In characteristic style, Sathe begins his study, by distinguishing between a freedom and a right. And how whilst a guaranteed freedom only required the State not to impede the flow of information; a guaranteed right placed a more positive obligation of making information available to the people.⁷⁰

In line with his belief of the need to understand law as process, he extensively details in the second chapter of the study, how the law has moved from secrecy to transparency; the circumstances in which there was a duty to inform and when information can be withheld, in the relationship between two individuals, between the individual and the state.

In order to appreciate the altered regime that could be ushered in by the new statute, he has recapitulated, the case law relating to one kind of

⁶⁶ Id at 286-87.

⁶⁷ S.P Sathe, *The Right to Information* (Lexis Nexis Butterworths 2005).

⁶⁸ S.P. Sathe, *The Right to Know* (1991) as cited in supra note 64 at 9.

⁶⁹ Supra note 64 at 21-22.

⁷⁰ Id at 15, 27-28.

documents for which the government can claim privilege; the secrecy surrounding the advice of cabinet ministers and the requirements of the Official Secrets Act. Of special interest here, is his re-examination of the decision of the Supreme Court,⁷¹ rejecting the constitutional challenge to section 18 of the Atomic Energy Act 1962. The Court had upheld the non disclosure safeguards employed in nuclear plants, on grounds of security of state. Sathe contends that the safeguards should be disclosed to the people, to save them from future hazards. And the Court should reconsider its ruling, in the light of the transparency regime, ushered in by the new statute. He recognises that security of state is a ground to refuse information even in the Right to Information Act 2005, but insists that such refusal can only be on reasonable grounds, even though the word reasonable has not been included in the new law. The word reasonable, he contends, will have to be read into the new Act, as right to information has been found to be a right concomitant with the right to freedom of speech⁷².

The above discussion shows that Sathe wants transparency to be practised for all manner of information. He is not saying that there may not be circumstances in which security of state may prevail. Instead what he is challenging is the manner in which, the justification of “security of state” is being employed, to halt public scrutiny. In the same spirit, of not creating any holy cows, he has questioned the decision of the Supreme Court in *Indira Jaisingh v. Registrar General Supreme Court of India*⁷³ where the petitioner sought access to the report of a Karnataka High Court Committee, investigating into the conduct of some judges of the High Court. The Supreme Court ruled that it had no power over the High Court, and could not ask for the publication of the report. The best course would be for the petitioner to approach the High Court. Questioning the decision of the Supreme Court, Sathe asks, “did the court not shirk its responsibility..? Is a High Court not within its jurisdiction so far as fundamental rights are concerned? Since the Court has held that the right to information is included within the right to freedom of speech and expression, could it not have issued a writ of mandamus against the High Court asking it to release the report?⁷⁴” And then most evocatively, “why should the conduct of the judges be shrouded in secrecy?⁷⁵” Curiously, Sathe does not subject the regimes of copyrights and patents to a similar scrutiny instead he views them as striking the correct balance between the right to privacy and public access to knowledge⁷⁶. It is

71 *People's Union for Civil Liberties v Union of India* AIR 2004 SC 1442.

72 *Supra* note 64 at pp 52-53.

73 (2003) 5 SCC 494.

74 *Id* at 54.

75 *Ibid*.

76 *Id* at 54-55.

worth speculating, as to whether he would have continued to hold this opinion, upon encountering the arguments of the copyleft and open source movements⁷⁷.

This monograph, like all his other publications, has provided comprehensive documentation of all relevant materials be it : the constitutional recognition of the right to know;⁷⁸ or a comprehensive analysis of all state legislations;⁷⁹ and the central act⁸⁰. Possibly because the book is dealing with a legal development, which would empower the people, and hence strengthen democracy, there is a noticeable optimism in its tone and tenor. He sees immense possibilities for people enforced accountability, and believes that “an informed citizenry is a condition precedent to democracy”⁸¹. In awareness of the distrust of our times, he points out, “despotism and oppression thrive on secrecy and lack of information. Terrorism thrives on secrecy and hate. Both need to be combated through information”⁸².

§ The Evolving Scholar of Administrative Law

In the last segment of this piece, I am elaborating on Prof Sathe’s commentary on Administrative Law, which has run into its seventh edition⁸³. This book was primarily planned as a study aid for the teachers and students of administrative law. The challenge here was how to balance the demands of information and analysis, because if the book was exclusively analytical, then it lost the fresh initiate into the subject. And if an overly descriptive approach was adopted, then the duty to develop critical understanding got sacrificed. This is how Sathe responded to the challenge.

He firstly laid out, the basic building blocks of every key concept in administrative law and then moved on to discuss, how this issue has been dealt with by the legislature and the courts. Thus for example: he would describe the difficulties of classifying an administrative function as quasi-judicial and yet why is it necessary to do so.⁸⁴ What is a jurisdictional question?⁸⁵ And what are the main features of a tribunal;⁸⁶ special features of the writ jurisdiction under the Indian Constitution;⁸⁷ the difference between

77 For a sample of these arguments see the sarai reader on public domain <http://www.sarai.net/journal/reader1.html> (last visited 4.2.2007).

78 Supra note 64 at pp 61-90.

79 Id at pp 91-130.

80 Id at pp 131-160.

81 Id at 2.

82 Id at 4.

83 S.P. Sathe, *Administrative Law* (Lexis Nexis Butterworths 7th edn 2004).

84 Id at 142-43.

85 Id at 269.

86 Id at 300.

87 Id at 460-63.

legitimate expectation and promissory estoppel;⁸⁸ or how the doctrine of proportionality has expanded judicial review⁸⁹ before embarking on more detailed discussion of the area.

Baxi, in his introduction to Massey's *Administrative Law*,⁹⁰ has bemoaned that Indian textbooks in Administrative Law, often deal with their subject in an acontextual manner. In Sathe's book, however, the legal formulae of administrative law are referred to, after explaining the reason for their adoption and how they are operating in practice. Thus, when he deals with parliamentary control of delegated legislation, he informs, how pre-enactment control is exercised by requiring legislations providing for delegated legislation to "be accompanied by a memorandum explaining such proposals, drawing attention to their scope, and also stating whether they are of exceptional or normal character"⁹¹. This rule, he further informs, does not mean much as "the memorandum is usually scrappy and inadequate and fails to give adequate information"⁹². He next informs that the Committee on Subordinate Legislation has taken note of this deficiency and asked for its rectification. However, "inspite of this suggestion the quality of the memorandum annexed to the Bills has not improved much in the matter of giving information"⁹³. Thus Sathe assesses parliamentary control of delegated legislation, not just by referring to the normative efforts, but by also examining the ground level operation of the norms.

One of the major difficulties, in attempting a contextual analysis of administrative law, is the wide terrain of the subject. Sathe has crossed this hurdle by introducing sub-classification. Thus for example, in the introductory chapter itself, he alerts the reader to the patterns of administrative law questions which, arise in different kind of legislations.⁹⁴ In the chapter on tribunals, commissions and regulatory authorities, he has distinguished not lumped, by providing dedicated space to the various kinds of tribunals, commissions and regulatory authorities⁹⁵.

And whilst looking at administrative review of administrative discretion, while his main headings refer to the principles evolved by courts to review discretionary powers, his sub-headings inform us of the operation of these

88 Id at 184-86.

89 Id at 276-78.

90 Upendra Baxi "Introduction" to I.P. Massey, *Administrative Law* at xvi (Eastern Book Company 6th Ed 2005).

91 Id at 73.

92 Ibid.

93 Ibid.

94 Id at 14-16.

95 Id at 289-383.

principles, in specific contexts.⁹⁶

As administrative law is almost entirely judge made law in India, one of the difficulties a textbook writer has to reckon with, is the volatility and inconsistency of judicial law making. Often textbook writers undertake their task, seemingly oblivious, to these contradictions. Sathe has continually referred to the contradictions whether with⁹⁷ or without comment⁹⁸.

It needs to be appreciated that Sathe grew with every edition of his book, and whilst the informative thrust of the book remained, there was both a subliminal and explicit growth, of the critical content. However as he did not wish to alter the primary thrust of the publication, the critical content, primarily came in the shape of thought-pregnant one-liners⁹⁹. This generous use of the one-liner, for a pithy articulation of complex ideas, was an integral part of the Sathean writing style¹⁰⁰ which held him in good stead to continue providing basic information, even as he personally was increasingly more attracted, to analyse what was happening.¹⁰¹

§ In Conclusion

I have already admitted in the introduction that a single piece cannot do justice to the scholarship of Prof Sathe. This task is further complicated by the fact, that Prof Sathe had a penchant for continually stretching himself. Hence whilst constitutional and administrative law were his primary areas of interest, he did not undertake an acontextual and black letter study of these

96 See for example his treatment of non-application of mind at 418-422 or non examination of relevant considerations from 422-430.

97 In the chapter on judicial review, whilst dealing with the various tests devised by courts to deal with error apparent on the face of the record, Sathe refers to Justice Chagla's ruling in *Batuk Vyas v Surat Borough Municipality*, AIR 1953 Bom 153 that an error was apparent if it obvious and self evident, and not become apparent by a process of examination or argument. Sathe concedes that this test should hold good for a majority of cases. However even that test could not handle inconsistency "because an error which may be considered by one judge to be self-evident may not be considered by another". Id at 273.

98 Thus see for example his pointing out how the Supreme Court upheld a provision providing for repeal in *A.V. Nachane v Union of India*, (1982) 1 SCC 205 after opining in *In Re Delhi Laws Act*, AIR 1951 SC 332 that the power of repeal could not be delegated. Id at 47.

99 See for example : "The excessive delegation argument remains the only bulwark against government authoritarianism" id at 55; "It may be worthwhile to consider whether Press Council could be provided greater teeth to deal with recalcitrant journalism" id at 329; "Appointments of judges should not depend upon the veto of a few judges. If they should not be at the mercy of the government they should not be at the mercy of the judges" id at 535; "PIL must be constrained by considerations of feasibility as well as propriety" id at 546.

100 See for example "Transparency in administration was therefore perceived to be a lethal weapon against corruption and abuse of power" supra note 67 at 22 "When populism prevails over legal requisites, the rule of law suffers and in the long run adversely affects the legal culture" supra note 42 at 144.

101 Prof. Sathe, while visiting NASLAR Hyderabad in August 2004, for a series of lectures at the University, admitted in a private conversation that the commentary no longer excited him, and wondered whether he would do another edition.

areas. How principles of administrative and constitutional law impact on excluded and marginal populations, was a constant concern.¹⁰² Amongst his last completed pieces, was an article exploring the freedom of sexuality for women and persons with different sexual orientation.¹⁰³ The piece, uses principles such as prospective overruling, to expose the limitations of the Supreme Court ruling in *Sakshi vs Union of India*¹⁰⁴. Prof Sathe was no orthodox but neither was he a compulsive radical. He saw moderation as an integral component of scholarship, and it is this ability to see both sides of an issue, which makes his argument for the freedom of sexuality constitutionally compelling.

I have already referred to his ability to raise complex questions through pithy one- liners. However what needs to be even more particularly noted is the simplicity of his writing style. His style is testimony to the fact that deep scholarship neither requires jargon nor is dependent on ponderous language. Or more appropriately as he knew his mind and spoke it, he used language to communicate and not to camouflage. He continually shows himself as firm of conviction but open to reason. Further the manner in which he critiqued his own positions, shows that he believed that wrongness was in sticking to an incorrect position, rather than in making an error of judgement.

Our scholastic growth often depends upon the company we keep be it of teachers, colleagues or friends. This intellectual and emotional debt often goes unacknowledged. Herein again Prof Sathe blazed his own trail. Three of the five books I have reviewed in this article have been dedicated to professional colleagues.¹⁰⁵ In his book on Right to Information he most generously acknowledges his colleague Ms Sathya Narayan to go so far as to say that “she actually wrote out the full text of chapter 4”.

Prof Sathe saw legal academics as the conscience keepers of the legal system, which is why he bemoaned the absence of a juristic culture of criticising judicial decisions.¹⁰⁶ In critiquing judicial decisions, he believed, academics provided judges the much required feedback on their work. He adopted the voice of reason backed with evidence, to present his standpoint, and thus kept the dialogue going. The inherent danger of a polarised position is that its opponents find it easy to label and dismiss. However those who show that they are listening as they are speaking, stand a better chance of being able to

102 Administrative Law for the Poor in U. Baxi (ed), *Law and Poverty Critical Essays*; Amita Dhanda and Archana Parashar (ed), *Engendering Law Essays in Honour of Lotika Sarkar*.

103 Archana Parashar and Amita Dhanda (eds) *Redefining Family Law* (Routledge Forthcoming).

104 (2004) 5 SCC 518.

105 Thus Constitutional Amendments was dedicated to Prof A.B. Shah; The Tribunal System in India to his extended ILS family and Judicial Activism in India to Justice V.M. Tarkhunde with the byline “from whom I learnt humanism and human rights”.

106 Supra note 42 at 229.

persuade the opposition to also provide a hearing. Prof Sathe's genre of legal writing, gently prodded his readers to distinguish between right and wrong, by helping appreciate the distinctions between the legally permissible and the legally desirable. The fact that no technical legal wrong has been committed is no reason to believe that the act done or the decision taken was fair and just. In bringing out this distinction between the ethical and the legal, he convincingly shows, why there is need to continually interrogate the legal. He tirelessly carried on this work in his writings and lectures and taught not just his students but so many of us by just being. In saluting his efforts, I on behalf of Indian academia, celebrate the best in Indian legal scholarship.

FROM GOPALAN TO GOLAKNATH, AND BEYOND: A TRIBUTE TO MR. M K NAMBYAR

*Soli J. Sorabjee**

The buzz word today is Incredible India. Be that as it may, it is indeed incredible that a district lawyer practicing in a district court in Mangalore would ultimately occupy centre stage in the Supreme Court and make an invaluable contribution to the evolution and development of our constitutional law. But that is precisely what Meloth Krishnan Nambyar achieved. After practicing in Mangalore for about 10 years during which time he was the Public Prosecutor and Government pleader, he shifted to Madras. He commanded a large and lucrative practice in the Madras High Court for several years especially in cases relating to nationalisation of road transport.

Before he began practicing in the Madras High Court he appeared in 1933 in the Privy Council, instructing Senior Counsel Subba Rao and appeared along with him in the case. The judgment in which his appearance is noted is reported in AIR 1933 PC 167.

Nambyar made his mark as a constitutional lawyer by his appearance and arguments in the case of *A.K. Gopalan v. State of Madras*¹. This case arose out of the detention of a well-known Indian communist A.K. Gopalan. It is a curious coincidence that the full name of his client was Ayilliath Kuttieri Gopalan Nambiar.

Gopalan's case was the first case of seminal significance regarding the interpretation of fundamental rights and their interplay. One of Nambyar's arguments was that the expression "except according to procedure established by law" in Article 21 should not be read literally in the sense that the Court only has to ascertain whether there is a procedure and it is established by law but procedural due process and the principles of natural justice should be read into it. The majority of the Supreme Court in *Gopalan* did not accept Nambyar's argument. In its first historic judgment delivered on 19th May 1950 the Supreme Court placed an unduly narrow and restrictive interpretation upon Article 21 and held that "procedure established by a law" means procedure established by law made by the State; that is to say, the Union Parliament or the legislatures of the State, and refused to infuse the procedure with the principles of natural justice.

* Former Attorney General of India and Senior Advocate, Supreme Court of India.

¹ AIR 1950 SC 27.

Another argument advanced by Nambyar that, preventive detention law could be challenged on the anvil of the fundamental rights guaranteed by Article 19, was also rejected because of the doctrine of mutual exclusivity of fundamental rights evolved by the Supreme Court. The Court's startling conclusion was that Article 21 excluded enjoyment of the basic freedoms guaranteed under Article 19 because Article 19 postulates legal capacity to exercise the rights guaranteed by it and if a citizen loses his freedom by detention he cannot claim the rights under clauses (a) to (e) and (g) of Article 19. Consequently, a law of detention could not be challenged on the touchstone of Article 19.

This unsound doctrine which held the field for a long time was ultimately overruled in 1970 in the Bank nationalization case, *R.C.Cooper v. Union of India*². In *Maneka Gandhi's* case decided on 25th January 1978, Justice Chandrachud stated that

"...the assumption in A.K. Gopalan that certain Articles of the Constitution exclusively deal with specific matters cannot be accepted as correct. Though the Bank Nationalisation case was concerned with the inter-relationship of Articles 31 and 19 and not of Articles 21 and 19, the basic approach adopted therein as regards the construction of fundamental rights guaranteed in the different provisions of the Constitution categorically discarded the major premise of the majority judgment in A.K. Gopalan as incorrect. That is how a seven-Judge Bench in Shambhu Nath Sarkar v. State of West Bengal³ assessed the true impact of the ratio of the Bank Nationalisation case on the decision in A.K. Gopalan. In Shambhu Nath Sarkar it was accordingly held that a law of preventive detention has to meet the challenge not only of Articles 21 and 22 but also of Article 19(1)(d). Later, a five-Judge Bench in Haradhan Saha v. State of West Bengal⁴ adopted the same approach and considered the question whether the Maintenance of Internal Security Act, 1971 violated the right guaranteed by Article 19(1)(d)".

It is ironical that in a property case relating to the nationalization of a bank the restrictive interpretation placed by the Supreme Court in a case involving personal liberty in *Gopalan's* case was over-turned.

Again, it was after 28 years, that the Supreme Court differed from *Gopalan* as to its interpretation of Article 21 and ruled in *Maneka Gandhi's* case, that the expression in Article 21 "except according to procedure

2 (1970) 2 SCC 298.

3 (1973) 1 SCC 856.

4 (1975) 3 SCC 198.

established by law” means a procedure which is just fair and reasonable. Nambyar’s farsighted arguments which if accepted by the Supreme Court in *Gopalan* would have led to a healthy development of constitutional law ultimately secured judicial acceptance by the Apex Court, and Nambyar’s submissions and stand were fully vindicated.

It needs to be noticed that on account of Nambyar’s persuasive advocacy, section 14 of the Preventive Detention Act was struck down as unconstitutional on the ground that it contravened the provisions of Article 22(5) of the Constitution “in so far as it prohibits a person detained from disclosing to the Court the grounds on which a detention order has been made or the representation made by him against the order of detention, and is to that extent *ultra vires* and void”.

Kania C.J. in his judgment in *Gopalan* paid a well deserved tribute to Nambyar in these words: “The Court is indebted to the learned counsel for the applicant [that is Nambyar] and the Attorney-General for their assistance in interpreting the true meaning of the relevant clauses of the Constitution”.

In *West Ramnad Electric Distribution Co. Ltd. v. State of Madras*⁵ Nambyar argued with great force that “where the contravention of fundamental rights is concerned, the legislature cannot pass a law retrospectively validating actions taken under a law which was void because it contravened fundamental rights”. Unfortunately the Supreme Court did not accept that argument. In view of certain observations of the Supreme Court in the eleven-Judge Bench judgment in *I.R. Coelho v. State of Tamil Nadu*⁶ it is arguable that Nambyar’s stand about the incapacity of the legislature to retrospectively validate a law which has been declared void because of violation of fundamental rights has now become acceptable.

In the case of *Deep Chand v. State of Uttar Pradesh*⁷ important constitutional issues were involved. One of the issues was whether the doctrine of eclipse as propounded by the Supreme Court in *Bhikaji Narain Dhakras v. The State of Madhya Pradesh*⁸ could also apply to a post-Constitution law that infringed a fundamental right conferred on citizens. Nambyar was a leading counsel in the case and successfully argued that the doctrine of eclipse cannot apply to any post-constitutional law that infringed fundamental rights conferred on citizens alone. The Supreme Court accepted Nambyar’s argument that a post constitutional law contravening the provisions of Part III of the Constitution “was a nullity from its inception to the extent of such

5 AIR 1962 SC 1760.

6 (2007) 2 SCC 1.

7 AIR 1959 SC 648.

8 AIR 1955 SC 781.

contravention”. The prohibition [imposed by Article 13] “went to the root and limited the State’s power of legislation and law made in spite of it was a still-born one”. The arguments advanced by Nambyar in that case manifest his deep research and study.

Nambyar’s most significant contribution in the field of constitutional law and fundamental rights was his argument in the case of *Golaknath*⁹ that the amending power under Article 368 of the Constitution is not absolute but is subject to certain implied limitations. It was urged that the power of amendment was that by exercise of the power of amendment of the Constitution its essential features cannot be destroyed and thereby the Constitution cannot be damaged. The stand adopted by Nambyar and his arguments apart from reflecting his deep research, study and erudition are evidence of his farsightedness. It can be said that he had an almost prophetic vision of the Supreme Court judgment in 1973 in *Kesavananda Bharati*¹⁰ where the doctrine of implied limitation was accepted. The Court in its path breaking judgment held by majority that the power to amend the Constitution cannot be so exercised as to damage its basic structure. It is a pity that on account of his indifferent health Nambyar could not appear in the *Kesavananda Bharati* case.

It is remarkable that the very arguments advanced by Nambyar in *Gopalan*’s case in 1950 as well as in *Golaknath*’s case in 1967 regarding implied limitations were subsequently accepted by the Apex Court. Nambyar’s sensitivity to fundamental rights and the need for their protection is evident in his submissions and approach to the interpretation of fundamental rights..

Justice Krishna Iyer has paid an apt tribute to Nambyar in these words: “There was a commitment about him in the garb of fundamental rights. He fought the case not for the ideology of his client who was a Communist but for the ideology of human rights which found expression in Part III ...his complete commitment to the human cause”.

Nambyar passed away on 18th December 1975, a few months after the spurious June 1975 emergency was foisted on the country. I was informed by his son K.K. Venugopal, who is a thorough gentleman and a great lawyer in his own right having argued many important constitutional law cases in the Supreme Court, that his father was disturbed by the imposition of emergency and the mala fide detention of reputable political leaders and other persons. On account of his weak health he could not lead an active campaign against the emergency.

9 I.C. Golaknath v. State of Punjab, AIR 1967 SC 1643.

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

I had occasion to be briefed with him in a matter in the Bombay High Court in the case of Century Mills. The legislation was challenged on the ground that it was confiscatory because of some of its provisions. He was courteous, appreciative of whatever little assistance I could give him and generous in his praise. The matter went on for about four days. Justice N.A. Mody who was the presiding judge in the Bombay High Court which was hearing the case requested Nambyar after the case was over to meet him for tea in his chamber. Justice Mody was warm in his appreciation of Nambyar's arguments and his approach.

Subsequently when Nambyar was appearing in the Bombay High Court on behalf of certain persons detained under COFEPOSA, I had occasion to oppose him appearing for the government. Obviously there could be no question of grant of interim relief by way of suspension of the detention orders. Therefore Nambyar forcefully urged that the cases be heard most expeditiously and the government should not be given more than ten days for filing its counter affidavit. He was agreeably surprised when I informed the Court that the government would file its counter affidavit within a week and the matter could proceed to hearing promptly thereafter. I will never forget what he told me after we both left the Court: "Why did you oppose me? You should have been my junior in this matter". To which I replied, "unfortunately the Government of India had briefed me before your solicitors Gagrat & Co. sent me the brief".

There have been many great Indian lawyers. However there can be no doubt that MK Nambyar was one of our greatest constitutional lawyers. On account of the farsightedness and the vision involved in his arguments regarding the interpretation of constitutional provisions, especially fundamental rights, he paved the way for and stimulated, constructive juristic thinking. There could be no better tribute to Nambyar's invaluable contribution to the development of our constitutional law than the fact that his arguments, his stand, his approach towards fundamental rights were ultimately accepted by our Apex Court.

THE UNBEARABLE WRONGNESS OF *BUSH V. GORE*

Laurence H. Tribe*

INTRODUCTION

Again? Another article about *Bush v. Gore*?¹ Is there anything of substance left to say that has not already been said? I think there has to be—as long as there remain serious observers who react to the Supreme Court’s announced equal protection rationale for its stop-the-counting ruling with anything but head-scratching incredulity, and as long as trying to figure out how they convince themselves that the Court’s rationale made sense reveals something of interest and importance about constitutional law. How one reacts to the Court’s equal protection rationale is, of course, affected to some degree by one’s disposition toward the results it produced—although Nelson Lund, for his part, seems far too focused on rationalizing his desired result to see that law professor-non-litigants are no less susceptible to “acquired conviction syndrome”² than are law professor-litigants.

* Tyler Professor of Constitutional Law, Harvard Law School. For his extraordinarily able assistance in the preparation of this comment, I am indebted to Michael J. Gottlieb, who will receive his J.D. degree from Harvard Law School in June 2003. A remarkable student, research assistant, and teaching fellow, Mr. Gottlieb deserves much credit for whatever is right about this essay. For her splendid editorial assistance, I owe my thanks also to Rebecca Onie, another remarkable student and research assistant who will receive her J.D. in June 2003. For whatever remains wrong with this essay, the blame rests squarely with me. The essay’s title was inspired by Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 *Cardozo L. Rev.* 1219 (2002). I must leave to the reader whether any part of this exchange deserves to be linked even nominally with Milan Kundera’s luminous *Unbearable Lightness of Being*.

1 531 U.S. 98 (2000).

2 Professor Lund accuses me of suffering from this syndrome—apparently the result of my role as counsel to Vice President Gore during both the federal and state litigation surrounding the Florida election dispute. See Nelson Lund, “EQUAL PROTECTION, MY ASS!”, *Bush v. Gore* and Laurence Tribe’s *Hall of Mirrors*, 19 *Const. Comm.* 543, 543 (2003) (“Lund, EQUAL PROTECTION”). Nowhere in my Harvard Law Review comment did I ever claim to be a disinterested observer. Quite to the contrary, I disclosed my professional and emotional involvement in the dispute, see Laurence H. Tribe, *eroG .v hsuB and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*, 115 *Harv. L. Rev.* 170, 178-79 (2001), and left to the reader the task of determining whether I had succeeded in offering a persuasive account of the Court’s decision. Professor Lund admits that he wanted to see then-Governor Bush become President, yet seems to believe he is immune from acquired conviction syndrome. See Lund, *EQUAL PROTECTION* at 545 (describing his analysis as “disinterested”). Notably, Professor Lund was a Bush-campaign cheerleader from the first days of the dispute; as the controversy evolved he launched a series of acerbic attacks on the Florida Supreme Court, the Gore campaign, and any observer who expressed sympathy for either. See, e.g., Nelson Lund, *Travesty in Tallahassee*, *Wkly. Std.* 17 (Dec. 18, 2000). Although Lund argued in his capacity as campaign observer that the “only sane approach is to count the votes according to the laws in place on November 7, and accept that result” *id.*, his hindsight-informed conclusion was that the federal judiciary should step in to halt the counting of votes according to those laws if the state’s highest court construes that state’s laws as authorizing “any method or means’ of weighting votes differently depending on where the voters reside.” Lund, *EQUAL PROTECTION* at 551-52.

For Professor Lund, an attempt to write a “disinterested” response to an “unexceptional” article of “daunting volume” and “genuinely indefensible” conclusions³ has produced what is undoubtedly the single most partisan and unself-critical defense of the *per curiam* opinion in *Bush v. Gore*—a defense that is, to borrow what foreign affairs columnist Tom Friedman once aptly said of Benjamin Netanyahu, “deeply, deeply shallow.” While most defenders of the decision have at least struggled with the difficult questions it poses—whether the Equal Protection Clause mandates precisely drawn and completely uniform standards for recounting electoral ballots; whether Article II imposes substantive constraints on a state court’s power to interpret its own state election laws; when federal judicial resolution of state ballot-counting disputes intrudes too far into the responsibilities of the coordinate political branches; when the interests of finality and stability instead justify such federal judicial intrusion and might even justify abandoning some voters’ rights to have their ballots counted—Professor Lund seems to find all these problems easy. *Bush v. Gore*’s critics have not agreed on just where the Court went wrong, and even most of the decision’s defenders, after noting the uniquely hurried and thus arguably extenuating circumstances in which the Court acted, have found something significant to criticize in what the Court did and in what it said. But not Professor Lund. For him, *Bush v. Gore* was “simply not a close case.”⁴ Lund’s loyalty to each argument, idea, and even word used by the Court is, to my knowledge, unmatched in the academic community.⁵ Methinks the Professor doth protest too little.

In writing this comment, I have resisted the temptation to provide yet another version of the events leading up to the Supreme Court’s now famous—or infamous—decision of December 12, 2000. I have already

3 These are all direct quotations from Lund’s characterization of my Harvard Law Review comment. See Lund, EQUAL PROTECTION at 543-45 (cited in note 2).

4 Nelson Lund, The Unbearable Rightness of *Bush v. Gore*, 23 *Cardozo L. Rev.* 1219, 1249 (2002) (“Lund, Unbearable Rightness”).

5 For examples of more balanced contributions to this debate, see generally Richard A. Posner, *Bush v. Gore as Pragmatic Adjudication*, in Ronald Dworkin ed., *A Badly Flawed Election (Debating) Bush v. Gore, the Supreme Court, and American Democracy* 187-213 (New Press, 2002) (defending the decision on crisis-avoidance grounds); Richard A. Posner, *Breaking the Deadlock: The 2000 Election, The Constitution, and the Courts* (Princeton U. Press, 2001) (defending *Bush v. Gore* both on Article II and crisis-avoidance grounds); Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 *U. Chi. L. Rev.* 657 (2001) (defending most of the decision but critiquing the remedy imposed by the Court); Richard H. Pildes, *Democracy and Disorder*, 68 *U. Chi. L. Rev.* 695 (2001) (arguing that *Bush v. Gore* followed naturally from the Court’s vision of democracy); John C. Yoo, *In Defense of the Court’s Legitimacy*, 68 *U. Chi. L. Rev.* 775 (2001) (defending the Court against critiques made against its legitimacy but criticizing it for its equal protection rationale and remedy).

provided a more detailed account than space here will permit,⁶ and many other thoughtful histories exist.⁷ As a result, this comment jumps straight into the deep end of the proverbial pool, assuming all the while that the reader has at least a modest degree of familiarity with the Election 2000 controversy. In Part I, I defend my belief that the Court's *per curiam* opinion cannot be grounded in any previously recognized form of the Equal Protection Clause. I first respond to Professor Lund's suggestion that *Bush v. Gore* was nothing more than a logical extension of "one-person, one-vote" voting rights jurisprudence. I then argue that the Court's failure to grapple with the underlying equal protection issues, and its particularly inexplicable failure to grasp the inconsistency between its own equal protection holding and the remedy on which it settled, evince the almost embarrassing bankruptcy of the rationale the Court's majority adopted.

In Part II, I argue that *Bush v. Gore* presented a political question that most likely never should have been decided—and, at a minimum, provided an answer that never should have been given—by a federal court. In the course of making that argument, I confess both the error of my insufficient attention to the political question problem during the heat of the litigation itself, and the error of my overly mechanical formulation of the "political question" question in my first scholarly analysis of the dispute—published a year later in the Harvard Law Review. And I offer a considerably more nuanced formulation that rejects both Professor Lund's position that the question before the Court was manifestly a justiciable one and my own Harvard Law Review position that the question was categorically non-justiciable, advancing instead a "political process" doctrine according to which political nonjusticiability, in an important class of instances, is akin to nonjusticiability for want of ripeness—rather like a species of failure to exhaust available remedies.

I. THE UNSURPRISINGLY SHOCKING EQUAL PROTECTION RATIONALE

To say that the equal protection holding adopted by the *per curiam* opinion in *Bush v. Gore* was shocking is simply to describe a psychological and cultural reality: as even Professor Lund concedes, most non-specialists viewed the decision as "quite startling, and transparently dishonest."⁸ Scores

6 See Tribe, 115 Harv. L. Rev. at 179-84 (cited in note 2).

7 See generally Abner Greene, *Understanding the 2000 Election: A Guide to the Legal Battles That Decided the Presidency* (New York U. Press, 2001); E.J. Dionne Jr & William Kristol eds., *Bush v. Gore: The Court Cases and the Commentary* (Brookings Institute Press, 2001); Larry J. Sabato ed., *Overtime! The Election 2000 Thriller* (Longman, 2002).

8 Lund, EQUAL PROTECTION at 548 (cited in note 2).

of academics agreed.⁹ I think the technical term for the standard reaction at the time would have to be the one Keanu Reeves voiced in *The Matrix*: “Whoa!”

What are we to make of that reality? If we regard the Constitution as an arcane repository of rules whose meaning is accessible only to a specialized elite, then we might respond with a shrug and reason that, if all but a handful of constitutional lawyers fail to see why the Court’s analysis was correct, all that follows is that most Americans, including most law professors, would be unlikely to earn high grades in an exam on equal protection law. But if instead we share the vision that the task of expounding the Constitution¹⁰ as our nation’s fundamental law entails communicating its contents to the people at large and engaging them in a conversation about its commands, its aspirations, and its shortcomings,¹¹ then so dramatic a disconnect between what the Court says and what people find credible ought to be disconcerting.

Although by December 2000 the Court’s stock of political and moral capital sufficed to enable it in essence to dictate the succession to the presidency, through the agency of the electoral college, of the candidate with half a million fewer popular votes nationally than his opponent—and to do so with a 5-4 decision announced in an opinion that the overwhelming majority of informed observers found incoherent—the brute fact that the opinion and the ruling it rationalized seemed to come out of nowhere and failed to make the slightest sense to those who were told the vote-counting had to stop¹² itself therefore counts heavily, although not decisively, against the Court’s action, even before we consider on their merits the legal arguments offered in its support.

The battle cry that the Florida Supreme Court had been guilty of changing the state legislature’s definition of a lawfully cast vote or of the applicable deadlines, perhaps for partisan reasons, after the polls had closed and thus violating due process or Article II of the Constitution¹³—the principal claim that had been used to make a federal case out of it from the outset—

9 See Law Professors for the Rule of Law at <<http://www.the-rule-of-law.com/archive/supreme/>> (last visited December 29, 2002) (noting support of 673 law professors in denunciation of the *Bush v. Gore* ruling).

10 See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“we must never forget, that it is a constitution we are expounding”).

11 See *id.* (emphasizing importance of public understanding of the Constitution and the resulting necessity that it not “partake of the prolixity of a legal code”). As Justice Hugo Black is said to have told Walter Dellinger when Dellinger served as his law clerk in 1968-69, “Write it so your Mamma can understand it.” Joseph Goldstein, *The Intelligible Constitution: The Supreme Court’s Obligation to Maintain the Constitution as Something We The People Can Understand* 112 & n.9, 190 (1992).

12 See note 76-78.

13 U.S. Const., Art. II (“The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the Certificates and the votes shall then be counted.”).

had, in the end, proven too weak to persuade more than three of the Court's nine Justices.¹⁴ All that remained was the claim, perplexing on the face of it, that equal protection of the laws required giving no protection of the laws to the thousands of still uncounted ballots. Because ballots that looked the same might get counted differently under the Florida Supreme Court's approach depending on when and where they were counted, much larger differences among precincts using dramatically different ballots or counting methods, and between the ballots that were counted and those that were not, had to be ignored—and that in the name of equal protection of the laws! Professor Lund's effort to enlist the support of two of the four dissenting justices for that equal protection holding, the better to fend off the charge that the holding was not just incorrect but utterly bizarre, rests on a transparent exaggeration of what Justice Breyer wrote on the subject¹⁵ coupled with an obvious fallacy: Lund equates the view that equal protection might have required some improvements in the counting method put in place by the Florida Supreme Court with the view that freezing the status quo in mid-count might somehow represent the equal protection of the laws.¹⁶

Against that backdrop, I make no apology for expressing my solidarity with the public outrage and frustration that was concisely if crudely expressed in the logo, "Equal Protection My Ass!", whose appearance on buttons worn by Gore-Lieberman supporters within hours of the Court's decision bespoke not contempt for the Court but disdain for its stated rationale.¹⁷ Such disdain made sense, of course, only if one began with the premise, expressed with

14 Only Justices Scalia and Thomas joined the Chief Justice's concurring opinion relying on Article II. *Bush v. Gore*, 531 U.S. 98, 111 (2000) (Rehnquist, C.J., concurring).

15 See *Bush*, 531 U.S. at 145-46 (Breyer, J., dissenting) (agreeing only that the Florida recount scheme "implicate[d] principles of fairness" that, given the "very special circumstances," may well have "counseled the adoption of a uniform standard to address the problem"). As I have made clear before (and will do again later), the claim that seven Justices "adopted" the Court's equal protection holding is inaccurate. See text at notes 132-136; Tribe, 115 Harv. L. Rev. at 258 n.361 (cited in note 2).

16 To dismiss that as "just" a debate about remedies is like asking: "Apart from that, Mrs. Lincoln, how did you like the play?"

17 I'm frankly baffled that Professor Lund would choose that vulgar slogan for his title and for the centerpiece of his reply—or, for that matter, would use the phrase more than half a dozen times in his text. In *eroG .v hsuB*, I mentioned the slogan twice: once to introduce it, and once to underline my conclusion that a careful examination of each possible rationale that might be used to defend the *per curiam* opinion revealed how justified was the utter frustration expressed by the wearers of those buttons. See Tribe, 115 Harv. L. Rev. at 221, 247 (cited in note 2). Yet, like a child irrepressibly fixated on an adult's use of a dirty word, Professor Lund has chosen to make the slogan on that button—admittedly a tasteless and imperfect expression of emotions ranging from disbelief to rage—central in his critique. In so doing, he has made a regrettable rhetorical move, reframing my dissection of *Bush v. Gore* as a juvenile and disrespectful assault on the Supreme Court. But of course it was nothing of the sort, as any reasonable reading of my painstaking 135-page comment would reveal. Of particular interest in that regard should be the section in which I attempted to explain how *Bush v. Gore* fits into a now familiar pattern of political process cases decided by the Rehnquist Court. *Id.* at 247-54, 287-90.

some frequency by the Court itself, that the “Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.”¹⁸

(A) “One- Ballot, One-Vote” Doctrine?

Professor Lund believes that the disdain, while widely felt, was misguided, and that a careful reading of the cases cited in *Bush v. Gore*, of which there were only a small handful,¹⁹ reveals a doctrinal principle so plain that no disinterested and properly informed observer could find fault with the Court’s application of that principle to overturn the Florida Supreme Court’s December 8 order. Putting to one side the discomforting elitism implicit in his claims, the main thrust of Professor Lund’s doctrinal argument is that the critics of *Bush v. Gore*, myself in particular, like poorly trained students who slept through the basic course in the subject, have simply confused two distinct categories of equal protection cases: those involving suspect classifications, and those involving fundamental rights. Once one wakes up, separates the two categories, and recalls that voting rights cases of course belong on the fundamental rights branch of the equal protection tree, says Lund, it becomes clear that any differential treatment of voters is subject to strict judicial scrutiny and is therefore presumptively unconstitutional regardless of the presence or absence of discriminatory intent. Any state scheme that treats voter A differently from voter B has at least two strikes against it, constitutionally speaking. Aha! Now it’s all clear! How did so many of us manage to forget anything so elementary?

I’ll say this much: Professor Lund’s approach has the appeal of simplicity going for it. The tougher question is what else there is to be said for it. Consistency with precedent certainly isn’t among its virtues. Take the principal case invoked by Professor Lund for the conclusion that the attack on the Florida Supreme Court’s December 8 recount order was properly justiciable rather than political: *McPherson v. Blacker*.²⁰ There, the Michigan Legislature in 1891 had chosen to exercise its Article II responsibility of directing a method of selecting the state’s presidential electors for the national election of 1892 through a statewide popular election in which individual voters were

18 *Planned Parenthood of S.E. Pa. v. Casey*, 505 US 833, 865-66 (1992) (plurality opinion of Justice O’Connor, Kennedy, and Souter). See generally Joseph Goldstein, *The Intelligible Constitution* (cited in note 11).

19 See *Bush*, 531 U.S. at 105-07 (*per curiam*). The fact that the Court could come up with only three cases to support its equal protection holding is not, by itself, proof that the decision didn’t arise from a firm foundation of constitutional doctrine but does add to the burden of anyone who claims that it did.

20 146 U.S. 1 (1892).

divided into separate geographical districts and, as a result, treated differently based upon where they lived (in the sense that demographic and political differences among districts might work either to magnify or to dilute the influence of voters of any given persuasion who find themselves concentrated into relatively few districts rather than dispersed among many). Yet rather than requiring that voters be treated identically without regard to a factor like local residence, the way they are in a system where a single statewide electoral slate is chosen at-large under a winner-take-all system, the McPherson Court unanimously and brusquely rejected the Equal Protection Claim²¹—a holding which the *Bush v. Gore* Court would have reaffirmed in a heartbeat,²² plainly repudiating the simplistic thesis Lund adopts.

In its place there must stand a far richer and more complex (even if rarely articulated) set of assumptions about presumptively acceptable vs. presumptively invalid structures for aggregating the political preferences of individual voters—for assuming some mix of fair treatment of all “groups,” variously identified; effective representation of voters generally; openness to political challenge and change; and treatment of all persons as entitled to equal dignity and respect.²³ As Justice Thomas noted in a widely cited 1994 opinion, even deciding “to rely on single-member geographic districts as a mechanism for conducting elections is merely a political choice,”²⁴ not a neutral fact of nature—just as deciding to use winner-take-all electoral college system, the decision made by all but two states in the 2000 presidential election,²⁵ is a political choice, one with its own mix of consequences for how individual and group preferences are aggregated to yield electoral outcomes and for how various groups, and even the polity as a whole, might in one respect or another be “injured” over time by the resulting structure of political representation.

Of course the McPherson Court was not presented with a sophisticated challenge to the particular method of drawing district boundaries—either in terms of alleged population disparities, intentional or accidental, or in terms of deliberate dilution of the influence wielded by voters of a given race or political party by techniques of packing or of dispersal.²⁶ If it had been, the

21 *Id.* at 40-42.

22 See *Bush*, 531 U.S. at 104 (per curiam); *id.* at 113 (Rehnquist, C.J., concurring).

23 See Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and its Progeny*, 80 N.C. L. Rev. 1411, 1419-27, 1448-55 (2002).

24 *Holder v. Hall*, 512 U.S. 874, 909 (1994) (Thomas, J., concurring in judgment). See also Gerken, 80 N.C. L. Rev. at 1454 n.172 (cited in note 23).

25 Maine and Nebraska were the only two states to use modified systems. See Note, *Rethinking the Electoral College Debate: the Framers, Federalism, and One-Person, One-Vote*, 114 Harv. L. Rev. 2526, 2530 & n.28 (2001).

26 For a description of “packing” and “dispersal” (also known as “cracking”), see generally Bernard Grofman, *Criteria for Districting: a Social Science Perspective*, 33 UCLA L. Rev. 77 (1985).

challenge would have been dismissed as nonjusticiable from the early 1900s,²⁷ until *Baker v. Carr*²⁸ in 1962. After *Baker*, various subspecies of voting rights challenges would have been entertained, either under the “no-exclusion” rubric of *Harper*²⁹ and its progeny; or under the first-generation “no-dilution” framework of *Reynolds v. Sims*³⁰ and its descendants; or under the second-generation “no dilution” rubric elaborated in cases like *Thornburg v. Gingles*.³¹ In all three categories, the Court’s rhetoric and its imagery have gravitated toward notions of individualistic harm; indeed, such notions have been central both to the Court’s acceptance of the challenges as justiciable and to the gradual accommodation of conservative commentators to this entire body of jurisprudence.³² But, as a number of astute observers—most perceptive among them in this respect, perhaps, being Professor Heather Gerken—have shown, the overarching maxim of “one-person, one-vote,” which Professor Lund seems to think can bear the weight of the *Bush v. Gore* decision, cannot in fact be “designed to vindicate a purely individualistic definition of equality”³³ even in its most straightforward application to an equipopulous territorially based scheme of legislative representation, but must “necessarily incorporate[] a structural theory regarding the way votes should be aggregated.”³⁴

It follows that, even if the Florida Supreme Court’s December 8 decision could be said to have launched a scheme under which the “weight” of some individual votes cast in Florida would in some sense be less than the “weight” of other individual votes cast in Florida, that would not by itself even begin to state a prima facie equal protection claim under *Reynolds* or any other line of authority.³⁵ One would need to ask: which groups or categories of votes were being systematically underweighted or undervalued, and to what end? To ask this question does not, as Professor Lund asserts, confuse suspect classification cases with fundamental rights cases. Rather, it recognizes a development in voting rights cases to which Professor Lund

27 See *Giles v. Harris*, 189 U.S. 475 (1903). See also Gerken, 80 N.C. L. Rev. at 1464 & n.211 (cited in note 23).

28 369 U.S. 186 (1962).

29 *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

30 377 U.S. 533 (1964).

31 478 U.S. 30 (1986); see also Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 Mich. L. Rev. 1077, 1093-94 (1991).

32 See Gerken, 80 N.C. L. Rev. at 1464 (cited in note 23).

33 *Id.* at 1453.

34 *Id.* at 1453.

35 Cf. *Oregon v. Mitchell*, 400 U.S. 112, 127 (1970) (noting that “it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection”).

seems altogether blind: as the Court has increasingly turned towards the “fairness” of challenged state election laws, it has become increasingly tolerant of laws that classify voters with politics in mind.³⁶

To illustrate, in *Gaffney v. Cummings*,³⁷ the Court approved of a gerrymandering scheme explicitly designed to produce safe districts for incumbents.³⁸ The Court did not ask whether the state scheme, by placing Democratic voters in predominantly Republican counties (or vice versa), treated voters “unequally” on the basis of geography or party affiliation. Rather, the Court found this “bipartisan gerrymandering” scheme permissible so long as it was not deliberately designed to harm the political strength of any identifiable group. “The reality is that districting inevitably has and is intended to have substantial political consequences.”³⁹ The Court took this reasoning a step further in *Davis v. Bandemer*,⁴⁰ insisting that a mere demonstration of dilution of a particular group’s voting strength was no longer enough. “Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”⁴¹ The relevant test after *Davis* is thus whether the challenged election practice denies a particular group “its chance to effectively influence the political process.”⁴²

36 See, e.g., Gerken, 80 N.C. L. Rev. at 1417-18, 1438-40 (cited in note 23).

37 412 U.S. 735 (1973).

38 *Id.* at 753.

39 *Id.*

40 478 U.S. 109 (1986).

41 *Id.* at 132 (emphasis added).

42 *Id.* at 132-33. Professor Lund attempts to dismiss the importance of *Davis* on the ground that it was merely a plurality opinion. Apparently, the reader is supposed to believe that, because *Davis* commanded no clear majority, the case is not good law. I trust Professor Lund is kidding. First of all, he cites no case to the contrary. Nor could he, for the holding of the *Davis* plurality has been treated as authoritative: despite the fact that political gerrymandering has been held “justiciable,” courts have generally upheld gerrymandering schemes when enacted and defended on the basis of political considerations. See, e.g., *Hunt v. Cromartie*, 526 U.S. 541, 552 & n.7 (1999) (noting that political gerrymandering has been held constitutional despite the lack of clear standards by which to adjudicate such claims). Of course, a strong argument can be made that this has been an unsound doctrinal development. See generally John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?* 56 U. Miami L. Rev. 489 (2002); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593 (2002). But see Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case For Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649 (2002). But Professor Lund does not make that argument. And what’s more, one could agree completely with Professors Ely and Issacharoff and say that the Court ought to play a role in supervising incumbent protecting schemes that block the channels of political change without believing that there should be little or no judicial tolerance for the consideration of politics in the design of systems for recounting ballots. See text at notes 45-67.

Second, as I will discuss later, Justice O’Connor’s concurrence, joined by then-Chief Justice Berger and current-Chief Justice Rehnquist, would have gone even farther than the plurality and held that political gerrymandering claims present nonjusticiable political questions. See text at

Thus, it should have been obvious that merely pointing to hypothetical differences in the “weight” given to the voters of different counties did not describe the sort of deviation that would suffice to invalidate—either conclusively or presumptively—a scheme designed to ensure the legality and completeness of the total vote count. In that regard, it plainly should have mattered that the manual recounts were neither alleged nor shown to discriminate against any discernable group of voters. Professor Lund seems to recognize as much implicitly when he asserts that the differential treatment present in *Bush v. Gore* was not random. He accuses the Florida Supreme Court of accepting “one litigant’s self-serving requests in a particular election . . . at a time when any recount could help only that particular candidate.”⁴³ This formulation is wrong for a number of reasons. First, it is simply not true that the recount could only have helped Gore. Even though Katherine Harris had certified Bush the winner, the election was not yet legally final.⁴⁴ Given the fact that the recount might actually have increased the margin of Bush’s lead, it could have solidified the legitimacy of his claim to office rather than offering any comfort to Gore.⁴⁵ Second, to the extent that the Florida Supreme Court regarded the state’s election laws as requiring an effort to discern and effectuate the intent of the countless voters whose ballots had been discarded, it had no choice but to accept (in a formal sense) the “self-serving” requests of a particular candidate. Why? Because then-Governor Bush refused to request manual recounts, with the result that the only requests before the court were requests to recount the ballots in Gore-leaning counties. Thus, even if the Florida Supreme Court had insisted that any recount be limited to the four Gore-selected counties, which it plainly didn’t do, it would not have been judicial activism, but judicial restraint, that guided its decision.

But the link between *Bush v. Gore* and the voting rights cases, especially *Reynolds v. Sims*, is even more attenuated than that, for at least two reasons.

First, *Bush v. Gore* did not involve a problem of valuing or weighing some votes more than others, much less deliberately packing or diluting groups of voters, but instead involved the obviously distinct problem of differentially treating ballots as evidence of votes. This is far from an irrelevant

notes 137-139. Thus, a clear majority of the Davis Court was of the view that the political gerrymandering claim at issue did not offend the Equal Protection Clause.

43 Lund, EQUAL PROTECTION at 552 (cited in note 2).

44 See *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972) (finding that, “[d]espite the fact that a certificate of election may be issued to the leading candidate within 30 days after the election, the results are not final if a candidate’s option to compel a recount is exercised” and that a recount is “an integral part of the... electoral process... within the ambit of the broad powers delegated to the States by” the Constitution) (emphasis added); see generally Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 Boston U. L. Rev. 609 (2002) (arguing that elections are not legally final until all challenges have been resolved).

45 See note 85.

factual distinction.⁴⁶ It is a distinction of crucial doctrinal significance.

The Florida Supreme Court's remedy did nothing to alter the manner in which legally cast votes were weighed in the overall state scheme to choose presidential electors. At most, the scheme created the possibility that different standards would be used for determining what constituted a legal vote. In the eyes of the *Bush v. Gore* majority, the equal protection violation evidently arose when the recount employed standards that, as applied to the circumstances in Florida as of December 8, unacceptably increased the probability that certain voters would have their ballots counted while leaving the probability unchanged for other voters.⁴⁷ But the much maligned "intent of the voter" standard, on its face, treated all voters equally, just as a "reasonable doubt" standard in criminal law treats all defendants equally. It was only in the application of that standard that equal protection violations could have arisen—and even those violations were correctable under the supervision of a single, impartial state judge, about whose role in the process the *per curiam* opinion said nothing.⁴⁸

The laws challenged in the three cases cited in *Bush v. Gore* involved injuries of an entirely different genus, let alone species. *Reynolds v. Sims* considered a legislative apportionment scheme with population deviations of up to 41 to 1 in certain districts.⁴⁹ A voter in the state's most populous Senate district knew *ex ante* that, in order to elect a single representative, she would have to aggregate her vote with 41 times as many voters as would a voter in the state's least populous district. Unlike *Bush v. Gore*, the state had in place no mechanism capable of correcting the deviation by weighing disparately counted votes equally *ex post*. Similarly, *Gray v. Sanders*⁵⁰ involved a challenge to Georgia's county-unit voting system as a basis for counting votes in the presidential primary. The Court found that Georgia's system had the effect of systematically giving more weight to the votes of rural voters at the expense of urban voters.⁵¹ And in *Moore v. Ogilvie*,⁵² the Court reviewed a ballot-access law that required all nominating petitions for

46 Lund labels my attempt to distinguish cases like *Reynolds* on their facts as illegitimate. See Lund, EQUAL PROTECTION at 550-51 (cited in note 2).

47 See *Bush v. Gore*, 531 U.S. 98, 106 (2000) (noting that "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another").

48 See *id.* at 126 (Stevens, J., dissenting) (noting that the concerns of differing substandards "are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process").

49 377 U.S. 533, 545 (1964).

50 372 U.S. 368 (1963).

51 *Id.* at 379 (finding that the system "in end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties").

52 394 U.S. 814 (1969).

presidential electors to obtain their requisite 25,000 signatures from at least 200 qualified voters in at least 50 counties. According to the Court, the law imposed a “rigid, arbitrary formula to sparsely settled counties and populous counties alike.”⁵³ Even the Court’s use of the word “arbitrary” is a bit misleading, for the Court’s holding unquestionably relied upon the fact that the law made “classifications of voters which favor residents of some counties over residents of other counties.”⁵⁴

When one compares the Florida recount scheme with the laws in *Reynolds*, *Gray*, and *Moore*, it becomes clear that the two groups of cases involve dramatically different sorts of injuries. No individual voter—and no group of voters identifiable *ex ante* by any characteristic like place of residence, party affiliation, or, to take the worst case scenario, identity of the candidate for whom the voter appears to have intended to cast his or her ballot—could claim to be harmed by a substandardless “intent of the voter” standard.⁵⁵ Had the statewide recount been allowed to proceed under the supervision of a single judge, no county, for example, could reasonably claim that its votes were being systematically undervalued as compared to those of another county.⁵⁶

What of the exclusion of overvotes in the Florida Supreme Court’s recount scheme?⁵⁷ Didn’t that treat distinct groups of voters differently? Not at all: there is no discernable class of “overvoters,” and there is nothing in *Reynolds* or any other case preceding or following it to suggest that a state cannot be selective in deciding which types of ballot errors it deems worth recounting, subject only to a requirement of rationality. What’s more, the entire objection to the Florida Supreme Court’s failure to mandate a statewide recount of overvotes while it mandated a statewide recount of undervotes overlooks the crucial fact that thirty-four of Florida’s sixty-seven counties examined overvotes for mistakes in the original machine recount and thus submitted, to the final tally on which the Harris certification of November 26 was based, counts that included “classes of voters” that were not similarly counted in other counties.⁵⁸

53 *Id.* at 818.

54 *Id.* at 817; see also *id.* at 819 (stressing that the law “granted greater voting strength” to one group over another, thus discriminating “against the residents of the populous counties of the State in favor of rural sections”).

55 By “substandardless,” I mean that the “intent of the voter” standard contained no derivative rule-like criteria to direct local election officials in the task of determining what counted as evidence of a voter’s intent.

56 In earlier cases, the Supreme Court had granted considerable deference to state courts in resolving these sorts of equal protection problems. See text at notes 104-110.

57 Overvotes make up the group of ballots that machines originally reject because they are “read” as containing more than one vote for President.

58 See McConnell, 68 *U. Chi. L. Rev.* at 658 n.8 (cited in note 5).

Despite the fact that *Bush v. Gore* therefore involved no allegation of an injury or wrong at all analogous to those considered in the traditional one-person, one-vote cases, or indeed in any line of voting rights precedents, Professor Lund defends an extension of Reynolds's "broader principle": the Constitution forbids the weighting of "votes of citizens differently, by any method or means."⁵⁹ Now, I am no critic of broad principles as such. Nor do I think that Reynolds was wrongly decided.⁶⁰ Still, Professor Lund makes Reynolds so broad that it becomes impossible to take seriously.

Each state delegates to counties and its local officials substantial discretion in the conduct of elections. This delegation creates a virtually unlimited source of equal protection problems under the "broader principle" Professor Lund would extract from Reynolds. The presence of more poll workers in County A might make voting assistance more readily available, thereby "devaluing" the votes of citizens in County B. Meanwhile, County B might use an Accuvote optical scanning device, while County C uses an older punch card system, thus giving greater weight to a vote cast in B than one cast in C.⁶¹ But if County C allowed its voters to cast provisional ballots, and County A did not, the voters of C might be more likely to cast a meaningful vote than voters in A.

Confused? It gets worse. Consider that the Gray Court held that states may protect the right to have one's vote counted from the diluting effect of illegal ballots.⁶² How, precisely, do states go about ensuring that individual votes are not diluted by fraud? Quite simply, they provide mechanisms for protesting and contesting fraudulent counts on a county-by-county, or precinct-by-precinct basis. Imagine an election in the State of Texas in which several voters in one precinct in Dallas have alleged counting fraud. If Professor Lund's equal protection argument is to be taken seriously, the Constitution would prohibit any process that included any adjustment to that precinct's count unless the adjustment were the result of applying a uniform, statewide substandard. If not, the voters of the other precincts in Dallas, the voters of Houston, and the rest of the voters in Texas would have had their votes systematically devalued.

⁵⁹ See Lund, EQUAL PROTECTION at 551 (cited in note 2) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555, 563 (1964)).

⁶⁰ See *id.* at 558.

⁶¹ See Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection From Shaw v. Reno to Bush v. Gore*, 79 N.C. L. Rev. 1345, 1364-65 (2001) ("By any reckoning, the machine variability in undervotes and overvotes exceeds the variability due to different standards by factors of ten to twenty. Far more mischief, it seems, can be created by poor methods of recording and tabulating votes than by manual recounts.").

⁶² *Gray v. Sanders*, 372 U.S. 368, 380 (1963).

It is precisely the impossibility of taking the “broad principle” of *Reynolds* as literally as the Lund argument would take it and applying it to the full range of cases it would address that has led the Court to narrow the decision’s reach considerably. *Reynolds* itself recognized that attention must be given “to the character as well as the degree of deviations from a strict population basis.”⁶³ Even with respect to the degree of deviation, the Court has moved away from a rigid rule requiring near-perfect equality, albeit in limited circumstances.⁶⁴ And with respect to the “character” of deviations, the Court has increasingly permitted deviations so long as the challenged practice does not engage in “discriminatory” treatment of any group of voters. When a legislature’s plan “may reasonably be said to advance [a] rational state policy” (or, when the deviation is “supported by substantial and legitimate state concerns”), the inquiry must then take account of whether the state population variations “are entirely the result of the consistent and nondiscriminatory application of a legitimate state policy.”⁶⁵

Thus, Professor Lund is left with nothing to fall back upon but an argument that the recount’s eyeball-based treatment of ballots was impermissible per se. I have already explained why this argument is really just a poor attempt to justify invalidating the recount on substantive due process grounds.⁶⁶ But perhaps more importantly, any claim that the Constitution requires that all ballots be treated identically is indefensible on its face. Indeed, it would make no sense even to insist upon a uniform substandard for all ballots when different types of ballots inevitably will not only bear wildly divergent indicia of intent but will differ in ways that are not random with respect to the locale in which the ballots were cast in the first instance. Would it be arbitrary or unreasonable for a state to create a presumption against recounting undervotes in counties with fancy error-averse systems, but to maintain a presumption in favor of recounting undervotes in

63 *Reynolds*, 377 U.S. at 581. See also *Brown v. Thomson*, 462 U.S. 835, 848 (1983) (O’Connor, J., concurring) (“[E]qual representation is not simply a matter of numbers. There must be flexibility in assessing the size of the deviation against the importance, consistency, and neutrality of the state policies alleged to require the population disparities.”).

64 Thus, in *Brown v. Thomson*, the Court affirmed an apportionment scheme with an average deviation of 13% and a maximum deviation of 66%. The Court cited *Reynolds* for the proposition that, so long as states “make an honest and good faith effort to construct districts... as nearly of equal population as is practicable,” the inevitable deviations that result will be permitted in order to allow states to pursue other “legitimate objectives.” *Id.* (citing *Reynolds*, 377 U.S. at 577-78). For other examples of large deviations tolerated by the Court, see *Bd. of Estimate v. Morris*, 489 U.S. 688 (1989); *White v. Regester*, 412 U.S. 755 (1973); *Mahan v. Howell*, 410 U.S. 315 (1973).

65 *Brown*, 462 U.S. at 843-44. Professor Lund is right to note that this standard departs from the traditional form of strict scrutiny that one might find in other Fourteenth Amendment contexts. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Yet neither is such a standard pure rational basis review, for the Court must examine the fit between the deviation from perfect equality and the policy said to advance the state’s legitimate interests.

66 See Tribe, 115 *Harv. L. Rev.* at 237-47 (cited in note 2).

counties with antiquated error-prone systems? Certainly not. Yet the Court's equal protection rationale, as Professor Lund defends it, seems to rule out just such a system. And even within the subset of punchcard ballots, "a dimple next to two punched-through holes may not mean the same thing as a dimple next to [] two merely dimpled chads."⁶⁷

It is in this sense that *Bush v. Gore* appears to put states in a Catch-22: the failure to specify a uniform statewide substandard for recounting may risk invalidation under the "arbitrariness" principle, while the decision to specify such a substandard may inadvertently treat ballots unequally. And this dilemma in turn exposes the absurdity of the Court's freshly-minted "one-ballot, one-vote" principle. Need one actually say it? A ballot is not a person; it is a piece of paper. Often, in order to effectuate the intent of the person behind the ballot, individual pieces of paper must be subjected to case-by-case review.⁶⁸ In its obsessive desire to ensure uniform treatment of ballots, the Court lost focus of the fact that the purpose of the Fourteenth Amendment has always been to protect persons.

The second reason *Bush v. Gore* seems to be such an odd extrapolation from traditional Fourteenth Amendment jurisprudence is that, even if there were some equal protection objection to be made to Florida's scheme if it were allocating independently fundamental rights, the *Bush* Court was at pains to state that the franchise being allocated in that case was one extended by the grace of the state legislature performing its federal Article II role.⁶⁹ This was so, the Court's *per curiam* opinion noted, because the Constitution grants the people no fundamental right to vote in a presidential election.⁷⁰ The Court added that the state legislature could indeed take back what it had given, even after the election had been held.⁷¹ The right the Court protected was therefore a right to distribution, in accord with a Court-imposed norm, of a privilege that the state was free to withhold altogether. In essence, the Court was telling Florida that it could choose either to grant a perfectly

⁶⁷ *Id.* at 236-37.

⁶⁸ See Tribe, 115 *Harv. L. Rev.* at 238-39 (cited in note 2).

⁶⁹ *Bush*, 531 U.S. at 104 (*per curiam*); *id.* at 112-13 (Rehnquist, C.J., concurring).

⁷⁰ *Bush*, 531 U.S. at 104 (*per curiam*) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."). Contrast, for example, the rights granted to the people in elections for members of the U.S. House of Representatives, see U.S. Const., Art. I, § 2, or of the U.S. Senate, see U.S. Const., Amend. XVII.

⁷¹ *Bush*, 531 U.S. at 104 (*per curiam*) (noting that the State "can take back the power to appoint electors... at any time") (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892)). Some scholars have voiced doubt that this is actually correct. See email from Sanford V. Levinson, Garwood Chair in Law, University of Texas School of Law (Jan. 18, 2003) (on file with author) (arguing that "the 17th Amendment, read in its full import, would make it unconstitutional for a state legislature to deprive the people of the right to elect their own electors").

uniform—as defined ex post in *Bush v. Gore* —“right” to vote for president or not grant any such right at all.

In this sense, the “right” ostensibly protected by the majority in *Bush v. Gore* seems characteristic of a class of entitlements that has received only reluctant federal protection from the Rehnquist Court. At least some in the majority—Chief Justice Rehnquist for one⁷²—in nearly every other circumstance have stated unambiguously that the holder of any such state-tethered entitlement must take the bitter with the sweet.⁷³ And even when the Rehnquist Court has rejected this position, it has done so only when the state has either denied the individual entitlement-holder a fair hearing, as in *Cleveland Board of Education v. Loudermill*,⁷⁴ or employed an invidious or otherwise impermissible criterion of distribution.

Professor Lund’s creative deployment of the phrase “EQUAL PROTECTION MY ASS” should not distract the reader from the real slogan at play in his comment: “one-ballot, one vote.” It should now be quite clear that Professor Lund has taken that doctrinal title, extracted it from its roots, severed it from its theory in the one-person, one-vote jurisprudence, and extrapolated it mindlessly to processes of recounting to correct errors. Far removed from a “disinterested” analysis, this is the essence of jurisprudence by slogan.

(B) Of Underlying Inequalities and Inexplicable Remedies

Even if one were convinced that the one-ballot, one-vote principle required judicial intervention in *Bush v. Gore*, it would remain difficult (if not impossible) to justify the Court’s decision to halt the entire political and legal process set in motion⁷⁵ and declare by fiat an end to the presidential election.⁷⁶

I have already described at length the woeful inadequacy of the Court’s explanation for shutting down the recount rather than remanding the case to the Florida Supreme Court.⁷⁷ I am not alone in this aspect of my critique; the Court’s remedy has been criticized by nearly every commentator to

72 See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 559 (1985) (Rehnquist, J., dissenting).

73 For a more detailed discussion of this point, see Tribe, 115 Harv. L. Rev. at 234-37 (cited in note 2).

74 470 U.S. 532 (1985).

75 See *Bush*, 531 U.S. at 110-11.

76 See, e.g., Weinberg, 82 Boston U. L. Rev. at 629 (cited in note 44) (arguing that Bush’s successful equal protection claim made him a judgment winner on a claim unrelated to the merits of Vice President’s Gore challenge to the election—a challenge that demonstrated without doubt that the originally certified count illegally (under Florida law) excluded ballots—but was not sufficient to justify ending a contest process that by law had to be complete before the election result became “official”). See also *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972).

77 See Tribe, 115 Harv. L. Rev. at 263-68 (cited in note 2).

consider the issue, and perhaps this is why Professor Lund's most recent work studiously avoids any mention of the issue.⁷⁸ Yet ignoring the issue does not make it go away. And even Professor Lund must admit that he is in a bit of a bind. Assume that the Florida Supreme Court did in fact interpret Florida law, in conjunction with 3 U.S.C. § 5, to impose a mandatory December 12 conclusion to any and all recounts. Also assume that Professor Lund is correct in his reading of *Reynolds v. Sims*: strict scrutiny must be applied to any state judicial decision that in any way burdens or distributes unequally the fundamental right to have one's vote counted. Given the near-universal recognition that countless votes remained uncounted, and given that the underlying count certified by Katherine Harris included a dizzying array of arbitrary inequalities, deferring to the Florida Supreme Court's December 12 deadline would plainly violate the Fourteenth Amendment.⁷⁹ Under Lund's one-person, one-vote theory, the only constitutionally permissible remedy was a remand.⁸⁰

The closest Professor Lund comes to a response is his argument that the Supreme Court had no reason to consider the inequalities of the underlying count because no one ever "proved any such thing in court. Indeed, Gore never alleged any such thing."⁸¹ This argument defies common

78 In an earlier article, Professor Lund claimed that the Court did not forbid the Florida Supreme Court from conducting a statewide recount under uniform standards. Lund, *Unbearable Rightness*, supra note 4, at 1276 (cited in note 4). Au contraire:

December 12... is upon us, and there is no recount procedure in place... that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional... we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.... Justice Breyer's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18—contemplates action in violation of the Florida election code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. § 102.168(8) (2000).
Bush, 531 U.S. at 110-11.

79 See *United States v. Mosley*, 238 U.S. 383, 386 (1915) (noting that "the right to have one's vote counted is as open to protection" as the right to cast a ballot); see also *South v. Peters*, 339 U.S. 273, 279 (Douglas, J., dissenting) (arguing that the "right to vote includes the right to have the ballot counted"). It is simply not true, as Professor Lund suggests, that the Court had no reason to consider the underlying inequalities. See, e.g., Brief Amicus Curiae of the National Bar Association in Support of Respondents at 6-10, *Bush v. Gore*, 531 U.S. 98 (2000) (arguing that numerous legal votes remained uncounted and that the Fourteenth Amendment forbids disregarding legally cast votes in the name of finality).

80 Professor Lund claims that such a remedy would order "the Florida court to violate Florida law as construed by the Florida Supreme Court." Lund, *Unbearable Rightness* at 1275 (cited in note 4). So what? The Equal Protection Clause trumps state law, and forcing the Florida court to violate its own law is precisely what the Court did when it reversed the Florida Supreme Court's manual recount order—an order that Florida's highest court had determined was required by Florida statute—and "remanded for further proceedings not inconsistent with this opinion." Bush, 531 U.S. at 111.

81 Lund, *EQUAL PROTECTION* at 559 (cited in note 2).

sense. First, precedent counseled in favor of resolving any existing inequalities via inclusion rather than ignoring them through exclusion.⁸² At a minimum, the Court should have justified its departure from this constitutional norm. Second, examples of such inequalities abounded from even a cursory reading of the *Gore v. Harris* opinion.⁸³ And even if one were capable of missing those examples, it is madness to think that the inequalities of the underlying count were somehow peripheral side-notes in *Bush v. Gore*. To the contrary, it was the existence of thousands of uncounted votes, many of which were tossed aside by disparate counting standards, that formed the very basis of the remedy the Court overturned! The right to have one's vote counted was the core of Vice President Gore's state suit from the very start. Finally, Professor Lund cannot simultaneously argue that the Florida Supreme Court acted improperly by "selectively" choosing the remedy suggested by the parties while praising the U.S. Supreme Court for acting with restraint by resisting the temptation to eliminate "all inequalities in a state's election process[]." ⁸⁴

The remedy was and remains indefensible. There is thus no doubt that much of the outrage directed at the *Bush v. Gore* majority has its genesis in the perception that the Court simply handed the presidency to its favored candidate, or at least to the candidate whose rapid and assured victory it preferred to a period of prolonged uncertainty and a potentially untidy presidential transition. Given the likelihood that Bush would have won a statewide recount anyway,⁸⁵ the Court could have minimized the perception that it was engaging in pure politics had it simply allowed the political process to take shape. The Court insisted on just such an approach when it considered

82 See Karlan, 79 N.C. L. Rev. at 1363 (cited in note 61).

83 772 So. 2d 1243, 1258-61 (Fla. 2000).

84 Lund, EQUAL PROTECTION at 559 (cited in note 2).

85 In part III of his essay, Professor Lund attacks me for arguing "that Bush would almost certainly have become President even if the Court had not decided this case in his favor, and that this would have been apparent to the Justices when they decided *Bush v. Gore*." Lund, EQUAL PROTECTION at 567 (cited in note 2). Lund drops one shoe by using my hindsight-driven reflection to engage in a bit of pop-psychoanalysis—I fabricated this prediction, he suggests, in order to demonstrate my ability to stay above the fray of gross partisanship—and then drops the other shoe by citing supposedly contradictory testimony from my co-counsel, Ron Klain. *Id.* at 568.

With all due respect, Professor Lund's "argument" is silly. First, after-the-fact studies have now confirmed what many people suspected: even under the recount specifically ordered by the Florida Supreme Court, it is likely that Bush would have "won" by almost 500 votes. See Ford Fessenden and John M. Broder, Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote, N.Y. Times A1 (Nov. 12, 2001). But see Martin Merzer, The Miami Herald Report: Democracy Held Hostage 9-11 (2001) (arguing that Gore would have won a statewide recount under the Florida Supreme Court's "intent of the voter" standard but that Bush would have won under more detailed substandards).

Second, Professor Lund inexplicably equates my best guess about what the majority "could readily have calculated," with my own personal prediction, made in the midst of a whirlwind of litigation, of what was likely to happen. Of course I believed at that point that a Gore victory was still possible. Yet by December 8, I had begun to have doubts whether Gore could win under any

the closest Senate election in Indiana history. In *Roudebush v. Hartke*,⁸⁶ the Supreme Court forbade a federal district court from shutting down a state manual recount process (on federal constitutional grounds) once a challenger had properly invoked state laws to contest the certification of his opponent.⁸⁷ Recognizing that a contested election certification was but a midpoint in an ongoing electoral process, the Court chose to allow that process to run its course: “A recount is an integral part of the . . . electoral process and is within the ambit of the broad powers delegated to the States.” As we shall soon see, the existence of an ongoing political process should have dictated much more than the question of what remedy to impose.

II. DEFENDING THE “SPECTACULARLY INDEFENSIBLE”—THE POLITICAL PROCESS DOCTRINE

Professor Lund devotes the second section of his comment to attacking my belief—indeed, labeling it “spectacularly indefensible”⁸⁸—that *Bush v. Gore* presented a nonjusticiable political question. In essence, my argument

conceivable scenario. And even while I retained hope, it still seems plain to me in retrospect that the members of the Court who voted to grant certiorari and joined the per curiam opinion would have assumed as of December 9 that, given the structural resolution dictated by the Constitution and the political composition of both the Florida legislature and the U.S. Congress, a Bush victory was exceedingly likely even without the Court’s action to prevent a resumption of the recount process. The main questions were how long that victory would take and how messy it would be. Third, Lund’s attack seems completely baseless when one realizes that he made almost exactly the same observation in an earlier article: “the passing of the December 12 ‘safe harbor’ deadline would virtually have assured intervention by the Florida legislature.... The legislature was already gearing up to appoint a slate of electors directly. Given the makeup of the Florida legislature, and the fact that Bush was the certified winner of the election, it is safe to assume that a slate of electors pledged to Bush would have been selected.” Lund, *Unbearable Rightness*, at 1272 (cited in note 4). One might doubt the power of the Florida legislature to make such a move, but the *Bush v. Gore* majority clearly did not. See *Bush*, 531 U.S. at 104 (per curiam) (noting that Florida could “take back the power to appoint electors... at any time”). If that slate had been selected, the matter would have proceeded (if at all) to the U.S. Congress, where no one predicted a victory for Vice President Gore.

86 405 U.S. 15, 25 (1972).

87 *Id.*

88 Lund, *EQUAL PROTECTION* at 562 (cited in note 2). It is interesting to note that Professor Lund’s first reaction to the political question doctrine argument was significantly more measured. See Nelson Lund, *An Act of Courage: Under Rehnquist’s Leadership, the Court did the Right Thing*, *Wkly. Std.* 19 (Dec. 25, 2000) (describing as a “plausible interpretation of the Constitution” the belief that the “Twelfth Amendment assigns Congress (rather than the federal courts) the responsibility for correcting such problems”).

Professor Lund’s more recent contention that the political question doctrine is plainly inapplicable dismisses out-of-hand numerous contributions made by many commentators of diverse political stripes. Although I have long believed that the Constitution grants Congress the primary responsibility for resolving presidential election disputes, see Laurence H. Tribe and Thomas M. Rollins, *Deadlock: What Happens if Nobody Wins*, *Atlantic Monthly* 49, 61 (Oct. 1980), I was not the first, nor the last, person to raise such an objection to *Bush v. Gore*. See, e.g., Steven G. Calabresi, *A Political Question*, in Bruce Ackerman, ed., *Bush v. Gore: A Question of Legitimacy* 129-41 (Yale U. Press, 2002); Jeff Polet, *The Imperiousness of Bush v. Gore*, in David K. Ryden, ed.,

was that the Twelfth Amendment,⁸⁹ supported by the 1887 Electoral Count Act, textually committed to Congress the power to resolve electoral disputes in presidential elections, thereby precluding the heavy-handed judicial resolution imposed by the Court when it reversed the Florida Supreme Court's order to conduct a manual recount.⁹⁰ Indeed, I argued that the Court never should have stayed the recount, nor should it have granted certiorari in either of the cases it eventually heard. The Twelfth Amendment's delegation to Congress of the power to resolve disputes over the legitimacy of electoral votes constituted the grand finale of the Constitution's deliberately contemplated political process that, rather than being derailed and taken over by the Supreme Court at the first sign of potential defect, should instead have been allowed to run its course in order to express the "respect due coordinate branches of government."⁹¹

Professor Lund is right to criticize some of the language I used in my first formulation of this argument. Indeed, with the benefit of hindsight, it seems obvious to me that I approached this question too mechanically the first time around. Justiciability is "not a legal concept with a fixed content"⁹² of a rule-like character. Rather, it is a richly-textured doctrine whose proper application is inextricably linked both with the institutional context in which judicial intervention is sought (including the remedial character such intervention would have to take) and with the substantive principles of constitutional law that lie at the foundations of the allegedly "political" question at issue. In *Bush v. Gore*, a case that moved at dizzying speed and involved an unprecedented interplay of institutions in a confusing maze of legal challenges, it seems implausible that any resolution of the ultimate legal battle over the propriety of the Court's intervention in the face of the political question doctrine could be described as plainly right or as plainly wrong. It should not come as a shock, therefore, if "[t]he matter [would] not appear to me now as it appears to have appeared to me then."⁹³

The U.S. Supreme Court and the Electoral Process 278-79 (2d ed. 2002); Jeffrey Rosen, Political Questions and the Hazards of Pragmatism, in Bruce Ackerman, ed., *Bush v. Gore: A Question of Legitimacy* at 145-62; Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 *Notre Dame L. Rev.* 1093, 1105-09 (2001); Samuel Issacharoff, *Political Judgments*, 68 *U. Chi. L. Rev.* 637, 639-41(2001).

89 U.S. Const., Amend. XII ("The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted....").

90 For a fuller version of this argument, see Tribe, 115 *Harv. L. Rev.* at 276-87 (cited in note 2). See generally Laurence H. Tribe, 1 *American Constitutional Law* § 3-13 (Foundation Press, 3d ed. 2000).

91 *Baker v. Carr*, 369 U.S. 186, 217 (1962).

92 *Poe v. Ullman*, 367 U.S. 497, 508 (1961). *Contra* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (noting that "[q]uestions in their nature political... can never be made in this court") (emphasis added).

93 *Andrews v. Styrup*, 26 L. T. R. (N. S.) 704, 406 (Baron Bramwell).

There are obviously times when even the presence of an inherently “political question” does not foreclose the need for and propriety of judicial review. In *McPherson v. Blacker*, for instance, the Supreme Court held justiciable claims relating to the constitutionality of a district-based scheme for choosing presidential electors.⁹⁴ The suit in *Blacker* was filed on May 2, 1891, one day after the legislature passed the challenged state statute and several months before the start of the presidential election that the law was designed to regulate. The Supreme Court of Michigan had already affirmed the constitutionality of the state law in question. There was no process by which petitioners could seek review other than through the Supreme Court. Nor was there a coordinate political branch or process that judicial action could be said to usurp. Congress was assigned no role by the Constitution in reviewing state legislative exercises of Article II responsibility. With no judicially irresolvable question, and no parallel congressional process in place, review and remedy in the Supreme Court were entirely appropriate.

Moreover, it’s quite easy in hindsight to think of different facts under which no “political question” argument could be persuasively marshaled against the Court’s intervention in *Bush v. Gore*. Had the Florida Supreme Court put in place a statewide recount system that said “count the undervotes in precincts where the percentage of non-whites registered to vote was less than 10%” waiting for the political process to correct the error would have been both unnecessary and wrong. Or, if the Florida court had said: “it is clear that the electoral process that our state legislature put in place prior to the election has resulted in a victory for an electoral slate committed to Governor Bush, but we think he’d make a bad president, so we will declare the Gore slate to have been duly selected on November 7,” it would be obvious that the court’s decision would have violated Article II of the Constitution. The reason that *Bush v. Gore* is not analogous is that the Florida court’s decisions in those outlandish hypotheticals are so far outside of the range of constitutionally plausible actions that none of the traditional concerns presented by the political question doctrine would justify tolerating the undeniable offense to the Constitution created in each instance.⁹⁵

It follows that the question posed by *Bush v. Gore* was not unambiguously “political” in the sense that no possible set of facts could have rendered the controversy justiciable—something one can say of only a tiny subset of genuinely “political questions.” Yet to admit seeing ambiguities is not to concede defeat. There are limited sets of constitutional matters that must be resolved by the political branches without judicial review. A Senator’s vote against a bill, or a President’s veto of a bill, on the ground that it violates

⁹⁴ 146 U.S. 1, 23-24 (1892).

⁹⁵ See *Baker*, 369 U.S. at 217; see also text at note 96.

the Constitution obviously cannot be reviewed by the Supreme Court. The “questions” resolved by such votes involve, among other things, textually demonstrable commitments to the political branches, a lack of manageable standards by which to resolve potential challenges, and the potential of embarrassment “from multifarious pronouncements by various departments on one question.”⁹⁶

But those familiar *Baker v. Carr* standards do not tell us enough. Consider the case of *Nixon v. United States*,⁹⁷ in which the Court pronounced that it had no authority to construe the meaning of the word “trial” in the context of a judicial impeachment. The majority in *Nixon* spoke as if the interpretation of what constitutes a “trial” would never be judicially reviewable. It seems plain to me, however, that what the Court must have meant was that the Senate had not gone outside the broad range of interpretations that could be considered acceptable, given the Constitution’s textual commitment to the Senate of the sole power to try impeachments and given the functional considerations that the Court adduced in discussing the way in which a role for the Court in closely or routinely overseeing the impeachment of federal judges could undermine the legitimacy of the Court itself.⁹⁸ Extracting this meaning from *Nixon*’s holding isn’t as difficult as reading tealeaves. Any first year law student could readily dream up hypothetical impeachment proceedings that the Court would probably feel compelled to review: an impeachment decided by a coin flip, a decision delegated solely to the two Senators who represent the state in which the accused judge resides, or an impeachment justified solely on the basis of a judge’s religion would all plainly be justiciable despite the existence of a textual commitment. The majority’s arguable mistake in *Nixon* was its decision to express the political question holding in absolute terms.⁹⁹ But if it was a mistake, it was a typical one. Generally speaking, calling something a political question has served merely as shorthand for saying that the branch initially entrusted with making a decision—or, to put it another way, the institution to which the Constitution has granted the power to resolve such disputes—did so within the outer boundaries of its constitutional authority as policed by the Court.¹⁰⁰

⁹⁶ See *Baker*, 369 U.S. at 217.

⁹⁷ 506 U.S. 224 (1993).

⁹⁸ *Nixon*, 506 U.S. at 229-38 (1993). See *id.* at 253-54 (Souter, J., concurring in the judgment) (“If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply ‘a bad guy,’ judicial interference might well be appropriate.”) (internal citation omitted).

⁹⁹ Justices White, Blackmun, and Souter argued for a more contextual, case-by-case review. See *id.* at 239-40 (White, J., concurring); *id.* at 252 (Souter, J., concurring).

¹⁰⁰ See, e.g., *Nixon*, 506 U.S. at 229-38; *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality opinion) (finding nonjusticiable the question whether the President has the power to terminate treaties

Perhaps, then, the real difficulty is that the political question doctrine really isn't about "political questions." Rather, the doctrine suffers from a "truth in advertising" problem—a problem to which I referred in my Harvard Law Review comment—that is hardly unique to the Court's decision in *Bush v. Gore*.¹⁰¹ Simply put, the political question doctrine is misleadingly named; it really ought to be called the political process doctrine.

To illustrate how this political process doctrine has operated in practice even if not in name, it is important to consider not only cases like *Nixon*, where the Court found institutional comfort in describing as a "political question" ruling an adjudication that rested on an implicit determination that a coordinate branch of government had not in fact unacceptably exceeded its own constitutionally delegated powers, but also cases where the Court could not plausibly rely on this sort of implicit oversight of the political process to operate as a check on constitutional violations.

Recall that it was not until *Baker v. Carr* that the Court treated as reviewable the question whether the ground rules under which an election was about to take place satisfied equal protection norms. The pre-*Baker* Court wrongly treated all apportionment disputes as nonjusticiable, despite the absence of at least some of the traditional reasons for staying the judicial hand and the presence of truly egregious disenfranchisement or gerrymandering problems that the political branches simply refused to or could not realistically be expected to address. In many cases, these apportionment questions were considered "political" simply because they concerned politics.¹⁰² The *Baker* Court thus acted appropriately when it found such apportionment schemes subject to judicial review under the Fourteenth Amendment.

without approval of the Senate); but cf. *id.* at 1007 (Brennan, J., dissenting) (arguing that the political question doctrine, properly understood, "does not pertain when a court is faced with the antecedent question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power" and explaining why "[t]he issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion" and thus "falls within the competence of the courts").

101 Professor Lund irresponsibly suggests that my "truth in advertising" critique of the political question doctrine was actually a critique of the *Bush v. Gore* Court. See Lund, *EQUAL PROTECTION* at 567 (cited in note 2) ("Or, adopting the language that Professor Tribe uses to attack the Supreme Court, one might say that his assertion does 'not fare too well in the truth in advertising department.'") (emphasis added) (internal quotation marks omitted). This entirely misunderstands my argument. See Tribe, 115 *Harv. L. Rev.* at 282 (cited in note 2).

102 See, e.g., *Giles v. Harris*, 189 U.S. 475, 487 (1903) (opinion by Holmes, J.) (holding that the Court could provide no remedy for Black plaintiffs who had demonstrated that they had been denied the right to vote explicitly on account of their race on the grounds that "equity cannot undertake now, any more than it has in the past, to enforce political rights"). The legal community owes a debt of gratitude to Professor Richard H. Pildes for bringing this nearly-forgotten abomination to widespread attention in *Democracy, Anti-Democracy, and the Canon*, 17 *Const. Comm.* 295 (2000).

In later cases, the Court extended Baker's reasoning to cover the ground rules for a primary election, racial gerrymandering, and political gerrymandering.¹⁰³ In these cases, two factors were usually present: first, the challenged state actor seems plainly to have violated some aspect of the Constitution; and second, there was no ongoing political process—recognized in the Constitution's institutional design—to review and resolve disputes of the sort presented so as to vindicate the constitutional values at stake. When the constitutional violation has been less clear, and especially when there has been a process in place fully capable of resolving the dispute in question and vindicating the right at stake, the political process doctrine has operated to deny, or at least postpone, judicial review.

Take, for example, the Court's unanimous decision in *Grove v. Emison*.¹⁰⁴ In *Grove*, two challenges to the reapportionment of the Minnesota state legislative and federal congressional districts were proceeding simultaneously in state and in federal court. Redistricting plans emerged from both the federal and state suits, and the federal district court sought to enjoin enforcement of the state-initiated plan. The Court, through Justice Scalia, found that the abstention doctrine required the federal court to “stay its hands” until the state process had run its course.¹⁰⁵ The Court's reasoning provides support for deference to the political process in cases like *Bush v. Gore*: “In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself.”¹⁰⁶ Justice Scalia, along with all of his colleagues, concluded that, “[a]bsent evidence that these state branches will fail timely to perform [their] duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.”¹⁰⁷ It is difficult to believe that the concurring opinion explaining the *Bush v. Gore* Court's grant of a stay on December 9, 2000, could have been written by the same hand: “Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance

103 See *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (exercising judicial review over an Ohio statute regulating the presidential primary process); *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) (finding justiciable equal protection claims based on “purely political” gerrymandering allegations but holding that “bipartisan” gerrymandering did not run afoul of the Fourteenth Amendment); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (finding that redistricting that harms the voting strength of racial groups presented a justiciable question). Despite actively policing the use of race in districting plans, the Court has refused to invalidate districting plans designed to enhance the power of incumbents. Compare *Shaw v. Reno*, 509 U.S. 630, 651 (1993), with *Davis v. Bandemer*, 478 U.S. 109, 131-33, 143 (1986), and *Gaffney*, 412 U.S. at 752-54.

104 507 U.S. 25 (1993).

105 *Id.* at 32 (citing *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501 n.1 (1941)).

106 *Id.* at 33.

107 *Id.* at 34.

democratic stability requires.”¹⁰⁸

Indeed, the reasoning in *Grove* applies perfectly to a dispute over which ballots to count in the midst of a presidential election. Once the election machinery has begun to grind away—a particular moment in time which depends entirely on the content of a state’s election code—a process has been set in motion that does not conclude until the requirements of state and federal law have been exhausted.¹⁰⁹ Once the political switch has been flipped to the “on” position, it is normally the political machinery to which micromanaging the process in accord with constitutional standards is and should be entrusted. Unless it is demonstrable that the process itself is structured in such a way that the political branches cannot be trusted to abide by constitutional norms, so that some impermissible form of exclusion or dilution in an identifiable individual’s or group’s rights of political participation might take place without adequate opportunity for timely correction within the process itself, the case for the *deus ex machina* of a judicial SWAT team leaping into the fray, halting the ongoing political process, and attempting to impose its own resolution, is pathetically weak in terms of our constitutional tradition.¹¹⁰

No doubt, there are times when the existence of a later process, capable of reviewing and correcting the alleged constitutional injury, does not by itself operate to render a judicially-imposed remedy improper. When the constitutional right in question is a right to engage in a particular course of conduct free of any state chill or restraint, the state’s deliberate interposition of an obstacle to that course of conduct may be void regardless of any process the state may have put in place to provide after-the-fact compensation. Thus, providing for *ex post* money damages, or pointing to the availability of redress through an open legislative process, would not prevent the judiciary

108 *Bush v. Gore*, 531 U.S. 1046, 1046-47 (2000) (Scalia, J., concurring). It is even more surprising that Chief Justice Rehnquist was willing to agree to this type of *ex ante* invalidation when a single state court judge stood by to provide *ex post* review of individual ballot determinations. Cf. *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972) (White, J., dissenting, joined by Rehnquist, J.) (“To justify striking down the Ohio system [—allowing mayors to sit as judges to resolve certain ordinance violations or traffic offenses—] on its face, the Court must assume either that every mayor-judge in every case will disregard his oath and administer justice contrary to constitutional commands or that this will happen often enough to warrant the prophylactic, *per se* rule urged by petitioner. I can make neither assumption.... I would leave the due process matter to be decided on a case-by-case basis....”).

109 See Weinberg, 82 *Boston U. L. Rev.* at 627-35 (cited in note 44).

110 This tradition dates back to *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (holding that a federal court could not adjudicate a dispute over which of two competing governments was Rhode Island’s real government and finding that Congress, under the guaranty clause, had the exclusive power to resolve the dispute); see also *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 142 (1912) (holding nonjusticiable the question whether a state government is “republican” under the guaranty clause); cf. *O’Brien v. Brown*, 409 U.S. 1, 4 (1972) (noting that “[j]udicial intervention into [inherently political processes] traditionally has been approached with great caution and restraint”); Taylor &

from invalidating unconstitutional legislative restrictions on a woman's right to terminate a pregnancy. Even so, there are plainly other times when a state action temporarily imposes a burden or disadvantage on an individual or group in the course of an ongoing process of adjusting and adjudicating the costs and benefits of life in a complex society. In such cases, the constitutional harm is not considered complete or ripe for judicial review before that process has had an opportunity to engage in the self-correction anticipated by its design. Thus, the Takings Clause may not be deemed to have been violated when a constitutionally adequate avenue for just compensation remains open.¹¹¹ It is in these contexts that the Rehnquist Court has routinely held that "postdeprivation remedies made available by the State can satisfy" the Fourteenth Amendment.¹¹²

The *Bush v. Gore* *per curiam* opinion's decision to halt the recount and freeze the result as certified by Katherine Harris is defensible only if whatever constitutional injury is said to have been done was complete and incapable of being averted or satisfactorily undone by whatever processes lay ahead. Plainly, no "injury" to candidate Bush could conceivably be so described—unless the very existence of some further political commotion on his way to the White House, or the possible discovery that someone else should be there in his stead, can be described as a constitutionally cognizable injury. Nor has anyone suggested any plausible "injury" to any identifiable set of voters in Florida that the recount, with all that lay ahead by way of corrective mechanisms, was bound to inflict and that a halt in the recount would prevent or remedy. Instead, the nature of the equal protection injury in *Bush v. Gore* most closely resembled that in the second category of cases described above.¹¹³ For the structure of the Florida Supreme Court's recount order of December 8, including the role it assigned to the state court judge in addressing alleged inequalities, left open numerous avenues for correcting procedural inequities in ballot counting. And the alleged inequities were so

Marshall v. Beckham, 178 U.S. 548, 580 (1900) ("In the eye of the Constitution, the legislative, executive, and judicial departments of the State are peacefully operating by the orderly and settled methods prescribed by its fundamental law, notwithstanding there may be difficulties and disturbances arising from the pendency and determination of these contests."); see generally Tribe, 1 American Constitutional Law §3-13 (cited in note 90).

111 See *Williamson County Reg. Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) (holding that, when "the government has provided an adequate process for obtaining compensation, and if resort to that process [yields] just compensation, then the property owner has no claim against the Government for a taking") (internal quotation marks omitted).

112 *Parratt v. Taylor*, 451 U.S. 527, 538 (1981). Chief Justice Rehnquist authored the *Parratt* majority opinion. He there concluded that "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." *Id.* at 539.

113 See text at note 108.

complicated and so attenuated that to argue that the Court had before it on December 8 a completed constitutional harm notwithstanding what the Florida courts and legislature, followed by Congress, might have done seems completely bizarre.

That is why nearly everyone—and I mean that literally—was stunned to see the Supreme Court leap in to adjudicate the deadline extension issue in *Bush v. Palm Beach County*.¹¹⁴ Numerous political processes had already been put in place when the Court handed down its dispute-ending decree. First, although it was difficult (if not impossible) to discern any group of voters whose members were being denied the equal protection of Florida's laws, the Florida Supreme Court had set in motion a process designed to lead to a statewide recount to be supervised under a single, impartial magistrate.¹¹⁵ Second, the political branches of Florida's government, assisted by two extraordinarily capable Harvard Law Professors, stood by ready to act "on all the key questions."¹¹⁶ And third, the Court had no reason to believe that the Congress would not act in a constitutional manner to resolve any dispute over what constituted the legitimate slate of Florida's electors had the issue come to the nation's capital.

Rather than let it come, the Court yanked the dispute from the Florida courts, canvassing boards, and legislature, only to decide it under the roof of a building never contemplated as a forum for presidential selection by Florida law or by the Constitution. At least three separate processes were underway. The very process halted by the Court in *Bush v. Gore*, the manual recount, was itself but a corrective step in an ongoing election designed to ensure that individual ballots were fully and fairly translated into votes. The last of the three processes—a combination of Article II, the Twelfth Amendment, and the Electoral Count Act—was designed to ensure the fair representation of each state in the electoral college. Yet the Court carved up complex, multi-step processes into baloney-thin slices—fixing its gaze upon the slice represented by the Florida Supreme Court's December 8 order—as though

114 *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 1004, 1005 (2000) (granting certiorari and asking "[w]hat would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. Sec. 5?").

115 Professor Lund's claim that the Florida Supreme Court ordered a selective recount is, quite simply, a selective reading of the *Gore v. Harris* opinion. See *Gore v. Harris*, 772 So. 2d 1243, 1258-61 (Fla. 2000).

116 See Calabresi, *A Political Question* at 141 (cited in note 88). Indeed, it was those very Professors (Charles Fried and Einer Elhauge) who filed a brief in the first round of litigation claiming that challenge before the Florida Supreme Court, and later before the U.S. Supreme Court, presented a nonjusticiable political question. See Brief of the Florida Senate and House of Representatives as Amici Curiae in Support of Neither Party at 7, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

each were just one still shot in a sequence too complex to view in motion.¹¹⁷ And when the Court lifted just one single slice out of that rich national process in a way that disregarded the inequities the process was attempting to correct (however imperfectly) and the inequities its remedy left in place,¹¹⁸ it upset the integrity of the very electoral college process which ensured that Bush defeated Gore despite the Vice President's capture of the popular vote. There is thus a strong connection between the veritable culture shock set off by the Supreme Court's intervention in the presidential election of 2000 and the proper characterization of the Court's action as a violation of the implicit "political process" doctrine that has governed our national life without much interruption from the outset.

The shock brought about by the Court's intervention should have been less jarring in 2000 than it would have been a decade ago. As I have explained elsewhere, the Court's mistrust of the political branches—along with its "self-confidence in matters constitutional"—reached an all time high at the turn of the millennium.¹¹⁹ Meanwhile, the Court's tolerance for the rough and tumble of politics had reached an all time low.¹²⁰ Most recently, in *Republican Party of Minnesota v. White*,¹²¹ the Court took the position, very much in tension with a strong belief in state sovereignty in structuring each state's processes of self-governance, that states had to make yet another

117 See, e.g., *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

118 At the time *Bush v. Gore* was decided, at least sixteen states besides Florida authorized manual recounts "without specifying a standard for counting ballots." Greene, *Understanding the 2000 Election* at 34-35 (cited in note 7). Additionally, as Justice Stevens's dissent pointed out, the majority of states employed either an "intent of the voter" standard or an "impossible to determine the elector's choice" standard in ballot recounts of various forms without specifying more specific substandards. See *Bush*, 531 U.S. at 124 n.2 (Stevens, J., dissenting). The absence of any successful constitutional challenge to these state laws helps explain why the rationale adopted by the per curiam opinion seemed all-too-convenient to so many observers. And the fact that no voters or political parties had challenged the constitutionality of such laws *ex ante*—unlike the Florida elections laws invoked by Vice President Gore, which had (in earlier forms) been used by previous candidates—should have signaled the Court that the *ex post* requests to invalidate the Florida Supreme Court's interpretation of those laws were self-serving political requests, not colorable claims for federal relief.

119 Tribe, 115 *Harv. L. Rev.* at 288 (cited in note 2); cf. Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 *Colum. L. Rev.* 237, 242-43 (2002) (arguing that the Court should have applied the political question doctrine to the Article II question in both *Bush v. Palm Beach County Canvassing Board* and *Bush v. Gore*; that the Justices' failure even to address the political question problem in the case is evidence that the doctrine no longer operates as an effective check on judicial supremacy; and suggesting that a casual assumption of judicial supremacy also manifests itself in the Court's lack of respect for congressional exercises of power under Article I and Section 5 of the Fourteenth Amendment).

120 *Id.* See also Richard H. Pildes, *Constitutionalizing Democratic Politics*, in Ronald Dworkin, ed., *A Badly Flawed Election: Debating Bush v. Gore, the Supreme Court, and American Democracy* 176-86 (2002).

121 122 S. Ct. 2528 (2002).

all-or-nothing choice. According to White, states that have granted voters the right to participate in the selection of judges must choose either to abandon judicial elections altogether or to leave those elections free of any restraints in the course of a judicial campaign on what judges may announce about what view they take on issues likely to come before them if they are elected.¹²² In essence, states must purchase fairness and integrity and the appearance of both, and thus judicial legitimacy, at the price of excluding the public from direct participation in the process of selecting judges. Who were the five Justices in the majority? The same Justices that made up the *Bush v. Gore* five.¹²³

Even if the Court had invoked the political question doctrine only to rule out remedies that prematurely short-circuited the political process, and had remanded the case to the Florida Supreme Court to conduct a manual recount with uniform standards, it would at least have remained somewhat faithful to our constitutional tradition. Thus, in *Gilligan v. Morgan*,¹²⁴ the Court found nonjusticiable the question whether the training of the Ohio National Guard complied with the Fourteenth Amendment. The *Gilligan* Court did find that the training and control of military personnel pose quintessentially legislative and executive questions. Yet it cannot be doubted that, had the *Gilligan* petitioners proffered evidence that Ohio had trained its guardsmen explicitly to shoot at black students, and never to shoot at white students, the violation of the Fourteenth Amendment would have been so plain as to present a justiciable question despite the difficulties inherent in the judicial management of traditional military functions. Recall, though, that the plaintiffs in *Gilligan* asked the federal courts to create new standards to govern the training of the Ohio National Guard.¹²⁵ It was thus not the subject matter of National Guard training itself that led the Court to invoke the political question doctrine; it was the particular type of judicial remedy—a heavy-handed form of judicial supervision over traditionally political functions—that the Court found precluded by the political question doctrine. The Court concluded that “[i]t would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the

122 *Id.* at 2541-42.

123 *Id.* at 2531.

124 413 U.S. 1 (1973).

125 See *id.* at 6 (noting that the respondents “further demand, and the Court of Appeals’ remand would require, that the District Court establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard” and that, if respondents prevailed, the District Court would be forced to “assume and exercise a continuing judicial surveillance over the Guard to assure compliance with whatever training and operations procedures may be approved by that court”).

Judicial Branch is not—to the electoral process.”¹²⁶ *Bush v. Gore* answered the Court’s challenge.

Was this “political process” doctrine relevant to the *Bush v. Gore* Court, or does this part of my comment represent only the fringe views of a disgruntled law professor? Professor Lund clearly believes the latter, arguing that neither I nor any Supreme Court Justice relied upon the political question doctrine when *Bush v. Gore* was litigated and ultimately decided.¹²⁷ Lund is wrong, at least with respect to the Justices.

Contrary to Lund’s utterly bizarre assertion, Justices Breyer and Souter plainly invoked the political question doctrine. Justice Souter argued that the Court “should not have reviewed” either of the two cases it eventually heard.¹²⁸ “If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedure provided in 3 U.S.C. § 15.”¹²⁹ Armed with a more textured understanding of the political question doctrine, we can see how Justice Souter’s argument invokes both the traditional doctrine and what I have called its political process variant. Second, like the *Gilligan* Court, Justice Souter invoked the political process doctrine with respect to the *per curiam* opinion’s remedy: “[t]he case being before us, however, its resolution by the majority is another erroneous decision.”¹³⁰ Justice Souter would have remanded the case to the Florida Supreme Court to adopt uniform standards for counting disputed ballots, finding “no justification for denying the State the opportunity to try to count all disputed ballots now.”¹³¹

Like Justice Souter, Justice Breyer plainly believed that the appropriate remedy was to remand the case to the Florida Supreme Court to develop a “single-uniform substandard.”¹³² And like Justice Souter, Justice Breyer believed that “no preeminent legal concern, or practical concern related to legal questions, required this Court to hear this case, let alone to issue a stay that stopped Florida’s recount process in its tracks.”¹³³ Justice Breyer mapped out a more elaborate argument than Justice Souter, though. He noted that

126 *Id.* at 10.

127 See Lund, EQUAL PROTECTION at 562-567 (cited in note 2).

128 *Bush*, 531 U.S. at 129 (Souter, J., dissenting).

129 *Id.* (emphasis added). See also *id.* at 130 (arguing that even a dispute over whether Florida intended to comply with the “safe harbor” statute “is to be made, if made anywhere, in the Congress”).

130 *Id.* at 129.

131 *Id.* at 135.

132 *Bush*, 531 U.S. at 146 (Breyer, J., dissenting).

133 *Id.* at 152.

the Constitution, federal statutes, and Florida law all combined to “set forth a road map of how to resolve disputes about electors” that “nowhere provides for involvement by the United States Supreme Court.”¹³⁴ Justice Breyer then used the precise language of *Baker v. Carr*, arguing that the Twelfth Amendment “commits to Congress the authority and responsibility to count electoral votes.”¹³⁵ Justice Breyer’s warning of a loss of public confidence in the Court, which Professor Lund has inexplicably decided is the only relevant part of the Breyer opinion, is ancillary to Breyer’s central conclusion: “[T]here is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court. . . . I think it not only legally wrong, but also most unfortunate, for the Court simply to have terminated the Florida recount. Those who caution judicial restraint in resolving political disputes have described the [characteristics of the] quintessential case . . . [t]hose characteristics mark this case.”¹³⁶

The responsibility for raising the political question argument should not have fallen solely upon Justices Breyer and Souter. The other seven Justices had a duty to discharge their constitutional responsibility as well. Justice Scalia, for instance, might have recalled the principles he elaborated in his *Grove v. Emison* opinion. Likewise, Justice O’Connor and Chief Justice Rehnquist ought to have been particularly sensitive to the argument. Justice O’Connor, joined by then-Justice Rehnquist, had penned a powerful concurring opinion in *Davis v. Bandemer*¹³⁷ that should have counseled deference to the political process in *Bush v. Gore*. In that opinion, Justice O’Connor and Chief Justice Rehnquist agreed that an apportionment scheme that intentionally placed individual voters into different political districts in order to maximize one party’s political strength was both nonjusticiable and, even if justiciable, insufficient to state a claim under the Fourteenth Amendment. The combination of the plurality opinion and Justice O’Connor’s concurrence meant that at least one group of plaintiffs, black voters from center-city Indianapolis who “found themselves placed in multimember, predominantly Republican districts,” suffered an unquestionable and arbitrary dilution of their voting power in order to preserve one party’s hold on power.¹³⁸ This fact did not sway Justice O’Connor or Chief Justice Rehnquist: The legislative business of apportionment is

134 *Id.* at 153.

135 *Id.* (emphasis added). Justice Breyer also cited the Electoral Count Act of 1887, 24 Stat. 373, 3 U.S.C. §§ 5, 6, and 15, and its legislative history, to make the claim that congressional legislation, as well as the Constitution, evinced an existing political process to which the Court should have deferred. *Id.* at 154.

136 *Id.* at 155, 157 (emphasis added).

137 478 U.S. 109, 144-61 (1986) (O’Connor, J., concurring).

138 See Samuel Issacharoff, Pamela S. Karlan, & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 883 (Foundation Press, 2d ed. 2001).

fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out . . . present a political question in the truest sense of the term. To turn these matters over to the federal judiciary is to inject the courts into the most heated partisan issues. . . . [T]he Framers of the Constitution [did not intend] the judicial power to encompass the making of such fundamental choices about how this Nation is to be governed. . . . There is no proof before us that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves.¹³⁹ If a pre-election scheme intentionally designed to entrench one political party at the expense of a discernable group of voters was nonjusticiable then, it is difficult to understand how a during-election court order designed to count ballots cast by voters of unidentifiable parties¹⁴⁰ under the supervision of a single-magistrate could be justiciable now.¹⁴¹

Professor Lund has at least one thing right: “Tribe the litigator” did not advance on behalf of Vice President Gore what now appears to me to be the correct formulation of the political process doctrine. I could try saying that I thought something like that formulation was inherent in my client’s pleas for judicial restraint and deference to the legal and political processes set in motion under Florida’s election code, and that I was content to leave explicit invocation of the political question doctrine to counsel for the Florida Legislature.¹⁴² Or I could try saying that I knew my client would veto the political process argument if I were to advance it.¹⁴³ But I would be lying. The truth is that, in the whirlwind of that moment, I assumed that the Article II and Equal Protection Clause challenges to what the Florida Supreme Court had done on Vice President Gore’s behalf on December 8 in ordering a statewide recount under the rules that the court put in place were justiciable, taking the simplistic, binary view of the matter that Professor Lund sets forth in his reply. In my Harvard Law Review comment, I leaned too far in the direction of nonjusticiability, in essence overcompensating for my earlier assumption of justiciability. With the benefit of hindsight, I have tried to

¹³⁹ Davis, 478 U.S. at 145-52.

¹⁴⁰ Any arguments that assumed the party-identification of the voters in the Gore-selected counties were just that: assumptions.

¹⁴¹ I have not conveniently latched onto Justice O’Connor’s opinion to support my argument. I praised Justice O’Connor’s Davis opinion for presenting “shrewd analysis” shortly after the decision. See Laurence H. Tribe, *American Constitutional Law* §3-13, at 105 (2d ed. 1988). Still, I continue to have reservations about a complete retreat from judicial review of political gerrymandering. See note 42.

¹⁴² See Brief of the Florida Senate and House of Representatives as Amici Curiae in Support of Neither Party at 7, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

¹⁴³ Vice President Gore made a similar decision when he refused to challenge irregularities in numerous military ballots from overseas. See Ronald A. Klain and Jeremy B. Bash, *The Labor of Sisyphus: The Gore Recount Perspective*, in *Overtime! The Election 2000 Thriller* 157 (Longman, Larry J. Sabato, ed. 2001).

articulate a more nuanced understanding of how to assess whether the Court should have intervened in *Bush v. Gore*, or, at a minimum, how to decide what remedy was proper, than either the one I acted on in December 2000 or the one I articulated in November 2001. “If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all.”¹⁴⁴

CONCLUSION

My journey has led me back to where I first began: *Bush v. Gore* was wrongly decided. It is no more right today than it was on December 12, 2000, although my reasons for that conclusion have evolved since that time. I am grateful to Professor Lund for making the wrongness of the decision even clearer than it was before he undertook to defend it as clearly right. I believe I understand the constitutional problems that *Bush v. Gore* surfaced more deeply now than I did two years ago, one year ago, even one month ago. Yet familiarity brings little comfort. Rather, after studying the case for over two years, and after reflecting on a career spent studying, observing, and making arguments in the Supreme Court, *Bush v. Gore*—unlike a wrong decision whose eventual overruling one can seek to achieve and can anticipate with a degree of comfort¹⁴⁵—seems not just wrong, but unbearably so.

¹⁴⁴ *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950) (Jackson, J., concurring).

¹⁴⁵ An example is *Lawrence v. State*, 41 S.W.3d 349 (Tex. App. 2002), cert. granted, *Lawrence v. Texas*, 123 S. Ct. 661 (2002), which I anticipate will overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986), if it does not render an equally bold if ostensibly narrower equal protection holding.

POLITICS AND PRICES: JUDICIAL UTILITY MAXIMIZATION AND CONSTITUTIONAL CONSTRUCTION

Randal N.M. Graham*

1. Introduction

Constitutional interpretation is hard work. Post-modern theorists have correctly (and relentlessly) observed that all language is indeterminate and that texts are innately vulnerable to the unsettling play of deconstructive forces.¹ This raises an obvious question – one that is typically ignored by the lion’s share of deconstructive theorists. If language is unstable and indeterminate, why does it work so well?² Why is language so effective in conveying information? As Canada’s leading constitutional scholar once asked, why is it that, despite the indeterminacy of language, people successfully “keep dental appointments and stop at stop signs”?³ My own view is that the degree of communicative success and interpretive consistency we observe in the real world does not imply that language is more determinate than post-modernists let on. Instead, it suggests that there is something apart from language that constrains the “free play” of deconstructive interpretation; something that restrains the post-modern impulse to destabilize the meaning of texts (including constitutional texts) through deconstructive acts. This “something else”, in my opinion, is self-interest.⁴ At its most basic level, interpretation is a form of decision-making whereby interpreters must choose

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1 A good introduction to Post-Modern theory can be found in Christopher Norris, *Deconstruction: Theory and Practice*, rev. ed. (London: Routledge, 1991). Another is found in James Boyle, *Critical Legal Studies* (New York: New York University Press, 1994). My own take on the inherent indeterminacy of language can be found in chapter 2 of R. Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery, 2001).

2 While this question has been ignored by a majority of language scholars, there are noteworthy exceptions. Stanley Fish, in particular, has done some excellent work in this area. See, for example, S. Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge: Harvard University Press, 1980) and S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989).

3 Peter W. Hogg in Foreword to R. Graham, supra n.1 at vii.

4 Throughout this paper the phrase “self-interest” is used in the microeconomic sense of “self-interested utility maximization”. In this context, it is important to bear in mind that “self interest” does not imply immoral, amoral, or mercenary behavior: someone whose over-riding personal preference is to do good deeds in the community, for example, can still be regarded as

between competing, alternative meanings. Like all decisions, interpretive choices are constrained by the self-interest of the decision-maker in question. This is equally true of the choices made by judges when they interpret legislation (and Constitutions, in particular). All people, including judges, interpret texts in whatever way they think will benefit them the most.⁵ This universal pursuit of self-interest has the effect of constraining the types of interpretive choices that an interpreter will make.

The interpreter's self-interested assessment of the costs associated with specific interpretative outcomes is a powerful determinant of interpretive decisions. This should come as no surprise. Indeed, all choices are guided by the decision-maker's assessment of competing costs and benefits. Ronald Coase explained the impact of costs and benefits upon the decision-making process in these terms:

“Whatever makes men choose as they do, we must be content with the knowledge that for groups of human beings, in almost all circumstances, a higher (relative) price for anything will lead to a reduction in the amount demanded. This does not only refer to a money price but to price in its widest sense. Whether men are rational or not in deciding to walk across a dangerous thoroughfare to reach a certain restaurant, we can be sure that fewer will do so the more dangerous it becomes. And we need not doubt that the availability of a less dangerous alternative, say, a pedestrian bridge, will normally reduce the number of those crossing the thoroughfare, nor that, as what is gained by crossing becomes more attractive, the number of people crossing will increase. The generalization of such knowledge constitutes price theory ... Why a man will take a risk of being killed in order to obtain a

a “self-interested” actor when carrying out these good works. As a result, a highly “moral” judge, whose preference set includes a number of altruistic goals, can nevertheless be regarded as “self-interested”. For a more thorough discussion of the intersection of self-interest and altruistic behavior, see R. Graham, *Legal Ethics* (Toronto: Emond Montgomery Publications, 2004), chapter 1.

5 The role of self-interest in constraining interpretive choices can be demonstrated through everyday examples. Recall Hogg's observations concerning dental appointments and stop signs. Even post-modern theorists manage to make it to the dentist despite their ability to deconstruct, destabilize, reinterpret and unravel any text that they encounter (including their own appointment books). They also stop at stop signs. The reason is that post-modern scholars (like the rest of us) have an interest in dental hygiene and in avoiding car crashes. While they could choose to undertake a convincing deconstructive romp through their appointment books, or deploy post-modern tools to reveal the layers of meaning embedded in a stop sign, they typically choose not to do so: their commitment to deconstructing the relevant text is overborne by their desire to achieve a particular outcome (clean teeth or safe driving in these examples). They do their best to interpret appointment books and stop signs in a conventional way because the cost of doing otherwise is too high. The cost associated with counter-intuitive interpretations of appointment books (namely, an increased risk of missed appointments) and the cost associated with unusual interpretations of stop signs (namely, an increased risk of a car accident) are so great that most people avoid deconstructing such texts.

sandwich is hidden from us even though we know that, if the risk is increased sufficiently, he will forego seeking that pleasure.”⁶

Of course, the explanatory power of price theory is not limited to the context of humankind’s quest for sandwiches. As Coase explains, every decision made by every thinking being (including non-human animals)⁷ can be explained by models rooted in price theory. The decisions made by judges are no exception. According to Coase:

“If the theories which have been developed in economics (or at any rate in micro-economics) constitute for the most part a way of analysing the determinants of choice (and I think this is true), it is easy to see that they should be applicable to other human choices such as those that are made in law or politics.”⁸

It should therefore come as no surprise that price theory – the basic notion that a higher relative cost for a given choice will reduce the frequency with which that choice is selected – has the capacity to explain the interpretive choices judges make.

The goal of this essay is to apply price theory to statutory construction, with particular emphasis on the interpretation of constitutional texts. To that end, this essay begins with a discussion of “*the Realist Vision*” of statutory construction, a vision which holds that the judicial interpretation of legislation as well as of Constitutions involve the manipulation of text in furtherance of the judicial interpreter’s preferences. Accepting the Realist Vision as correct,⁹ I move on (in section 3) to examine the forces constraining the judiciary’s ideological manipulation of legal language – in other words, the typical “costs” of statutory interpretation. While judicial self-interest might give rise to a judge’s impulse to manipulate legal documents in accordance with the judge’s policy preferences, the costs identified in section 3 of this essay (namely, reputation and time) can counter-act this impulse, effectively reining in a rational judge’s manipulation of statutory language. The identification of these costs paves the way for the development of an economic model of statutory interpretation, one that depicts the interpretive process as an exercise in judicial utility maximization constrained by an array of competing costs.

6 R. Coase, *The Firm, The Market, and The Law* (Chicago: University of Chicago Press, 1988), at 4–5.

7 “Indeed, since man is not the only animal that chooses, it is to be expected that the same approach can be applied to the rat, cat, and octopus, all of whom are no doubt engaged in maximizing their utilities in much the same way as does man. It is therefore no accident that price theory has been shown to be applicable to animal behavior”: *Ibid* at 3.

8 *Ibid*.

9 By stating that the Realist Vision is correct, I mean that it is “accurate”, not that the Realist Vision represents the way in which judges *ought* to interpret legislation.

Judges doing the job of interpreting legislation or constitutions are engaged in a process of rational, constrained and self-interested maximization: they subconsciously (and sometimes consciously) weigh the costs and benefits (to themselves) associated with specific interpretive outcomes, weighing the benefits derived from the ideological manipulation of legal texts against the costs that judges incur when interpreting statutes. The ways in which these costs and benefits interact, and their implications for a broader theory of statutory interpretation, will be developed throughout the remainder of this essay.

2. The Realist Vision of Statutory Interpretation

The traditional view of statutory construction holds that judges are politically neutral and objective when they interpret legislation. On this conception of the interpretive process, a judge's only goal in the interpretation of statutes is to discover and apply the will of the legislative author. The interpreter's role "*resembles that of an historian, or an archaeologist, in quest of an ancient thought of which the enactment may contain traces*".¹⁰ This idealized view of the interpretive process – a view Côté refers to as "*The Official Theory*" of statutory construction – posits that the meaning judges discover when interpreting legislation is the meaning that "*was sought by the legislator at the time of [the Act's] adoption*".¹¹ This official theory accepts "*the passivity of the interpreter on the political level*".¹² When carrying out their interpretive task, it is argued, judges set aside their own political preferences, disregard their personal ideologies and ignore the meaning that *they want* the statute to support. Instead of relying on their own political preferences, judicial interpreters are subservient to the author of the legislative text, carrying out will of Parliament without regard for their own ideological goals.

The official theory of statutory construction is attractive. Indeed, this view has been accepted as the accurate model of statutory interpretation by virtually every Western court.¹³ Unfortunately, the idealized view is wrong. While it would be nice to live in a world where judges were capable of setting aside their personal policy preferences when interpreting legislation, this is not the world we inhabit. Instead, we live in a world in which all language is indeterminate and interpreters cannot help but confront language through a lens distorted by personal ideology. In the real world, judges (whether consciously or unconsciously) manipulate the text of legislation as

10 P. Côté, *The Interpretation of Legislation in Canada*, 2d ed., (Cowansville, QC: Yvon Blais, 1992), at 7.

11 Ibid at 6.

12 Ibid at 9.

13 Some particularly potent endorsements of this view of interpretation can be seen in *R. v. Judge of the City of London Court* [1892] 1 QB 273, at 290; *Sussex Peerage Case* (1844) 11 C&F 85, 8 E.R. 1034 (H.L.), *R. v. McIntosh* [1995] 1 SCR 686; *R. v. Multifarm Manufacturing Co.* [1990] 2 SCR 624, at 630; and *US v. Alpers* (1950) 338 US 680 (USSC).

well as Constitutions in ways that give effect to judges' ideological preferences.

The depiction of statutory interpretation as an exercise in ideological manipulation has been put forward in a variety of contexts, most frequently by scholars affiliated with the school of Legal Realism and, perhaps most famously, by adherents of the Critical Legal Studies movement (affectionately called "Crits").¹⁴ This view of interpretation – which I shall call "*The Realist Vision*" – is far more accurate than the idealized model of statutory construction described above. Schauer summarizes the Realist Vision as follows:

*"Realism ...maintained that judges were never, rarely, or at least less often than advertised controlled in their decisions by constitutional provisions, statutes, rules, regulations, reported cases, maxims, canons, and all of the other traditional items of formal law. Instead, these Realists argued, the primary causal influences on judicial decision-making consisted of the judge's views about the immediate equities of the case at hand, the judge's less particularistic views about public policy, or the judge's array of philosophical, political, and policy views, an array that is nowadays called 'ideology'."*¹⁵

These ideas are echoed by a diverse group of legal academics,¹⁶ who note that judicial decision-making is "*obviously open to sub rosa ideological influence*,"¹⁷ and that judges inevitably reshape legal language "*according to the political philosophies of the judge*".¹⁸ According to Manfredi:

14 The nomenclature applied to scholars interested in the "value-laden" nature of interpretive activity is, somewhat ironically, shifting and indeterminate. Names applied to such groups include "attitudinalists", "positive scholars", "anti-foundationalists", "non-foundationalists", etc.

15 F. Schauer, "Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior" (2000) 68 U. Cin. L. Rev. 615, at 619.

16 In another context, I summarized The Realist Vision of statutory interpretation as follows: "...some element of "ideological appropriation" can be found in every act of interpretation. The views of the interpreter are necessarily relevant to the interpretation of every legal text. By emphasizing the elements of the text that support the judge's opinions, the judge inevitably – and often unconsciously – gives official approval to his or her own privately held beliefs, effectively grafting those beliefs onto the otherwise indeterminate legal text. The values of "the law" are inescapably shaped by the values of those who are charged with the task of interpreting legal rules. The "meaning" of a legal rule is not discovered by a neutral arbitrator, but selected from a wide array of interpretive possibilities "by the people who had the power to make the choices in accord with their views on morality and justice and their own self-interest". Interpretation is not constrained by any discoverable, original intention, but is left to the discretion of those who are given the freedom to impose their own beliefs on legal texts." See R. Graham, *supra* n. 1 at 70 – 71. The quoted language within this passage is taken from Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986), 36 *Journal of Legal Education*, 521.

17 D. Kennedy, "Law and Economics from the Perspective of Critical Legal Studies", *The New Palgrave Dictionary of Economics and the Law*, Edited by Peter Newman (1998), 465, at 468.

18 J. Goldsworthy, "Interpreting the Constitution In Its Second Century" (2000) 24 *Melbourne U. L. Rev.* 678, at 687. Note that Professor Goldsworthy is opposed to this form of judicial power, and points to it as a reason for embracing originalism as the appropriate theory of statutory construction.

*“Individual justices are goal-oriented actors whose personal attitudes and beliefs shape their interpretation of the law. They behave strategically to maximize the probability that their preferences will become binding rules. In the end, the Supreme Court makes policy not as an accidental by-product of performing its legal function, but because a majority of justices believes that certain legal rules will be socially beneficial.”*¹⁹

Other scholars note that:

*“...Justices are not constrained by judicial precedent but rather manipulate it (and, for that matter, all other legal materials) to maximize their personal, policy, and institutional preferences.”*²⁰

Those who endorse this claim believe that when judges interpret constitutions, read statutes, apply precedent or otherwise engage with legal materials, they inevitably manipulate those materials (whether consciously or unconsciously) in a manner that accords with the judge’s personal policy goals.

While the Realist Vision has *influenced* the writing of numerous scholars, relatively few legal academics – and virtually no judges – explicitly adopt the Realist Vision as an accurate model of statutory construction. Indeed, much of the social science evidence supporting the Realist Vision has been *“ignored by legal scholars”*.²¹ There are exceptions. Endorsements of (or at least tacit reliance on) the Realist Vision can be seen in the works of such notable scholars as Jeremy Waldron,²² Peter Hogg,²³ Richard Posner,²⁴

19 C. Manfredi, “The Life of a Metaphor: Dialogue in the Supreme Court, 1998 – 2003”, in G. Huscroft and I. Brodie (eds.), *Constitutionalism in the Charter Era* (Toronto: LexisNexis, 2004), 105, at 131. See also B. Friedman, “The Politics of Judicial review” (2005) 84 *Tex. L. Rev.* 257, where Friedman notes (at 258) that “Many positive theorists suggest that judicial ideology plays a significant role in how judges decide cases and that judges respond to pressures from other political actors. Positive scholars believe these forces play a large hand in shaping the content of the law, especially constitutional law”. At 272, Friedman goes on to note that “attitudinal” scholars believe that “...the primary determinant of much judicial decisionmaking is the judge’s own values. Judges come onto the bench with a set of ideological dispositions and apply them in resolving cases. As the most notable proponents of the attitudinal model, Jeffrey Segal and Harold Spaeth, explain: “Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal”.

20 M. Gerhardt, “The Limited Path Dependency of Precedent”, 7 *U. Pa. J. Const. L.* 903, at 911.

21 *Ibid* at 905.

22 See J. Waldron, “The Core of the Case Against Judicial Review”, 115 *Yale LJ* 1346 at 1401, where Waldron writes that judges engaged in strong judicial review “are ipso facto ruling on the acceptability of their own view”. Also see J. Waldron, “Do Judges Reason Morally?” (Draft prepared for conference on constitutional interpretation, University of Western Ontario, October, 2006).

23 See P. Hogg and A. Bushell, “The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)”, (1997) 35 *Osgoode Hall LJ*, 75, at 77.

24 See R. Posner, “What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)”, *Supreme Court Economic Review*, Vol 3. (1993) 1.

Michael Gerhardt,²⁵ Larry Alexander,²⁶ Duncan Kennedy,²⁷ Frederick Schauer,²⁸ Jeffrey Goldsworthy,²⁹ William Leuchtenburg,³⁰ William Eskridge,³¹ and Barry Friedman³² (to name a few). Indeed, I would argue that all mainstream legal theorists rely (unconsciously in some cases) on the Realist Vision of statutory construction – even those theorists who suggest that it provides an inaccurate model of statutory interpretation.

The influence of the Realist Vision is most evident in scholarship concerning the interpretation of constitutional text. Gerhardt, for example, baldly states that “*personal ideologies and strategic maneuvering do play a significant role in constitutional adjudication.*”³³ According to Gerhardt:

*“Most social scientists reject altogether the possibility of the path dependency of precedent in constitutional law. They produce extensive empirical studies, largely ignored by legal scholars, which purportedly show that Supreme Court Justices base their constitutional decisions not on precedent (or the law in any form, for that matter), but rather on exogenous factors, such as their personal policy preferences or strategic objectives.”*³⁴

This vision of constitutional interpretation is endorsed not only by social scientists, but also by influential legal scholars.³⁵ According to Peter Hogg, for example:

25 See M. Gerhardt, *supra* n. 20 at 909, where Gerhardt describes the attitudinal model (what I call the Realist Vision) as asserting that “Justices primarily base their decisions on their personal preferences about social policy”.

26 See L. Alexander, “Constitutions, Judicial Review, Moral Rights, and Democracy: Disentangling the Issues” (Draft paper prepared for conference on Constitutional Interpretation, Oct. 13 – 14, University of Western Ontario), at pages 12 – 13, where Alexander writes “it is ..the...decisionmaker’s view of real moral rights that is constitutionally controlling”.

27 See D. Kennedy, “Strategizing Strategic Behavior in Legal Interpretation” (1996) *Utah Law Review* No. 3, 785. At page 788 of that article Kennedy claims that “It is a common belief, supported by a not inconsiderable social science literature, that judges ... often can and do work to make the law correspond to “justice”, or to some other “legislative” ideal, and that they direct this work under the influence of their ideological preferences.”

28 See F. Schauer, *supra* n. 15.

29 See J. Goldsworthy, “Interpreting the Constitution In Its Second Century” (2000) 24 *Melbourne U. L. Rev.* 678.

30 See W. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York, Oxford University Press, 1995).

31 See W. Eskridge, *Dynamic Statutory Interpretation* (Cambridge, Mass: Harvard University Press, 1994).

32 See B. Friedman, *supra* n. 19, 276, where Friedman writes that “At best, law is having an influence, but any judge’s view of the law necessarily is influenced by ideology. (At worst, it is ideology and preference all the way down)”.

33 M. Gerhardt, *supra* n. 20 at 906.

34 *Ibid* at 905.

35 See, for example, J. Goldsworthy, *supra* n. 29, and D. Dyzenhaus, “The Unwritten Constitution and the Rule of Law”, in Huscroft and Brodie (eds.), *supra* n. 19.

*“Judges have a great deal of discretion in “interpreting” the law of the constitution, and the process of interpretation inevitably remakes the constitution in the likeness favoured by the judges.”*³⁶

As a result, leading constitutional scholars accept that the interpretation of constitutional text involves the judiciary’s ideological manipulation of text with a view to entrenching individual judges’ personal preferences.³⁷

The Realist Vision of statutory construction is unpalatable. It paints a picture of a world in which the law is indeterminate and its meaning is controlled by the political views of judges. Under this view of statutory interpretation, the meaning of legislative text – and therefore the content of the law – is not established by politically accountable institutions comprising elected officials. Instead, it is continually transformed by reference to the shifting political preferences of an elite cadre of relatively unaccountable judges. This bleak portrayal of the interpretive process is the principal reason for the Realist Vision’s failure to achieve widespread acknowledgment. Its apparently nihilistic depiction of the interpretive process is unseemly and unsettling, and unlikely to gain support from those who cherish democratic institutions. I also suspect that many commentators confuse “*normative unpalatability*” with “*descriptive inaccuracy*”: because they believe the Realist Vision is not how statutory construction *ought* to proceed, they suggest that it fails to describe how interpretation *does* proceed. Moreover, the Realist Vision is unlikely to be acknowledged by the courts: courts have an obvious interest in depicting adjudication as a value-neutral process governed by the will of legislative actors. As a result, judges frequently go to great lengths to deny the role of judges’ personal policy preferences in the interpretation of legislative text. Indeed, as we shall see in Section 3, below, denial of the Realist Vision is one of the core judicial strategies for encouraging respect for the judiciary.

Despite its lack of popularity, the Realist Vision is an accurate portrayal of the process of statutory and constitutional interpretation. The Realist Vision may be normatively unpalatable, but (subject to refinements introduced in section 3 of this essay) it represents the way that statutory interpretation really works. I believe this for a number of reasons, only two of which bear mentioning in this context. First, the Realist Vision accords with logical and widely accepted views regarding the self-interested nature of decision-making in general (a subject to which we will return in section 3).

³⁶ P. Hogg and A. Bushell, *supra* n. 23 at 77.

³⁷ See also M.P. Singh, “Securing the Independence of the Judiciary – The Indian Experience”, 10 *Ind. Int’l & Comp. L. Rev.* 245, at 281, where professor Singh notes that “Studies on judicial behavior have long established that a judge’s background plays an important role in that judge’s decision making”.

As a form of decision-making, statutory interpretation is subject to the same forces and constraints as other decisions, including the constraints imposed by the decision-maker's interests. More importantly, the Realist Vision offers the most coherent and sensible explanation for the large number of cases in which we observe the judicial propensity to render decisions coinciding with the relevant judges' personal policy preferences. Obvious examples drawn from the constitutional context include the nakedly partisan opinions in *Bush v. Gore*,³⁸ the United States Supreme Court's infamous "reinterpretation" of the Commerce Clause on the heels of FDR's threat to pack the Court,³⁹ the Supreme Court of Canada's constitutional entrenchment of judicial salaries and perquisites in the widely reviled *Remuneration Reference*,⁴⁰ and

38 531 U.S. 98. In this case, the US Supreme Court effectively had the power (through the interpretation of the 14th Amendment of the US Constitution) to decide whether the next US President would be a Democrat (Al Gore) or a Republican (George Bush, Jr.). All five members of the majority (who decided in favour of the Republicans) were appointed by a Republican President: Chief Justice Rehnquist, along with Justices Scalia, O'Connor and Kennedy were appointed by President Reagan, and Justice Thomas was appointed by the first President Bush. The four judge minority was comprised of two Justices appointed by the Clinton-Gore administration (Justices Ginsburg and Breyer) as well as two Justices appointed by Republicans who have nonetheless come to be regarded as political liberals (namely, Justice Stevens who was appointed by President Ford, and Justice Souter who was appointed by the first President Bush). For an excellent review of academic literature concerning the partisan nature of the *Bush v. Gore* opinions, see P. Berkowitz and B. Wittes, "The professors and Bush v Gore", *The Wilson Quarterly*, Autumn 2001, 76. In that article, Berkowitz and Wittes conclude that the lion's share of American Constitutional Experts (including such luminaries as Cass Sunstein, Ronald Dworkin and Bruce Ackerman) regard the opinions in *Bush v. Gore* as manifestations of the relevant Justice's partisan political preferences. See also Laurence H. Tribe, *The Unbearable Wrongness of Bush v. Gore*, 1 *Ind. J. Const. L.* (2007).

39 In these cases, at least one Justice of the United States Supreme Court (namely, Justice Roberts) appears to have selected whatever interpretation of the Commerce Clause maximized his personal preferences. Prior to FDR's threats, Justice Roberts had consistently held that the President's New Deal laws violated the Commerce Clause. Immediately following FDR's court packing threats (which, if carried out, would have undermined Roberts' influence on the Court), Justice Roberts "switched sides", now consistently voting that New Deal laws (even those that were startlingly similar to laws that Roberts had previously held unconstitutional) were constitutionally permissible. For a thoroughgoing review of the behavior of the Court in response to FDR's threat, see W. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995).

40 *Re Remuneration of Judges* [1997] 3 SCR 3. In this case, the Supreme Court of Canada was asked to determine whether or not the constitution protected judicial salaries from reduction by the government. The Court held that "unwritten principles" within the constitution did, in fact, protect the Justices' salaries. Canada's leading constitutional scholar, Peter Hogg, condemned this decision as unprincipled and nakedly self-interested. See P. Hogg, "Canada: Privy Council to Supreme Court", appearing as chapter 2 in J. Goldsworthy, ed., *Interpreting Constitutions: A Comparative Study* (New York: Oxford University Press, 2006) 55, at 73 – 74, where Hogg writes that "The Supreme Court of Canada has held that any reduction in judicial salaries, whether for superior or inferior judges, is a breach of judicial independence. The Court has struck down statutes reducing judicial salaries in Prince Edward Island, Alberta, and Manitoba, although in each case the judges' salaries had been reduced by a statute that applied across-the-board to all public sector salaries. How such a measure could be a threat to judicial independence was never explained. The Court invoked, not simply the guarantees of judicial independence that are explicit in the Constitution of Canada ... but an 'unwritten constitutional principle' of judicial independence, which was broader than the carefully drafted language of the constitutional text".

the same Court's decision to override the will of the constitution's framers in the *Motor Vehicle Reference*⁴¹: a decision by which the Canadian court radically expanded its own power to invalidate legislation. The Supreme Court of India has gone so far (under the auspices of constitutional interpretation) as to grant itself the powers to veto formal constitutional amendments⁴² and to nominate, approve and appoint its own members⁴³ notwithstanding constitutional text vesting the power of appointment in the executive.⁴⁴ These examples seem outrageous when listed together, but they are not atypical. Indeed, recently released correspondence between Justices of the US Supreme Court suggests that ideological (or self-interested) interpretation of constitutional text is the norm, and that some Supreme Court Justices have admittedly interpreted constitutional text disingenuously – that is, giving effect to interpretations which they did not sincerely believe the text could bear – where doing so could entrench the relevant Justice's personal preferences.⁴⁵

Hogg concluded (at 74) that “The jurisprudence interpreting judicial independence is not based on any ambiguity or uncertainty in the text of the Constitution of Canada. Rather, the judges have constructed an elaborate edifice of doctrine with little or no basis in the text *in order to protect the power, influence, salaries and perquisites of themselves and their colleagues*” (emphasis added).

41 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486.

42 *Kesavandanda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461.

43 *Supreme Court Advocates on Record Ass'n v. Union of India*, A.I.R. 1994 S.C. 268 (also known as “The Second Judges Case”). For an illuminating discussion of this case, see M.P. Singh, *supra* n. 37. Singh notes (at p. 270) that, despite s. 124(2) of the Constitution, the Court in The Second Judges Case held that “the proposal for the appointment of judges to the Supreme Court and the High Courts must be initiated by the Chief Justices of the respective courts. These proposals have to be submitted by the Chief Justice of India to the President. The President must consider these proposals within a set time frame. In case of a difference of opinion between different constitutional functionaries, the opinion of the Chief Justice of India has primacy.” Singh goes on to note (at page 271) that, as a result of this decision, “No appointment to the Supreme Court or a High Court shall be made except in conformity with the final opinion of the Chief Justice of India”. It should be noted that “the Chief Justice of India” is required, as a result of the Court's decision, to act in consultation with his fellow judges in making appointment decisions.

44 Section 124(2) of India's Constitution provides that “Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States *as the President may deem necessary*” (emphasis added). As a result of the Supreme Court's “interpretation” of this clause, the President is now required to await the Court's own list of nominees, and to accept whatever nominee for appointment is preferred by the Chief Justice (acting on behalf of the members of the Court).

45 See, for example, B. Friedman, *supra* n. 19. In that article, Friedman discusses the United States Supreme Court's decision in *Pennsylvania v. Muniz* (1990), 496 US 582, in which Justice Brennan (for the majority) narrowed the application of the “Miranda” rule, notwithstanding Justice Brennan's longstanding view that no such narrowing was constitutionally permissible. Private correspondence between Justices Brennan and Marshall reveals that Justice Brennan's reason for joining in (and authoring) the majority opinion was to prevent Sandra Day O'Connor from authoring the majority judgment and defining the extent of any exception to Miranda. Friedman summarizes that correspondence as follows (at 283): “Private correspondence between Justice Brennan and Justice Marshall indicates that Brennan's vote and opinion in *Muniz* likely were not an expression of his sincere [views regarding the meaning of the constitution's text]. Brennan wrote Marshall explaining

While the cases noted above may seem exceptional in that they demonstrate *brazenly* self-interested and partisan behavior, they are nonetheless typical in the sense that all of the relevant judges, under the auspices of constitutional interpretation, manipulated constitutional text with a view to entrenching their own preferences. With so many powerful examples of nakedly self-interested construction, it should be easy to accept the subtler textual manipulations predicted by the Realist Vision of statutory interpretation. As a result, it is somewhat surprising (to me, at least) that there are any mainstream scholars who suggest that the Realist Vision is inaccurate.

We should pause now to note that, while several of the scholars referred to in this essay believe that judges *intentionally* manipulate legal texts in order to give effect to the judge's policy preferences, we needn't accept this notion in order to acknowledge the role of ideological manipulation in the interpretation of constitutions and other legislative texts. Many scholars posit that, even where judges do not intentionally manipulate legal text with a view to entrenching the judge's personal preferences, the ideological manipulation of text is inevitable: readers of any text (including judges reading legislative language) cannot help but view that text through the lens of their own biases. As Searle notes: "...we have no access to, we have no way of representing, and no means of coping with the real world except from a certain point of view, from a certain set of presuppositions, under a certain aspect, from a certain stance."⁴⁶

In the context of statutory construction, this implies that we confront the text in a context of our own beliefs and biases. Our own presuppositions, political allegiances, personal experience and values (broadly referred to as "ideology") help infuse the text with meaning, leading us (through our unconscious) to prefer interpretations that support our own ideology. While we manipulate the text in the direction of these biases, this manipulation may nonetheless represent our good-faith effort to discern the meaning of the relevant text. Even if we try our level-best to interpret a constitution from an originalist perspective (for example), we may subconsciously attribute

that because "everyone except you and me would recognize the existence of an exception to Miranda for "routine booking questions" ...I made the strategic judgment to concede the existence of an exception but to use my control over the opinion to define the exception as narrowly as possible". In response to Marshall's circulated dissent in the case, Brennan wrote Marshall again: "I think it is quite fine, and I fully understand your wanting to take me to task for recognizing an exception for Miranda, though I still firmly believe that this was the strategically proper move here. If Sandra [O'Connor] had gotten her hands on this issue, who knows what would have been left of Miranda". Simply put, Justice Brennan gave the constitution a meaning that he did not think it supported, specifically for the purpose of maximizing the impact of his own policy preferences and minimizing the impact of Justice O'Connor's.

46 J. Searle, *Mind, Language and Society*, (London: Weidenfeld & Nicolson, 1999) at 20.

our own views to the text's authors: we assume that our own views are eminently reasonable, and then imagine that constitutional framers (who we envision as reasonable people) held those views as well. If we attempt to interpret constitutional text from a progressive or "dynamic" interpretive standpoint (and therefore interpret it by reference to the current needs of the public), our assessment of the public's "*current needs*" is bound to be shaped by our own ideological bent. Even where judges do not *intentionally* entrench their policy preferences – even where judges do their best to interpret legislation objectively – the indeterminate nature of all language, coupled with the "*ideological lenses*" through which we perceive indeterminate texts, ensure that all readers of legislation will tend to interpret the text in ways that align with their own ideologies. The Realist Vision of statutory interpretation is not an indictment of the judiciary's intentions: it is simply a description of how interpretation works.⁴⁷

Whether one accepts the "*subconscious*" model of the judiciary's manipulation of legal texts or the "*fully conscious*" model of value-laden interpretation, it is important to note that neither model necessitates the attribution of sinister motives to the judiciary. While both models posit that judges manipulate legislative text in furtherance of the judges' preferences, neither model makes a claim about the *content* of a particular judge's preference-set. A judge's personal preference-set might include a deep desire to help the poor, an urge to ease the plight of the suffering, or a preference for the promotion of world peace. A judge might favour broad interpretations of human rights enactments, expansive powers of judicial review and narrow incursions into personal freedoms because the judge believes that a truly "*just*" world (a world the judge prefers to inhabit) will have these features. Another judge might hold the opposite views, believing that a just society calls for the restrictive interpretation of Bills of Rights and narrow powers of judicial review. All that the Realist Vision of statutory interpretation posits is that, whatever the judge's preferences are (and whatever their original source might be), the judge will give effect to these preferences, either consciously or unconsciously, by manipulating statutory language in a manner that accords with the relevant preference. This does not preclude the existence of an altruistic judge,⁴⁸ or suggest that any judge has sinister motives.⁴⁹

47 Interestingly, this coincides with price theory's account of human behavior: humans may not (in many cases) consciously weigh the personal costs and benefits of their actions, but nevertheless behave as though they do.

48 For a more thorough discussion of the intersection of altruism and self-interest, see R. Graham, *supra* n. 4, 18–20.

49 At first blush, it seems that Justice Posner would like to exclude the possibility of altruism. A closer reading makes it clear that Justice Posner would accept an altruistic motive provided only that the so-called "altruist" felt that acting in the public interest enhanced the judge's utility. For example, in R. Posner, *supra* n. 24, at 14, Posner writes that "I exclude from the judicial utility

Now that we have reviewed the Realist Vision of statutory interpretation, one point should be obvious to any reader familiar with economic theory. The Realist Vision of statutory construction is perfectly consistent with the economic notion of self-interested utility maximization. According to the Realist Vision, judges interpret texts in ways that give effect to their own preferences. According to microeconomics, “*people choose to perform those actions which they think will promote their own interests*”.⁵⁰ When they manipulate the law in the direction of their own policy preferences, judges fulfill the basic predictions of economics, acting as self-interested utility maximizers. All things being equal, an interpretation which favours the judge’s personal policy preferences will generate (for the judge) more utility than a contrary interpretation. As a utility maximizer, the judge is very likely to select the interpretation that coincides with his or her preferences. Because the Realist Vision of statutory interpretation coincides with basic economic theory, it seems sensible to apply basic microeconomics to the decisions judges make when they interpret legislation.

Despite the Realist and economic prediction that, all things being equal, judges will interpret statutes in a manner that gives effect to their own preferences, we often observe (or think we observe) judges who make decisions that go *against* the judge’s apparent policy preferences.⁵¹ Why is that? Why would judges, who are expected (like the rest of us) to be self-interested utility maximizers, sometimes act in ways that seem to undermine their personal preferences? Why don’t judges *always* interpret legislation in a way that gives effect to their own ideological goals? As I noted in the introductory portion of this essay, this can also be explained as a manifestation of self-interest. In many cases, the costs associated with the ideological manipulation of text are so great that the judge will be unwilling to incur those costs in pursuit of specific policy objectives. The nature of those costs, and their impact upon the interpretive practices of judges, are described in the following sections of this essay.

3. The Costs of Statutory Interpretation

(a) Introduction

While Realists and Critics have done a successful job of unveiling the

function the desire to promote or maximize the public interest ... Although views concerning the public interest undoubtedly affect judicial preferences, just as they affect voter preferences ... they do so, I assume, only insofar as decisions expressing those views enhance the judge’s utility”.

⁵⁰ R. Coase, *supra* n. 6, at 27–28.

⁵¹ The most obvious examples include cases in which judges, as a result of constitutional issues, acquit guilty criminal defendants. Such judges are not “pro-criminal”, yet render decisions with the effect of immunizing criminals from prosecution. In this sense, such judgments appear to undermine the judge’s probable preference of having criminals off the streets.

ideologically-driven nature of statutory interpretation, they have largely ignored the costs associated with the interpretive process. By failing to acknowledge the costs of statutory construction, Critics and Realists have ignored a vital element of the interpretive equation: if language is indeterminate and subject to value-based manipulation by interpreters, the costs interpreters incur in the manipulation of texts serve as a fundamental source of stability in language. The “*free play*” of deconstruction – or the interpreter’s willingness to engage in the manipulation of text – is constrained by the costs interpreters incur in the act of interpretation. In the context of legislative interpretation, these costs constrain the judiciary’s interpretation of statutory text. As the costs associated with a particular interpretive outcome rise, the judge (regardless of his or her own ideological bent) becomes less likely to endorse that interpretation. This is simply the application of price theory to the practice of statutory interpretation.

What does it mean to apply price theory to statutory interpretation? In simple terms, it means accepting the notion that judges weigh the relative costs and benefits associated with competing interpretations of any legislative text that they confront. To be precise, it means that judges weigh the costs and benefits *to themselves* of those competing interpretations. The higher the cost (to the judge) associated with a given interpretive choice, the less likely the judge is to choose that outcome; the greater the benefit (to the judge) flowing from the relevant choice, the more likely the judge is to choose that outcome. This does not imply that judges typically calculate the financial costs and benefits that result from different outcomes: it is uncommon for a judge’s financial interests to be at stake in a case on which the judge is sitting. Judges rarely make decisions concerning judicial compensation (although Canada’s *Remuneration Reference*, noted above, shows that this can sometimes happen). Moreover, judges are paid the same amount regardless of the interpretive outcomes that they generate.⁵² If price theory applies to the interpretive choices judges make, the costs and benefits associated with interpretive choices must involve something more than judicial income. Happily, price theory can accommodate non-pecuniary determinants of behavior. As Coase observed, the application of price theory is not limited to “*money price*”, but refers “to price in its widest sense”.⁵³ This raises a good

52 This is not entirely accurate. If we assume that certain interpretive outcomes enhance the judge’s likelihood of promotion to a higher court, it is possible that specific interpretive outcomes over a certain number of cases may ultimately increase the judge’s pay. Similarly, if some interpretive outcomes can elevate the judge’s popularity in a relevant group, that group might grant the judge access to future income (through lucrative speaking engagements after retirement from the bench, for example).

53 R. Coase, *supra* n. 6, at 4. Also see R. Posner, *supra* n. 24, at 9, where Posner notes that the judicial utility function “may be dominated by non pecuniary sources of utility”. At page 13 of that article,

question: if price theory applies to the choices involved in statutory interpretation, what are the costs and benefits that influence those choices?

Legal scholars have posited a wide array of costs and incentives to which judges may respond. Justice Posner, for example, suggests that a judge's decisions may be influenced by:

*“...dislike of a lawyer or litigant, gratitude to the appointing authorities, desire for advancement, irritation with or even a desire to undermine a judicial colleague or subordinate, willingness to trade votes, desire to be on good terms with colleagues, not wanting to disagree with people one likes or respects, fear for personal safety, fear of ridicule, reluctance to offend one's spouse or close friends, and racial or class solidarity.”*⁵⁴

Professor Schauer proposes an equally broad array of costs and benefits that may influence the course of a judge's holdings. According to Schauer, judges might render decisions that maximize their chances of *“influencing the direction of policy ...being the object of deference by lawyers and litigants ...being adored by legal academics ...gaining higher judicial office, and ...seeing the morally worthier party prevail in a particular case”*.⁵⁵ Gerhardt agrees, noting that judges may *“try to maximize other interests, including preserving leisure time, desire for prestige, promoting the public interest, avoiding reversal, and enhancing reputation”*.⁵⁶ According to Friedman: *“...judges also might care about things as varied (and human) as reaching the outcome they prefer, increasing their leisure, anticipating what other people or groups think of them based on their decisions, seeing that their will is obeyed, and – particularly for lower court judges – being promoted.”*⁵⁷

Friedman goes on to note that judges have historically shown a tendency to change their interpretation of the legal texts where the personal costs (to the relevant judges) associated with prior interpretations grow too high. According to Friedman:

“...judicial change in constitutional doctrine is correlated with utilization of ...court-disciplining measures, or the threat to do so. Under threat of judicial impeachments, John Marshall offered to give up the judiciary's last word on constitutional questions. Jurisdiction was stripped in a manner that prevented the Supreme Court from ruling on the constitutionality of Reconstruction at a critical moment,

Posner also states that the judicial “utility function must in short contain something besides money income (from their judicial salary)”.

54 R. Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1995), 130.

55 F. Schauer, *supra* n. 15, at 635-636.

56 M. Gerhardt, *supra* n. 20, at 916.

57 B. Friedman, *supra* n. 19, 270-271.

and the Court acquiesced. The Court's size was changed at several points during the Civil war and Reconstruction and, in at least one famous instance; this had an immediate and substantial impact. Roosevelt's Court-packing plan did not succeed in changing the size of the Court, but the doctrine itself changed quickly enough thereafter. Congress threatened to strip jurisdiction after Red Monday and the Court moderated its views. To this day, Justices demonstrate an awareness of these historical events as a nod toward the Court's relatively fragile position."⁵⁸

While the authors quoted above propose a diverse set of determinants of a judge's interpretive choices, they seem unified in their assumption that price theory applies to judicial decision-making. As the cost associated with a particular outcome rises, a judge becomes less likely to select the relevant outcome. Whether the cost in question relates to financial incentives, political preference, likelihood of promotion, or reputation within a relevant group, a judge will (either consciously or unconsciously) balance that cost against the benefits of the outcome in question. In effect, judges are engaged in self-interested utility maximization when they interpret law: they weigh the costs and benefits (to themselves) of competing interpretations, and choose whichever interpretive outcome maximizes their utility. On this conception of the interpretive process, judges are the consumers of specific interpretive outcomes, and they engage in a process of rational price comparison when deciding between competing interpretations of legal texts.

The application of price theory to judicial behavior should be uncontroversial. Indeed, well-accepted legal doctrines are formulated on the premise that judges are likely to respond to personal costs when making decisions. Consider, for example, the rule (common to most legal systems) that no person may act as judge in his or her own cause (encapsulated by the maxim *nemo iudex in causa propria sua debet esse*).⁵⁹ The reason for this rule is obvious: We assume that where a judge's personal interests are directly implicated in a dispute, the judge will find it difficult to be objective.⁶⁰ The judge's interest in applying the law objectively is likely to be outweighed by the judge's interest in reaching whatever decision the judge prefers.⁶¹ Similarly,

⁵⁸ Ibid at 314–315.

⁵⁹ For a thorough discussion of this maxim, see chapter 2 of D. Mullen, *Administrative Law: Cases, Text and Materials*, 5th ed., (Toronto: Emond Montgomery, 2003).

⁶⁰ This includes both the possibility of a decision directly in the judge's favour (regardless of the merits of the dispute), as well as the possibility of a decision *against* the judge's apparent interest driven by the desire to appear objective (again, regardless of the merits of the dispute).

⁶¹ Do not be fooled by the suggestion that it is not "actual bias" that we fear in such cases, but the "reasonable apprehension of bias". Bias is "reasonably apprehended" in such cases because reasonable people are likely to believe that a judge will be biased where his or her own interests are

judges are precluded from hearing cases in which their family members are parties. In such cases, we assume that the costs (to the judge) associated with a decision against the judge's family are so great that the judge is likely to be unable to apply the law objectively. In these contexts, we accept that the costs associated with particular adjudicative outcomes are so great that they are likely to control the judge's decision: in short, we acknowledge that self-interest (in the economic sense) plays a role in the decisions judges make.

A detailed study of every cost or benefit to which a judge is likely to respond when making interpretive choices is beyond the scope of this essay. Such a detailed account would require extensive empirical study. In many instances, the relevant costs and benefits are likely to vary from judge to judge. There are two costs, however, that are relevant to all judges' interpretive choices. Those costs – namely, reputation and time – work together to generate a useful (and occasionally surprising) model of statutory construction. The costs associated with reputation and time, together with their implications for an overall model of statutory construction, are discussed throughout the remainder of this essay.

(b) Reputation

People like to be liked.⁶² Indeed, reputation is often regarded as one of the principal determinants of human decision-making. This should come as no surprise: it is a matter of common experience that people hope to avoid stigma, garner respect, appear clever, achieve fame or “*win friends and influence people*.”⁶³ Even people who seem to eschew popularity frequently do so with a view to enhancing aspects of their reputation: they are happy to be known as gadflies, malcontents or general pains-in-the-neck provided that they are at least *known*. People generally attempt to increase their influence over others, their prestige, or the esteem in which they are held by relevant members of the community. As a result, reputation functions as a determinant of the choices that we make: when we predict that a given choice will undermine our reputation, we become less likely to make the choice in question. When we think that a given choice will enhance our reputation, we become increasingly likely to make that choice. Indeed, concern for reputation frequently has the effect of deterring us from the choices we would otherwise prefer: I might be most comfortable wearing jeans and a T-shirt every day, but choose to wear a suit and tie in order to

directly implicated in a dispute. To suggest that judges will *not* experience bias in such cases is to suggest that most people, exhibiting that reasonable apprehension, are wrong. That seems rather presumptuous.

62 R. Posner, *supra* n. 24, at 13.

63 D. Carnegie, *How to Win Friends and Influence People*, Rev. ed. (New York: Simon & Schuster, 1981).

move my reputation in a particular direction (for example, to generate a reputation as a serious-minded fellow, as a fashionable man, or as a person who can afford expensive clothes). The utility that I lose (as a result of a loss in comfort) is outweighed by the utility that I gain by improving my reputation. In effect, desire for a good reputation constrains the choices that we make.

Judges are not immune from the constraining force provided by the desire to achieve or maintain a good reputation.⁶⁴ Indeed, an individual justice's desire to enhance (or at least avoid damage to) his or her reputation is likely to be a major determinant of the judge's interpretative choices. This is not an entirely new idea. Numerous scholars have suggested that judges' decisions are controlled, at least in part, by individual judges' desire to maximize the judge's (good) reputation. Gerhardt, for example, has observed that judges try to protect their reputations by exhibiting "*reluctance to admit they have made mistakes*" on the ground that such admissions "*might make the Justices appear to be indecisive or incompetent*".⁶⁵ Friedman echoes these ideas, noting that judges may make particular decisions – even decisions that conflict with the judges' policy preferences – "*out of a dislike of reversal or the desire to be thought well of by their peers*".⁶⁶

In *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*,⁶⁷ Frederick Schauer considers the impact of 'reputational costs' on the decisions made by judges. According to Schauer:

"...there is reason to believe that there are some reference groups that even life-tenured and highly prominent Supreme Court Justices desire to appeal to in a more or less conscious way. It is widely recognized that reputation or esteem provides a powerful money-independent incentive for many people. Perhaps the Justices of the Supreme Court, like the rest of us, care about their reputation, care about the esteem in which they are held by certain reference groups, and care enough such

64 Note that a judge may hope to enhance (or avoid damage to) the judge's reputation in at least two ways. First, the judge might act to protect (or enhance) his or her personal reputation (perhaps with a view to securing advancement or promotion to a higher court): see F. Schauer, *supra* n. 15, at 623). Alternatively, the judge may seek to protect his or her reputation indirectly by promoting (or protecting) the reputation of the judicial system, or the particular court on which the judge serves: B. Friedman, *supra* n. 19, at 324, where Friedman argues that "If not personal reputation, then the Justices might care about the institutional legitimacy of the Court". Jamie Cameron supports this point in "The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination", in Huscroft and Brodie (eds.), *supra* n. 19 at 159. See also M. Gerhardt, *supra* n. 20 at 954, as well as Coffin and Kattzman "Steps Towards Optimal Judicial Workways: Perspectives from the Federal Bench", (2003) 59 N.Y.U. Ann. Surv. Am. L. 377at 390.

65 M. Gerhardt, *supra* n. 20 at 953.

66 B. Friedman, *supra* n. 19 at 297–298.

67 F. Schauer, *supra* n. 15.

*that, at the margin or even far from the margin, they seek to conform their behavior to the demands of the relevant esteem-granting (or withholding) or reputation-creating (or damaging) groups.*⁶⁸

Schauer continues:

*“...one hypothesis would be that Supreme Court Justices [have] moved leftward in order to conform (at an indeterminate level of consciousness) their attitudes to the attitudes of elite reporters and elite law professors, for by doing so they increase the esteem in which they were held by the groups whose esteem they most valued, and they would enhance their current reputation and increase the likelihood that they would be lauded both in their lifetimes and thereafter. ...the Justices, for all that life tenure gives them, are still human, and thus still somewhat vulnerable to the pull of reputation, the desire for esteem, and the wish to avoid public criticism.”*⁶⁹

Schauer’s hypothesis seems sensible, for it conforms to common experience: people typically avoid (or at least try to hide) actions that are likely to undermine their reputation. There is no reason to believe that judges have immunity from the pull of reputation. Indeed, even judges are willing to admit the importance of reputation as a determinant of their own interpretive choices. According to Justice Posner, for example:

*“...a potentially significant element of the judicial utility function is reputation, both with other judges, especially ones on the same court – one’s colleagues (and here reputation merges with popularity) – and with the legal profession at large.”*⁷⁰

Posner goes on to note that the desire for prestige is “*unquestionably an element of the judicial utility function*”.⁷¹ In his opinion: “*...judges, although they are in no way dependent upon the goodwill of the bar ...are sensitive to their popularity with members of the bar, especially if, as is common, many of their friends are drawn from the bar.*”⁷²

Chief Justice Antonio Lamer (formerly Canada’s top jurist) has made similar assertions, famously arguing that judges may craft opinions with a view to avoiding criticism and achieving popularity. After condemning any brand of criticism that “*makes [judges] look stupid*”,⁷³ Lamer CJ claimed that harsh

68 Ibid at 629.

69 Ibid at 630.

70 R. Posner, *supra* n. 24, at 15.

71 Ibid at 13.

72 Id.

73 F. C. DeCoste, “Introduction”, 38 Alberta L. Rev. 607, at 611.

or virulent criticism “*might lead judges to shy away from unpopular decisions – ‘the most popular thing to do might become the outcome.’*”⁷⁴ In other words, the desire to be popular might cause judges to change the decisions that they make.

Reputation is particularly important where judges hope to move the law in the direction of their ideological preferences. As we have seen, the Realist Vision suggests that statutory and constitutional interpretation often involve the judge’s attempt to move the law in the direction of the judge’s policy preferences. The impact of reputation on this process should be clear: It is difficult to cause the law to conform to your own preferences if the legal community thinks you are a buffoon. If the relevant interpretive audience regards your decisions as foolish or unprincipled, or doubts your capacity to interpret legislation in a persuasive and sensible manner, that audience is unlikely to give credence to your decisions. Colleagues on the bench may not be inclined to endorse your interpretations of legislative text. Your decisions may attract widespread criticism, leading subsequent courts to overrule them. Where this is the case, your political or ideological views are unlikely to be especially influential. In other words, the ‘interpretive goal’ posited by the Realist Vision is, at least in part, dependent on the ability of the interpreter to be perceived as a credible and authoritative interpreter of the text of legislation.⁷⁵

There are at least two important (and overlapping) ways in which reputation constrains interpretive choices. First, desire for a good reputation might lead a judge to decide, regardless of his or her own policy preferences or views regarding the meaning of legislation, to interpret the relevant statute in accordance with the preferences of the judge’s favoured esteem-granting group. If a judge hopes to impress liberal colleagues on the bench, to be cited favourably in left-of-center law reviews and judgments, or to enhance the esteem in which the judge is held by liberal law professors (for example), the judge may attempt to craft a liberal opinion (even in cases in which the judge would otherwise opt for a conservative reading of the legislation). In such cases, the utility lost by deciding a case in a manner that conflicts with the judge’s own political preference is outweighed by the utility generated by the judge’s expected gains in popularity and respect (among the relevant

74 Ibid, quoting Chief Justice Lamer (as originally quoted in K. Makin, “Lamer Worries About Public Backlash: Angry Reaction Could Affect Judges’ Decisions, Chief Justice says”, *The Globe and Mail* (6 February 1999) A1 at A4).

75 Indeed, it is possible that the desire to push the law in the direction of the judge’s policy preferences is simply a corollary of the desire to have a good reputation: power enhances reputation, and the re-shaping of the law in one’s own image is an exhibition of power. For this reason, the maximization of a judge’s “ideological impact” and the maximization of the judge’s good reputation may simply be specific manifestations of the same underlying desire: the desire for social power.

esteem-granting community). In effect, the pull of reputation becomes a constraint on the judge's interpretive decisions. Where a given interpretive choice is likely to harm the judge's reputation in a manner that is relevant to the judge, a judge becomes less likely to make that interpretive choice. Conversely, where a given interpretive choice seems (to the judge) likely to enhance a judge's reputation in ways that are relevant to the judge, the judge is more likely to adopt that interpretation.

The second way in which the pull of reputation might impact upon a judge's interpretive choices relates to the way in which the judge will choose to *justify* interpretive decisions. Rather than reading legislation in a way that (a) conforms to the preferences of the judge's favoured esteem-granting group, but (b) conflicts with the judge's policy preference, the judge might choose to make the interpretive choice that conforms to the judge's policy preference and try to justify that interpretive choice in a manner that will placate the relevant esteem-granting (or esteem-denying) audience. As I said in another context:

"If the interpreter feels constrained by the interpretive community (out of a need for acceptance or a desire to gain legitimacy through the support of the relevant audience), the interpreter has less freedom, but is still able to inject his or her own values and prejudices into the interpretive process – at least to the extent that he or she can make these values palatable or persuasive to the relevant audience."⁷⁶

This is accomplished through the drafting of justificatory reasons for judgment. Viewed in this light, reasons for judgment serve to soften (or even reverse) the reputational impact of decisions that might otherwise appear foolish or unprincipled. Consider, for example, the decision of the Supreme Court of Canada in the *Remuneration Reference* (mentioned in section 2, above). In that case the Court decided that the Constitution protected judicial salaries from reduction by the government. Imagine the public response if the majority judgment in the *Remuneration Reference* had looked like this:

"We have been asked to determine whether or not the Constitution, despite its failure to address this issue, protects judicial salaries from reduction by the government. We have decided that it does. So there."

This cavalier decision seems massively unprincipled, brazenly self-interested, and unlikely to inspire public confidence in the courts. A judgment of this nature could harm judicial reputations. Of course, the *substance* of this cavalier, three-line decision is the same as the Court's actual decision in the *Remuneration Reference*. As Hogg notes, however, the Court in the *Remuneration Reference*

76 R. Graham, *supra* n. 1 at 70.

did not merely say that “*the Constitution protects judicial salaries*” – instead, they “*constructed an elaborate edifice of doctrine with little or no basis in the text in order to protect the power, influence, salaries and perquisites of themselves and their colleagues*”.⁷⁷ One function of the “*elaborate edifice of doctrine*” was, of course, to make it appear that the Court’s decision was rooted in law or in the intentions of the Constitution’s framers, and not merely a manifestation of the Court’s financial interests.⁷⁸ In short, one function of reasons-for-judgment is to protect the reputation of the Court – or, as Kavanagh puts it, to “*attract respect and honour for a judge*”.⁷⁹

In cases involving statutory construction, reasons for judgment are typically designed to generate a particular effect: the appearance that, despite what Realists tell us about judicial interpretation, the judge’s interpretive choices are driven by factors that are external to the judge. Specifically, judges deploy their legal skills with a view to “*proving*” that the interpretive outcome they have selected flows inexorably from the language of the statute, from the intention of the legislative author, from the demands of prior decisions or from other authoritative legal sources. In short, the judge attempts to deny the Realist Vision: to prove that his or her decisions are driven by “*the law*”, and not by the judge’s own political preferences.

Several leading interpretive scholars have made note of judges’ tendency to protect their reputations by attributing their interpretive decisions (which are governed by the judge’s policy preferences) to a legislative body. According to Beaulac and Côté, for example, a court’s goal in crafting interpretive decisions is “*to downplay the importance of the policy-making role it has to assume, inevitably, when it construes ... legislation*”.⁸⁰ Beaulac and Côté argue that the goal of this form of judicial rhetoric is to create:

*“the net impression that statutory interpretation implies simply the discovery or declaration of something which is already there, that the solution owes nothing to the court’s policy choices and is entirely determined by the intention of Parliament.”*⁸¹

In short, this form of decision-making (or, more accurately, decision-justifying)

⁷⁷ P. Hogg, *supra* n. 40 at 74.

⁷⁸ None of this should be taken to suggest that the judges in the *Remuneration Reference* (or other judges, for that matter) do not *buy into* the elaborate edifices of doctrine they construct. The judges are, in my estimation, convinced by what they are writing. They may be convinced by these arguments, however, largely because these arguments confirm the judge’s personal preferences. See D. Kennedy, *supra* n. 27.

⁷⁹ E. Kavanagh, “The Idea of a Living Constitution” (2003) 6 Can J Law & Jurisprudence 55, at 78.

⁸⁰ S. Beaulac and P. Côté, “Driedger’s ‘Modern Principle’ at the Supreme Court of Canada: Interpretation, Justification, Legitimization”, (2006) 40 RJT 131, at 162.

⁸¹ *Ibid.*

is designed to make the judge's decisions "*appear to be mere mirrors of the will of the elected assembly*", and to "*let judges attribute to Parliament the solution they select, which furthers the impression that judicial decision-making and justice are impersonal*".⁸² Duncan Kennedy agrees, claiming that judicial decisions are designed "to generate a particular rhetorical effect: that of the legal necessity of [the judge's] solutions without regard to ideology".⁸³ In Kennedy's view: "*[Judges] work for this effect against our knowledge of the ineradicable possibility of strategic behavior in interpretation, by which I mean the externally motivated choice to work to develop one rather than another of the possible solutions to the legal problem at hand.*"⁸⁴

Kennedy goes on to note that judges interpret legislation with a particular goal in mind:

*"... the goal of establishing that her preferred legislative solution is the correct legal solution. In pursuit of this goal, she has been anything but neutral in using her resources. She has spent a lot of time inventing a strategy, digging through the books, keeping an eye out all the time for random bits of stuff that might be useful in building her argument."*⁸⁵

In effect, judges protect their reputations by making it seem that ideologically-driven decisions are not, in fact, ideologically driven.⁸⁶ If a decision appears foolish or unprincipled, or if the decision appears to coincide with the judge's personal policy preferences, the blame cannot be placed at the feet of the judge. On the contrary, the blame lies with the legislative assembly. In effect, this form of decision (that is, a decision which succeeds in blaming a legislative assembly for the judge's interpretive choices) provides the judge with a form of "*reputational Kevlar*": a barrier against the potential reputational costs that might otherwise flow from the judge's interpretive choices.⁸⁷

82 Ibid at 168.

83 D. Kennedy, *supra* n. 27 at 785.

84 Ibid.

85 Ibid at 793.

86 More accurately, the judge wishes to make it seem that the decision is not driven by *the judge's* ideology. The judge may be perfectly happy to have the decision seem to be ideologically driven, so long as the relevant ideology can be attributed to a legislative body.

87 Justice Posner defines this form of opinion (that is, one which "blames" the legislature for the judge's own opinion) as a form of leisure-seeking behavior. According to Posner *supra* n. 24, at 20), "'Going-along' voting is one example of the influence of leisure-seeking on judicial behavior. Another – once leisure is defined for these purposes, as it should be, as an aversion to any sort of 'hassle,' as well as to sheer hard work – is the insistence by judges that their decisions are coerced by 'the law' and hence that the judge shouldn't be blamed by the losing party or anyone else distressed by the outcome".

As we have seen, the reputational costs that flow from foolish, unprincipled, or brazenly self-interested decisions can be avoided (or at least minimized) through carefully crafted reasons-for-judgment – typically reasons that cast the “*blame*” for a decision on factors external to the judge (namely precedent, legislative intention or the statute’s “plain language”). The judge deploys his or her legal and intellectual resources – or “*burns rhetorical fuel*”, as it were – in an effort to accomplish twin objectives: to promote the judge’s ideological preference while at the same time preserving (or enhancing) the judge’s reputation to the greatest extent possible. In effect, the judge sells his or her decision to the relevant interpretive community.

The “*sale*” metaphor was not selected by accident. A judge’s justification of interpretive decisions shares several features in common with a typical sale of goods. First, the seller’s goal is utility maximization: where an ordinary seller hopes to maximize utility through profit, the judge hopes to maximize utility through some combination of “*legal impact*” (through the promotion of the judge’s policy preferences) and reputation.⁸⁸ Second, the judge’s attempt to “*sell*” a decision, like a typical sale of goods, gives rise to transaction costs that have an impact on the actions of the seller. In the context of interpretive decisions, the transaction costs involve the judge’s time and effort: persuasive judgments do not write themselves.⁸⁹ The judge must often spend considerable time and effort crafting a judgment that accomplishes the judge’s twin objectives (that is, furthering the judge’s policy preferences and protecting or enhancing the judge’s reputation). The time it takes to generate such judgments constitutes one of the key determinants of a judge’s interpretive choices. Time’s impact on a judge’s interpretive choices, together with its interaction with the “*reputational costs*” described above, is discussed in the following section of this essay.

(c) **Time**

While the Realists and the Critics are surely correct in their acknowledgement of the value-laden nature of statutory interpretation, most proponents of the Realist Vision make an important error: they appear to assume that statutory text is *easily* and *infinitely* malleable – that one interpretation of legal language is just as easy to justify as any other interpretation, and that interpretive decisions are accordingly governed entirely by the judge’s policy preferences. This is implausible. It seems more

⁸⁸ As I noted in footnote 76, above, a judge’s desire for “reputation” and “legal impact” may be manifestations of the same desire.

⁸⁹ Even if one believes that law clerks write a judge’s decision, the clerk’s use of time still counts as an important transaction cost: the clerk’s time is a limited resource that is usable by the judge. Having the clerk write a judgment prevents the clerk from using his or her time to accomplish other goals on behalf of the judge.

likely that an interpretation rooted in “*plain meaning*”, or a construction that flows intuitively from a statute’s literal text, will often be easier to justify than a counter-intuitive meaning that seems to stretch or over-ride the statute’s terms.⁹⁰ A decision that “*X means X*” is fairly easy to defend, while a decision that “*X means Y*”, or “*X means the opposite of X*”, could, without significant stage-setting and justification by the judge, undermine the relevant judge’s reputation as a competent reader of texts. As a result, an “*obvious*” interpretation may require little or no justification, while a counter-intuitive construction calls for a greater expenditure of the interpreter’s time and effort. The relative difficulty involved in justifying competing outcomes is likely to serve as a powerful determinant of interpretive decisions: a rational judge who has no preference between two interpretive outcomes is, all things being equal, likely to choose whatever outcome can be justified most easily.

While it is feasible that a wide array of interpretative possibilities are supported by any legislative text, it is important to recall that statutory interpretation is hard work – indeed, interpretation is particularly labour-intensive when deeply contested texts are being interpreted, as is the case in most appellate litigation and in virtually all disputes involving constitutional text. In these cases, any judge who hopes to achieve the twin goals identified in section 3(b), above (namely, furthering the judge’s ideological preferences while preserving or enhancing the judge’s reputation) must be prepared to spend whatever resources are needed to explain and justify the judge’s interpretive decisions. The primary resource a judge expends when interpreting legislation is time: the judge expends whatever time the judge believes is needed to “*sell*” the judge’s decision to the interpretive community.

Time – at least from a mortal’s perspective – is a scarce resource. Time spent in pursuit of one activity (such as judging) depletes the time that is available for pursuing other activities (such as leisure). Time devoted to certain aspects of the job of judging (like interpreting constitutions), reduces the time available for other judicial tasks (such as writing judgments in non-constitutional cases, participating in judicial education programs, or engaging in administrative tasks). According to Coffin and Katzmann, the constraints imposed by time can have a significant impact on the work of the judge. Based on extensive empirical data concerning American judges’ use of time,⁹¹

90 Of course, what qualifies as a statute’s “plain meaning” is frequently up for grabs: a meaning that seems plain to some interpreters (when they confront a text through a lens distorted by personal ideology) may qualify as a counter-intuitive – or even unjustifiable – meaning for others (that is, those with different perspectives). These contested cases – that is, cases in which “plain meaning” is unclear – are the primary focus of this paper.

91 The data was drawn a full-year study (conducted in 1988) of the working patterns of all Third Circuit judges and their law clerks. See F. Coffin and R. Katzmann, “Steps Toward Optimal Judicial Workways: Perspectives from the Federal Bench”, (2003) 59 N.Y.U. Ann. Surv. Am. L. 377, at 381.

Coffin and Katzmman found that:

*“The average judge’s working year exceeded 2400 productive hours, certainly comparable to the billing hours of most hard-driving law firms. Sixty percent of judge time was devoted to cases; of that thirty-two percent was spent on preparation and forty-eight percent on opinions. Of the almost forty percent spent on non-case activities, court administration activity accounted for seventeen percent of the total recorded judge time, about five percent on national Judicial Conference committee work and continuing education, some eight percent on pro bono community activities, and less than four percent on general preparation (embracing all those activities to maintain professional competence).”*⁹²

Coffin and Katzmman went on to note that time constraints exerted significant pressures on most judges:

*“There are the pressures to which [the judge] seeks to respond: an inexorably rising caseload; the demand for expedition in disposing of appeals; the demand to publish all opinions ...; the rising involvement in administration and committee work ...; the proliferation of congressional oversight inquiries and hearings often resulting in new obligations and reporting requirements; the impact of government-wide ethical restraints, limiting judges’ recompense from teaching and barring any compensation for delivering a scholarly address or writing a solidly researched article for a periodical.”*⁹³

The impact of these pressures, according to Coffin and Katzmman, is to undermine the judge’s ability to “render top quality judicial service”.⁹⁴ Leo Levin (former director of the American Federal Justice Center) echoes these observations, noting that the significant time constraints imposed on judges have the effect of compromising the quality of the judgments courts produce. Levin contends that “*Judicial dispositions are not widgets, and at some point the optimal number of decisions per judge may be exceeded. Productivity cannot be increased indefinitely without loss in the quality of justice.*”⁹⁵ In short, judges doing the work of “judging” are beset by the problem of scarcity – the scarcity of time. Like all rational actors faced with a problem of scarce resources, judges must make a series of choices concerning how they will employ that scarce resource.

⁹² Ibid at 387–388.

⁹³ Ibid at 381–382.

⁹⁴ Ibid at 383.

⁹⁵ A. Leo Levin, *Managing Appeals in Federal Courts* 3 (Robert A. Katzmman & Michael Tonry eds., 1988), as quoted in F. Coffin and R. Katzmman, supra n. 91 at 378.

How does the scarcity of time impact upon the practice of statutory and constitutional interpretation? As we have seen, both Legal Realists and Economists predict that a rational judge will interpret statutes in whatever way will maximize the judge's utility (or, to translate into the language of the Realists, judges will interpret statutes in ways that give effect to their own preferences). We have seen (in section 3(b), above) that the goal of preference maximization is, in many cases, pursued through the creation of persuasive reasons-for-judgment: reasons designed to "sell" the judge's preferred interpretive solution to a relevant esteem-granting (or esteem-denying) group. Time constraints will influence this process: a judge who is faced with interpretive choices must choose between competing interpretations with a view to maximizing the judge's utility, while at the same time balancing the utility gleaned through making any given interpretive choice against the utility cost that flows from the expenditure of time required to sell that interpretation to the community. The interaction of the constraints imposed by time, reputation and the judge's policy preferences controls the outcome of the judge's interpretive choices. Justice Posner gives a useful illustration of the way in which these constraints can influence a judge's decision-making process:

*"...in a three-judge panel, provided that at least one judge has a strong opinion on the proper outcome of the case, or even that a law clerk of one judge has a strong opinion on the matter, the other judges, if not terribly interested in the case, can simply cast their vote with the "opinionated" judge. This will not be random behavior and will incidentally be leisure-serving. If both indifferent judges vote against the opinionated one, he may write a fierce dissent that will either make them look bad or require them to invest time in revising the majority opinion to blunt the points made by him. Notice that if one indifferent judge decides to go along with the opinionated one, the other indifferent one is likely to go along as well – otherwise he will be forcing himself to write a dissenting opinion, at least given the current norm of explaining a dissenting vote rather than voting without an explanation."*⁹⁶

In this example, the disinterested judges' "ideological payoff" from writing reasons-for-judgment (and justifying a particular legal outcome) is fairly low: they are "indifferent" about the outcome of the case. As a result, these judges are unwilling to invest significant time and effort in the justification of a particular outcome. The judge who *is* interested in the outcome (Posner's "opinionated" judge), by contrast, has an incentive to spend time persuading

96 R. Posner, *supra* n. 24 at 20.

others to accept the judge's preferred interpretation: the judge has a policy preference concerning the outcome of the case, and accordingly gains utility if that preference becomes law. It appears (from Posner's hypothetical) that the utility this judge generates by ensuring that his preferences become law outweighs the opportunity costs associated with the time it takes to write a judgment giving effect to the judge's preference. As a result, the opinionated judge invests the time required to justify his preferred interpretive outcome.

Assuming only that judges are rational, that their policy preferences play a role in how they interpret legislation, and that time is a scarce resource, we can generalize Justice Posner's example and use price theory to describe the influence of time upon a judge's interpretive choices. In all cases in which a judge is faced with interpretive decisions, the judge will weigh the utility that can be derived through the ideological or reputational gains that are available in a given case against the utility to be derived from other uses of the time that it would take to achieve those gains (say, deciding other cases, engaging in court administration, or spending time with family). Where the "*interpretive payoff*" (that is, the utility gained by furthering the judge's personal preferences) is great, the judge will be willing to spend more time and effort – to burn more "*rhetorical fuel*", as it were – manipulating the law and justifying the outcome sought. The judge is willing to work longer and harder to manipulate a text in cases where the judge's personal preferences are at stake. Where the judge's personal preferences are not implicated in a particular case (or where the predicted ideological and reputational impact of a particular case is low), the judge will be willing to spend less time and effort manipulating the law.⁹⁷ This seems sensible: a judge with a particular agenda (say, for example, an anti-poverty agenda) will be more willing to make extraordinary efforts to manipulate the law (for example, justifying a counter-intuitive reading of a statute) in cases where poverty issues are at stake. In a case that does not raise issues implicating the judge's agenda, the judge is more likely to take a less labour-intensive path: to accept a "*plain meaning*" interpretation of the law, to follow precedent, to adopt the reasoning of a court below, or to engage in "*go along voting*" (perhaps where a colleague whose preferences *are* implicated by the relevant case has already crafted a plausible judgment). This leads to a useful prediction: the level of time and effort that a judge will be willing to expend on a given case (or, in other words, the amount of "*rhetorical fuel*" a judge will be willing to burn in the ideological manipulation of the relevant legal materials) should vary with

⁹⁷ In effect, the scarcity of time reins in a judge's ideological manipulation of text. As Waluchow notes in "Constitutions as Living Trees: An Idiot responds" (2005) 18 Can J L & Jurisprudence 207 at 241, "the requirement that judgments be publicly defended in light of constitutional principle, can sometimes work against any political biases to which judges might be subject".

the degree to which the judge's personal preferences are implicated by the case at hand. In other words, $T_{RF} \sim P_I$, where T_{RF} represents the time a judge is willing to expend constructing convincing legal arguments in order to justify an outcome that coincides with the judge's views, and P_I represents the potential policy impact of a particular case (that is, the ability of the relevant case to advance the judge's preferences). T_{RF} varies with P_I (or, in quasi-mathematical notation, $T_{RF} \sim P_I$). As one quantity rises, the other quantity rises as well.

The implications of price theory's prediction that T_{RF} will vary with P_I should be straightforward. A judge whose passions are fueled only by privacy issues (for example) will be willing to spend more time and effort manipulating the law of privacy than she will on cases involving probate fees (or other non-privacy issues). In the latter class of cases, she may see no need to be innovative, no need to "*push the envelope*", or no need to depart from the obvious course of precedent or the statute's 'literal' text. In short, she will be willing to spend less time crafting and selling interpretive arguments than she would in a case that implicated privacy concerns. A judge whose passions are fueled by the desire to promote racial equality will be willing to spend more time on racial equality cases (or on cases where race relations are somewhat relevant) than on cases that do not relate to that particular social agenda. Less charitably, judges whose salaries are in jeopardy might – if they value their own income – be willing to spend significant time and effort constructing "*an elaborate edifice of doctrine with little or no basis in the [relevant statute's] text in order to protect the power, influence, salaries and perquisites of themselves and their colleagues*,"⁹⁸ as Canada's top Court did in the *Remuneration Reference*. In short, a judge will be willing to spend more time and effort on cases that will allow the judge to further his or her preferences. The judge seeks a return-on-investment when he or she spends time engaged in the task of interpreting statutes. That return is measured in policy impact (or associated reputational gains), and the level of investment is measured in time. A typical judge will seek the highest return in exchange for the lowest fruitful investment: a judge will tend to invest his or her time in cases that help the judge further his or her own policy goals.

While the notion that $T_{RF} \sim P_I$ seems to coincide with price theory's sensible assumptions regarding the way in which rational judges will behave, it would be nice to test this hypothesis against observed judicial behavior. While no scientific studies have gathered data for the purpose of exploring this hypothesis, a comparison of judicial behavior in different interpretive contexts may be instructive. If, for example, judges show a marked tendency

98 P. Hogg, *supra* n. 40, at 74.

to (a) avoid counter-intuitive (or “*difficult to justify*”) constructions in cases where the likely ideological and reputational payoff is fairly low, while (b) showing the opposite tendency (that is, frequently straining literal language or giving effect to counter-intuitive constructions) in cases where the ideological and reputational stakes are higher, we will have made some progress in verifying the hypothesis that $T_{RF} \sim P_I$. Happily, we do observe this pattern if we compare the Supreme Court of Canada’s approach to the interpretation of constitutional text with the same court’s approach to the interpretation of income tax legislation.⁹⁹ When interpreting constitutional laws (where the ideological and reputational stakes are high)¹⁰⁰ Canadian judges openly over-ride the intention of the constitution’s framers, supplement (or over-ride) the constitution’s text, and freely manipulate the text with a view to furthering judges’ personal policy preferences. When interpreting tax laws, by contrast – where the ideological and reputational stakes are markedly lower¹⁰¹ – Canadian judges typically assert that “In interpreting sections of the Income Tax Act, the correct approach ... is to apply the plain meaning rule”.¹⁰² In other words, Canadian judges show a tendency to avoid counter-intuitive construction (that is, constructions that are relatively difficult to justify) in tax cases, while frequently pursuing counter-intuitive constructions in cases involving constitutional text.

There are a number of reasons why judges may show a tendency to prefer “*plain meaning*” (or “*intuitive constructions*”, which take relatively little

99 The pattern observed with respect to the interpretation of constitutional laws is also observed in the interpretation of Human Rights enactments: as a result, one cannot conclude that the “supremacy” or special nature of the constitution is the sole determinant of the court’s interpretive practice. See R. Graham, “Right Theory, Wrong Reasons” (2006) 34 SCLR (2d) 169.

100 While tax statutes and constitutional texts both qualify as “fundamental elements” of a nation’s body of public law (that is, constitutional documents establish the ‘plan’ for a society, while tax statutes establish the method of paying for and implementing that plan), the ideological gains arising from the interpretation of constitutional texts are much greater than the gains one could achieve through the interpretation of income tax statutes. To the extent that a judge succeeds in infusing the text of a constitutional law with his or her own ideology, *all laws* in the relevant jurisdiction (due to the supremacy of constitutional text) must now comply with the judge’s ideology. The “ideological impact” of interpreting tax statutes, by contrast, is more localized, typically affecting only the administration of the tax statute. This is, perhaps, why relatively few jurists have achieved renown through their interpretation of income tax laws, while numerous judicial reputations are built on the strength of the judge’s interpretation of constitutional text. Moreover, any ideological impact achieved through the manipulation of income tax is likely to be short-lived (when compared to the ideological impact achieved through constitutional construction): see footnote 101, below.

101 One reason that the “ideological stakes” are relatively low in most cases involving fiscal legislation relates to the frequency with which fiscal statutes are amended: a judge may go to great lengths infusing the text with his or her own personal views, only to see the text amended following the next annual budget. Constitutions, by contrast – particularly bills of rights – are amended fairly infrequently. As a result, ideological influence achieved through constitutional construction is likely to give rise to longer-term policy impact and longer-term reputational gains.

102 *Friesen v. Canada* [1995] 3 SCR 103, at 113 (per Major J., for the majority).

time to justify or explain) when interpreting tax statutes while showing greater willingness to spend time explaining and justifying counter-intuitive constructions of constitutions. These reasons relate to the differing costs and benefits that arise in these distinct interpretive contexts. First (as noted above), the possibility of long-term ideological and reputational gain is greater when judges interpret constitutional text than it is when they interpret fiscal statutes: this gives the judge a greater incentive to expend time and effort manipulating constitutions in the direction of the judge's personal preferences. As a result, the "benefit" of ideological-manipulation in the constitutional context is likely to seem (to the judge) greater than the benefit of ideologically-manipulating the text of fiscal laws. Second, the "cost" of textual manipulation may be greater in the income tax context. Tax statutes are typically drafted in exceedingly precise and detailed language, while constitutional texts (particularly those that deal with fundamental rights) are couched in vague and open-textured terminology. All things being equal, a vague and open textured phrase¹⁰³ is more easily manipulated than precise and specific language: in other words, a counter-intuitive reading of tax statutes (that is, an interpretation that strays from plain meaning) will, in most cases, take more time and labour to justify¹⁰⁴ than a counter-intuitive reading of a constitutional text (for example, a reading that conflicts with the framer's expectations).¹⁰⁵ As a result, the "return on investment" (for the judge) in the

103 On the nature of vagueness and its implications for statutory construction, see R. Graham, *supra* n. 1, chapter 4, "Vagueness and Ambiguity".

104 A second reason that courts may find it harder to manipulate the text of tax statutes than the text of constitutions relates to the courts' own perception of their relative institutional competence (*vis-à-vis* the legislative or executive arms of government) when it comes to the interpretation and application of the relevant body of law. Canadian courts see themselves as less competent than the legislative or executive branches in the interpretation and application of statutes involving financial matters, and therefore often grant significant deference to government interpretations of laws dealing with such matters: see (for example) *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748 and *Pezim v. British Columbia (Superintendent of Brokers)* [1994] 2 SCR 557. By contrast, the Court appears to perceive itself as superior to the legislative or executive branches in the interpretation and application of statutes dealing with human rights, and therefore grants the government little deference when interpreting such enactments (see, for example, *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982). Indeed, the Court suggests that it has a particular advantage over the other branches of government when it comes to the application and interpretation of constitutional text, effectively granting other government actors no deference when interpreting the text of the constitution. For a discussion of the relevant jurisprudence, see R. Graham, *supra* n. 99. If one assumes that expertise with an enactment's subject matter lessens the difficulty (or lowers the learning-curve) associated with the manipulation of the language of that enactment, one can safely conclude that the courts would typically have a harder time manipulating the text of fiscal statutes than they would manipulating constitutions.

105 More importantly, perhaps, courts face a greater likelihood of "interpretive error" in the interpretation of tax statutes, particularly where they attempt to justify deviations from plain meaning. Let us assume, for the moment, that tax statutes are typically more complex than constitutions, and that courts have less institutional expertise with respect to the language of tax statutes than the financial advisors retained by the government in the drafting of tax enactments. Further assume (as the

interpretation of constitutional laws is (on average) far greater than the return on investment the judge receives by spending time interpreting tax statutes: a judge who seeks policy-preference gains through the interpretation of constitutional text may anticipate potentially large gains with a relatively small investment of time. A judge who seeks similar gains through the interpretation of income tax statutes may anticipate smaller (and shorter term) gains that require a significant investment of the judge's time. As a result, judges interpreting tax statutes can be expected to take a less labour-intensive path, embracing "*plain meaning*" or intuitive constructions (regardless of the judges' personal policy preferences), while judges working in the constitutional realm should be expected to go to greater lengths to over-ride intuitive meaning in pursuit of ideological goals. As we have seen, Canadian judges exhibit this pattern of behavior, lending support to price-theory's intuitive prediction that $T_{RF} \sim P_I$: the level of time and effort a judge is willing to expend on a given case (or, in other words, the amount of "rhetorical fuel" a judge is willing to burn in the ideological manipulation of the relevant law) varies with the degree to which the judge's personal preferences are implicated by the case at hand. Conversely, a judge's willingness to manipulate the law in the direction of the relevant judge's preferences will decrease as the interpretive costs rise.

The comparison of Canadian tax jurisprudence with the practices of courts interpreting constitutional texts not only supports the hypothesis that $T_{RF} \sim P_I$, it also reveals some of the specific costs and benefits to which judges respond in accordance with the predictions of price theory. Specifically, it shows that a judge's willingness to endorse counter-intuitive interpretations of a text varies inversely with the level of precision and complexity exhibited by the language of the relevant enactment. This makes sense: it is harder (and therefore more costly) to manipulate a precise and complex piece of legislation than it is to manipulate a vague and open-textured text. As a result, to the extent that legislators wish to minimize the judiciary's ideological-manipulation of statutory text, or to minimize the extent to which the court will give effect to counter-intuitive constructions of legislation, legislators have an incentive to increase the level of specificity and precision in the

courts appear to assume) that the courts have *greater* expertise than the legislature when it comes to interpreting constitutions. If these assumptions are correct, then there is a greater likelihood that a court's counter-intuitive reading of a tax enactment is demonstrably wrong (in the sense of that construction being demonstrably inconsistent with other provisions of the enactment) than there is that a court's interpretation of a constitution is demonstrably wrong. If courts are protective of their reputations (as we suggested in section 3(b), above), then they are likely to "tread lightly" in the interpretation of income tax statutes, for fear that the court's interpretation will be proven incorrect. They would experience less "fear" with respect to the interpretation of constitutional text, and would accordingly be more willing to interpret constitutions in a counter-intuitive manner where doing so could further the judges' personal preferences.

language of the statutes and the Constitutions that they pass.¹⁰⁶ The effect of increased specificity is to elevate the cost (to the judge) of pursuing counter-intuitive interpretations of the relevant legislation. Judges are the consumers of competing interpretive outcomes, and will tend to act as ordinary consumers when they make consumption choices – a higher relative cost (or a lower relative benefit) will reduce consumer demand. As consumers of competing interpretive outcomes, judge will tend to choose whatever interpretive outcomes cost the least while giving effect to those that benefit them the most.

§ Conclusion

I've always hated it when papers rooted in microeconomics feebly conclude with the observation that “*more data are required*”. It's usually true, but I still hate it. In the present context, it is obviously true that more data would be helpful in the creation of a thorough model of interpretive choice: it would be helpful to know more about the impact of reputation on specific interpretive choices, and it would be useful to have specific data concerning a typical judge's use of time. If the model that I have proposed is an accurate account of judicial behavior, the case for the collection of these data should be clear.¹⁰⁷ Even without these data, however, the model I have proposed supports at least three conclusions.

First, this model helps to explain the basic determinants of the decisions judges make when they interpret legislation. The Realist Vision explains that judges interpret statutes and Constitutions with a view to implementing the judges' policy preferences. This insight is not revolutionary. We have, however, answered a good question: what factors tend to “*rein in*” a judge's pursuit of his or her ideological agenda? As we have seen, two prime factors (or two major determinants of the judge's interpretive choices) are reputation and time. Judges typically care about the esteem in which they are held by specific esteem-granting (or esteem-destroying) groups. Where this is the case, the judge will either (a) moderate his or her ideological manipulation of text by accommodating the views of the relevant group, or (b) craft reasons-for-

106 Of course, legislative drafters are not immune from the pull of price theory: it is more difficult and time consuming to draft a specific and complex law than it is to draft an open textured statute. As a result, legislators will only do so where the gains associated with more specific statutes (say, for example, avoidance of judicial activism) outweigh the costs associated with the time it takes to draft and agree upon specific legislative text.

107 I shall leave aside, for now, the case to be made for the collection of data concerning potential appointments to the bench. While this paper makes it clear that such data would be useful in predicting the interpretive practices of prospective judges, the value of such data may be overmatched by the cost of acquiring it. Moreover, such data would be suspect in many cases: to the extent that our data is based on the judge's own self-interested statements (conducted through an appointment-hearing, for example), such statements are likely to be unreliable.

judgment designed to insulate the judge from reputational costs. Where the judge chooses option (b), the judge is constrained by time. A judge who is concerned with his or her reputation (or the reputation of the judiciary in general) will tend to manipulate the law in the direction of his or her own policy preferences only where the relevant ideological payoff justifies the amount of time and effort it takes to justify that decision in a manner that will persuade the relevant esteem-granting group. In a nutshell, this is how judges interpret legislation.

The second thing we have learned (which is really a broader version of the first) relates to post-modern claims concerning language. At the outset of this essay, I noted that post-modern theorists rarely ask why language works. They are adept at pointing out the vulnerability of language to the unsettling free-play of deconstruction, but rarely address the issue of why, despite this inherent vulnerability, language is so effective in conveying information. I think that we have laid the groundwork for an answer to this question. Language works because we typically have an interest in interpreting language in conventional ways. We avoid most attempts to pointlessly deconstruct everyday language because doing so would often lead to confusion, frustrate our expectations or make us look foolish or unprincipled to others. While we could undertake a deconstructive romp through the tax code, or unravel the layers of meaning underlying a statement of claim, we tend to refrain from doing so. Our self interest, frequently rooted in such base concerns as reputation and time, keeps us from trying to destabilize the texts that we confront. Instead, we tend to do our best to interpret texts in accordance with the intention of those who wrote them (or those with the power to generate authoritative meanings), for doing so can lead to predictable outcomes and preserve our reputations. Generally speaking, achieving predictable outcomes (and maintaining a good reputation) maximizes our utility. As a result, self-interest has the effect of pushing us toward conventional and intuitive interpretations of language, while leading us away from any counter-intuitive meanings that a deconstruction of the relevant language might reveal.

Finally, I think that we have learned something about legal theory. Specifically, we have seen the intersection of post-modern legal theories and the economic analysis of the law. It is (to me at least) somewhat remarkable that the rhetoric of the Realists, the Crits and the other supporters of the Realist Vision of statutory interpretation is so similar to the rhetoric of microeconomics. Proponents of the Realist Vision of statutory construction share the economists' view that the courts' interpretation of legal language is a value-laden process. Legal Realists and Crits point out that all interpretation is an exercise in ideological manipulation. Economists support this view,

pointing out that all judges are engaged in self-interested utility maximization, even when judges interpret legislation. Once we augment the Realist Vision with the intuitive assumption that the manipulation of legal text is a difficult and time consuming activity, the Realist Vision of statutory construction coincides perfectly with the economic depiction of constrained utility maximization. Although Critics and economists might use markedly different language to describe judicial behavior (and make different value judgments when assessing it), they are telling the same story: a story about constrained judicial preference maximization through the manipulation of legislative text. For me, the degree of consistency between the work of Critics and the analysis put forward by economists is a very welcome discovery. Critics and economists rarely pay sufficient attention to each other's scholarly work. Given the similarity of their views regarding statutory and Constitutional interpretation, it is time that they began to work together.

OUR CONSTITUTION AND ITS SELF-INFLICTED WOUNDS

*Arvind P. Datar**

The Constituent Assembly had its first sitting on 6th December 1946. On August 29, 1947, after India attained independence, the Constituent Assembly appointed a drafting committee which submitted the Draft Constitution in February 1948. After extensive discussion and various amendments, it was adopted by the Constituent Assembly on November 26, 1949. The result was the most elaborate Constitution in the world for perhaps the most diverse group of persons: of different religions, ethnic backgrounds and languages. It would be incorrect to give full credit to the Constituent Assembly for they did not draft the Constitution from scratch. The foundation for the new Constitution was the Government of India Act, 1935. Important portions that were added were the Preamble and the Chapters on Fundamental Rights and Directive Principles of State Policy. The chapter on Fundamental Rights was perhaps the most glorious chapter of the Constitution, which also provided for an elaborate judicial system to protect these rights. Before independence, India already had a complex hierarchy of courts administering civil and criminal laws although the executive was not fully separated from the judiciary. The Constituent Assembly decided to continue with the federal structure with a strong Parliament at the Centre. The Seventh Schedule set out the fields of legislation for Parliament (List-I) and for the State Legislatures in List-II. The Concurrent List (List-III) stipulated fields wherein both, the Parliament and the State Legislatures could make laws, subject, of course, to the primacy of Parliament.

The final product was a magnificent Constitution which provided the frame work for good governance and enabled all persons in India to achieve their dreams without forfeiting their basic human rights. On 26th January, 1950 we gave ourselves this noble Constitution. Little did we realise that, in the years ahead, the Constitution would suffer self-inflicted wounds from none other than our elected representatives – who ironically were obliged to preserve and protect the Constitution.

This article sets out the Constitutional amendments which, in the opinion of the writer, have done serious harm to the Constitution. Some of the amendments were to achieve certain social objectives, others were to protect certain individuals and yet others to achieve populist and politically

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expedient programmes. In *Dred Scott v. Sanford*¹, the US Supreme Court held that slaves had no rights and were chattel. Chief Justice Charles Evans Hughes characterized this decision as a “self-inflicted wound”. This expression has been borrowed to characterize those amendments which have seriously damaged our Constitution. In some cases, the damage was restored by another amendment or by the Supreme Court striking it down. The wounds were healed but the scars remained. Fifty-seven years later, the Constitution has survived, enabling us to enjoy basic human freedoms that are virtually non-existent in most other third-world countries.

I have set out these amendments in chronological order. [Like the *Dred Scott* case, some judgments of our Supreme Court can also be characterised as self-inflicted wounds.] But limitations of time and space have made it necessary to confine this article only to Constitutional amendments.

§ The First Amendment & the Ninth Schedule

In the beginning of 2007, a nine-Judge Bench of the Supreme Court observed that the power of Parliament to include laws in the Ninth Schedule was limited and would be subject to judicial scrutiny. An amendment which violated the basic structure can no longer be protected by placing it in the Ninth Schedule.²

Most of us hardly know that the idea of the Ninth Schedule was conceived by none other than the former Advocate-General of Madras, V. K. Thiruvengatchari. The transformation of this idea into the Ninth Schedule, inserted by the First Amendment made to the Constitution in 1951, is an interesting story.

Before independence, the Congress Party had promised to abolish Zamindari estates and large landholdings, and redistribute land to the farmers or tillers. Pandit Nehru called himself a socialist and a republican. Indeed, socialism was the preferred policy in several countries and was seen to be the best way for the equitable distribution of wealth and to attain social justice.

After independence, several land reform laws were enacted to implement the policy of redistribution of land. The compensation payable for the lands that were acquired was often less than the market value. These land reform laws were soon challenged before various High Courts, and some of the High Courts also granted injunctions against any acquisition of land by the State. The main complaint therein related to the quantum of compensation. Some civil servants suggested that the compensation must be

1 60 U.S. 393 (1856).

2 *I.R.Coelho v State of Tamil Nadu*, (2007) 2 SCC 1.

just and fair but others disagreed. Pandit Nehru felt that these socio-economic programmes would be slowed down by litigation and wrote to the Chief Ministers of various States telling them that the Constitution would have to be amended if it came 'in our way'. One suggestion was that land reform legislation should not be subject to judicial scrutiny by any court whatsoever.

While these amendments to the Constitution were being considered, the Patna High Court struck down the Bihar Land Reforms Act, 1950. The petition had been filed by the Maharaja of Darbhanga.³ Less than a fortnight later, the Calcutta High Court struck down certain acquisition proceedings in the famous *Bela Banerjee* case⁴. Pandit Nehru asked the then Law Minister, Dr. Ambedkar, to prepare necessary amendments to the Constitution. Dr. Ambedkar suggested that the question of compensation should not be reviewed in any court if Presidential assent had been given for acquisition of property. President Rajendra Prasad raised several doubts and Sardar Vallabhai Patel, who was in Bombay, also wrote to Nehru asking for some further time till the doubts raised by the President were considered by the Law Ministry. The judgment of the Patna High Court was in appeal before the Supreme Court. It is believed that Nehru threatened to resign if Rajendra Prasad did not give Presidential assent to the amendment. The President signed the Bill but expressed his unhappiness at the urgency.⁵

At this stage, V. K. Thiruvengkatachari, in a letter to the Law Secretary, K.V.K. Sundaram suggested that a new schedule could be added to the Constitution. All acts pertaining to land reform laws could be certified by the President and inserted in this new schedule. These laws would be deemed to be valid retrospectively and could not be challenged for violating any provision of the Constitution.⁶ Austin labeled the Ninth Schedule a 'genie that would have a profound impact on the Constitutional governance of the country.' V.K. Thiruvengkatachari's suggestion was later translated into Articles 31A, 31B and the Ninth Schedule. Under Article 31A, laws that related to acquisition of estates, nationalisation of industries, extinguishment of mineral leases or their premature termination could not be challenged on the ground that they violated Article 14 (right to equality), Article 19 (right to various

3 AIR 1951 Pat 91 (FB) – see also *State of Bihar v Kameshwar Singh* AIR 1952 SC 252 : (1952) SCR 889 – The method of calculating compensation was truly shocking.

4 AIR 1952 Cal 554 – see also *State of West Bengal v Bela Banerjee* AIR 1954 SC 170 (The impugned legislation fixed the market value of the land on 31.12.1946 as the maximum compensation payable irrespective of when the land was acquired. It was common knowledge that after the war, the value of land had increased considerably particularly in Calcutta. This provision was held to be violative of Article 31(2). The Supreme Court affirmed the decision of the West Bengal High Court.)

5 For an enlightening account, see Granville Austin, *Working a Democratic Constitution*.

6 Granville Austin, *Working a Democratic Constitution*, Chapter 3 (p. 69-74).

freedoms including the of speech association, etc) and Article 31 (right to property). Article 31B went even further: it stipulated that none of the Acts and Regulations specified in the Ninth Schedule shall be deemed to be void or ever to have become void on the ground that they abridged any fundamental right. Such laws could not be deemed to be void notwithstanding any judgment, decree or order of any court or Tribunal. The Ninth Schedule, initially contained thirteen land reform enactments.

The net result of the First Amendment was that any Act which was included in the Ninth Schedule would be completely immune from challenge in any court of law. At that time, this amendment was criticised in the media. Even the Supreme Court Bar Association passed a resolution expressing concern over the amendment. It was widely believed that the amendment had been made with undue haste.

There was no Constitutional justification for the Ninth Schedule. If the Government had to abolish zamindari estates or nationalise industries, just and fair compensation ought to have been paid. The large amount of litigation sought to be avoided could have been so if adequate compensation had been given to persons whose lands had been taken away. These laws also spawned dubious devices to circumvent land reform laws and created extensive illegal holdings.

Thus, we see, that the First Amendment set the precedent for the Constitution being frequently amended for the purposes of overruling judgments. It also set the trend of retrospective amendments regardless of the hardship that would be caused to the public.

The Ninth Schedule eventually was subject to substantial abuse. Thirteen laws were inserted in the Ninth Schedule in 1951, seven in 1955, forty four in 1964, two in 1972, twenty in 1974, thirty four in 1975 and another fifty nine in 1976. During the Emergency, more than eighty laws were included in the Ninth Schedule and the entire process of getting the approval of the Lok Sabha, Rajya Sabha and the ratification by two thirds of the States was completed in a few days! Thereafter, the number of laws included in the Ninth Schedule has kept on increasing and now contains 284 Acts.

Although several laws do relate to land reform legislation, a number of Acts have nothing to do with either zamindari abolition or nationalisation. The Essential Commodities Act, FERA and MRTP, among other laws, find a place in the Ninth Schedule. Consequently, these laws cannot be challenged on the ground that they violate a citizen's fundamental right. Legally, a law curtailing the freedom of the press could be included in the Ninth Schedule and nothing could be done – that is, till the basic structure doctrine was

evolved.

The greatest abuse was the insertion of amendments to election laws in the Ninth Schedule. After Mrs. Gandhi's election was set aside by the Allahabad High Court and the matter was pending before Supreme Court, amendments were made to put the elections of the President, Vice President, Speaker and Prime Minister beyond any challenge in a court of law. Including the amendments to election laws in the Ninth Schedule was a clear abuse of Parliament's power to amend the Constitution. It had nothing to do with land reforms or any socio economic reform. This demonstrated that the Ninth Schedule could be misused. H.M. Seervai, one of the greatest Indian Constitutional scholars, in his book⁷, published after the Emergency observed:

“The power of acquisition under Article 31(2), and under Article 31B, had been abused at all times to secure party political ends of the parties in power, but more particularly during elections. The power to acquire property on payment of illusory compensation was used as a weapon of blackmail to secure “donations” for the election funds of the party in power from industrial and commercial concerns.”

Seervai points out that Article 31B and the Ninth Schedule enabled the Government to make laws that violated fundamental rights but were immune from any legal challenge. In his view, the “grossest abuse” of Article 31B was the inclusion of the dreaded MISA (Maintenance of Internal Security Act) in the Ninth Schedule. Seervai called for a repeal of Article 31B and the Ninth Schedule.

The Ninth Schedule was further misused by re-enacting laws which had been held to be unconstitutional and inserting them in the Ninth Schedule. In several cases, these laws were validated retrospectively. It cannot be disputed that the Ninth Schedule was used for purposes for which it was never intended. It was inevitable that the validity of the Ninth Schedule itself would be eventually questioned.

After the basic structure theory was laid down in the historic *Kesavananda* case⁸, no law could be immune from judicial review. Parliament's power to amend the Constitution could not extend to altering the basic structure of the Constitution. The basic structure could not be violated indirectly by inserting unconstitutional laws in the Ninth Schedule. The Nine-Judge bench⁹ has now clearly laid down the scope of legislative

7 *“The Emergency, future safeguards and the Habeas Corpus case: A criticism”*, p. 149, (1978).

8 *His Holiness Kesavananda Bharathi v State of Kerala* AIR 1973 SC 1461.

9 *I.R. Coelho, Supra n. 2.*

power. It has made it clear that the Constitution is supreme and there are certain parts of it which are inviolable. Chief Justice Gajendragadkar, speaking about the Ninth Schedule, remarked that our Constitution was the only one that contained a Schedule to protect laws against the Constitution itself.¹⁰

The Supreme Court has made it clear that Parliament cannot indiscriminately include laws in the Ninth Schedule and debar judicial review. The laws inserted in the Ninth Schedule after 24.4.1973, the date of the *Kesavananda* ruling would now be examined on the basic structure doctrine. The latest judgment should not be seen as a confrontation with the legislature. It has only declared that it is the Constitution that is supreme.¹¹

Barring the controversial issue of compensation, there was no serious confrontation between the legislature and the judiciary. Pandit Nehru maintained the dignity of the judiciary, the legislature and the executive. In 1951, the Supreme Court had held that Parliament could amend any of the articles in Part-III of the Constitution. A Constitutional amendment was not a law under Article 13(2).¹² The Supreme Court upheld the validity of the Constitution (1st Amendment) Act, 1951 which had inserted Articles 31A and 31B. As long as Pandit Nehru was alive, one might not have felt the need for the basic structure doctrine to protect the Constitution from the elected representatives of the people.

§ The 24th Amendment – the onslaught begins

After 1951, the Constitution was amended 23 times. None ‘wounded’ the Constitution. On July 22, 1971 the 24th and 25th amendments were introduced in Parliament. They marked the beginning of repeated attacks on the integrity of the Constitution. Unlike the 42nd amendment, the amendments were brief but equally devastating. Like the first amendment, they were intended to overcome judgments of the Supreme Court. The only difference was that the first amendment had the policy objective of abolishing zamindari estates and providing nationalisation of industries. The 24th and 25th amendments would have the effect of placing the Constitution at the mercy of any ruling party that could command the requisite 2/3rd majority in Parliament and had the power to get it ratified by two-thirds of the State. In the well known *Golaknath*¹³ case, the Supreme Court by a majority of 6:5 overruled the earlier decision which had held that Parliament had the power to amend any part of the Constitution including the portion relating to fundamental rights.¹⁴ *Golaknath* ruled that Parliament would

10 Austin, *supra* 5.

11 *I.R.Coelho, supra* 2.

12 *Shankari Prasad Singh v Union of India* AIR 1951 SC 458.

13 *Golaknath v State of Punjab* AIR 1967 SC 1643.

14 *Shankari Prasad v Union of India* AIR 1951 SC 458; *Sajjan Singh v State of Rajasthan* AIR 1965 SC 845.

have no power to take away or curtail any of the fundamental rights which had been guaranteed by Part-III of the Constitution. The judgment in the *Golaknath* case was rendered in 1967. However, these amendments were introduced in 1971. There is no evidence of the *Golaknath* judgment being an obstruction to any programme of economic reform between 1967 and 1971. It was never demonstrated that fundamental rights had interfered with the implementation of any socio-economic reforms. The 24th amendment stipulated that Parliament could amend by way of “addition, variation or repeal” any provisions of the Constitution under Article 368. Under Article 368, the President had the power to send a bill to Parliament for being reconsidered. The 24th amendment provided that once the Constitution was amended by the requisite majority mentioned in Article 368(2), the President had no option but to give his assent to the bill.¹⁵ A corresponding amendment to Article 13 made it clear that a Constitutional amendment under Article 368 could not be struck down on the ground that it took away or abridged any fundamental right. The intention of Parliament was clear: it would have the power to abrogate any or all the fundamental rights and there would be no judicial review.

§ The 25th Amendment

The 25th amendment was also introduced on 22nd July 1971. It consisted of just two effective sections. The first enabled Parliament to acquire any property without payment of ‘compensation’. Article 31 provided for acquisition of property on payment of compensation. In the *Bank Nationalisation* case¹⁶, the court held that the right to compensation would be the right to get the money equivalent of the property that had been compulsorily acquired. Further, the Court held that the law which provided for acquisition or requisition of property for a public purpose should justify the requirements of Article 19(1)(f).

The Statement of Objects and Reasons of the 25th amendment lamented that the adequacy of compensation was justiciable and the courts could determine whether the amount paid to the owner of the property could be reasonably regarded as compensation for loss of property. Article 31(2) was amended whereby the word “compensation” was replaced by the word “amount”. The courts were barred from examining whether the amount was inadequate or that the amount was to be given *otherwise than in cash*. The word “amount”, in any dictionary, means ‘a sum of money’. For instance

15 In a speech at the Loyola College, Chennai in 1971, Nani Palkhivala bitterly criticised the 24th, 25th and 26th amendments. He pointed out that if the President could ask Parliament to reconsider a Sugar Control Bill but if the entire chapter on Fundamental Rights was sought to be deleted, the President would have no option but to give the assent immediately.

16 *R.C.Cooper v Union of India* AIR 1970 SC 564.

consider this hypothetical absurdity. The Government could acquire property worth crores of rupees and pay just a few lakhs as compensation. The person whose property was acquired would have no remedy. It was often forgotten that acquisition could be of a zamindari estate or other jagir property. The Government could acquire anyone's home, shop or factory and pay a paltry sum as an "amount" for the acquisition. Equally, the Government could give bonds repayable after ten years. The 25th Amendment also made clear that the acquisition of property would not be affected by Article 19(1)(f). Thus, the first part of the 25th amendment placed acquisition of property outside the pale of judicial review.

But the other amendment proposed by the 25th amendment was far more vicious. It sought to include Article 31C whose purported object was to save laws that gave effect to Directive Principles. Once again, it started with a *non-obstante* clause and declared that any law giving effect to the Directive Principles mentioned in clauses (b) and (c) of Article 39 could not be challenged on the ground that it took away or abridged the rights conferred by Articles 14, 19 or 31. The sting was in the last part of the Article. It stated that if a law contained a declaration that it was for giving effect to the Directive Principles of State Policy, it could not be questioned at any court on the ground that it did not give effect to the Directive Principles. In other words, a law, even if actually against public interest or to further private political ends, could merely contain a declaration that it was intended to give effect to Directive Principles and get the protection of Article 31C. Even if one could logically demonstrate that the law would actually defeat Article 39, one could not challenge it in a court of law.

Nani Palkhivala termed this amendment as being in utter contempt of Parliament and called it an outrage on the Constitution.¹⁷ The effect of the amendment was that any law could be passed by Parliament and it had merely to contain a declaration that it was intended to give effect to the Directive Principles of State Policy. A simple declaration would close the door of judicial review.

Similarly, any State Legislature could pass laws with such declaration. The only requirement was that they should be reserved for the consideration of the President.

The 24th and 25th amendment in their original form, effectively destroyed the heart of the Constitution that envisaged a democratic system of Government consisting of the legislature, executive and the judiciary. These two amendments sought to place the legislature and the executive

¹⁷ *Supra* 12.

above any checks or controls by way the judiciary. If the 25th amendment had not been partly struck down in the *Kesavananda Bharati* case, it would have been definitely subjected to extensive abuse as in the case of Ninth Schedule. A frightening point to note is that six out of thirteen judges who heard the *Kesavananda* case did not think anything was wrong with Article 31C!

§ The 26th Amendment – Constitutional breach of trust

In July 1971, Parliament also passed the 26th Amendment Act that abolished the Privy Purses; a questionable event in our Constitutional history. The Republic of India reneged on its Constitutional commitment to the former rulers of the princely States. The amendment was not in public interest because the total amount that was given as privy purse to the former rulers was just Rs. 4 crores per annum and was diminishing year after year. The princely States covered 48% of the territorial area of undivided India and 28% of the population resided therein.¹⁸

The Indian Independence Act, 1947 provided for the lapse of paramountcy of the sovereignty of the British crown in India over the Indian States and each Ruler had the option of either acceding to the dominion of India or Pakistan or to continue as an independent sovereign State. The Government of India formed a Ministry of States presided over by Sardar Vallabhai Patel. The herculean task undertaken by Patel with the assistance of V. P. Menon need not be recounted here.¹⁹ C. Rajagopalachari signed the Instrument of Accession as the Governor General of India accepting the various Instruments of Accession signed by the Rulers.

From the beginning, members of the Congress party were reluctant to give anything to the former rulers. Most of the rulers had done little to support the freedom struggle and they were looked upon as stooges of the British Empire. However, the Indian Independence Act, 1947 gave them complete freedom to join India or Pakistan.

As part of the settlement that was reached, several rulers joined India and Constitution guaranteed to them a privy purse which was to be free from income tax under Article 291. Under Article 362, this privy purse was charged to the Consolidated Fund of India. The privy purse that was paid was substantially less than the earnings of the Maharajas. In return for the privy purse, the rulers had given up assets worth Rs. 77 crores. Several palaces, houses etc. were surrendered to the Government and converted into Government offices in Delhi.

18 *Madhavrao Scindia v. Union of India* AIR 1971 SC 530, 545 (para 21).

19 Menon V.P., *The Story of the integration of the Indian States*, Orient Longman (1961).

After independence, some Congress leaders once again proposed the abolition of privy purses. Sardar Vallabhai Patel threatened to resign. He reminded them that it was a promise given to the rulers for signing the Instrument of Accession and that India could not go back on its promise.

In the late 50s, Pandit Nehru wrote to the rulers asking them to “voluntarily” reduce the privy purse. This itself was highly objectionable; once a promise had been made and provisions in the Constitutions reflected that promise, it was wholly inappropriate to request any kind of reduction in the quantum of privy purse.

Several leaders of the Congress party proposed the abolition of the privy purses and privileges given to the rulers. To the credit of Pandit Nehru, he rejected this proposal on the ground that the Government should not break its promise. He had also pointed out that the cost incurred on the privy purses was also diminishing. Thus, a formal resolution moved at the Bhubhaneswar convention of the Congress party was rejected. This shows that Pandit Nehru respected the promises made in the Constitution and did not countenance any proposal for abolishing the privy purses.

With the death of Pandit Nehru and Lal Bahadur Sastri, respect for the Constitution died as well. Before their death the policies of the Government were kept within the framework of the Constitution. After 1967, the Constitution was sought to be brought within the framework of the policy of the ruling party.

Austin recalls that several rulers joined the *Swatantra Party* and many of them defeated the Congress candidates in the Parliamentary elections in 1967.²⁰ The Congress party returned to power but with drastically reduced strength. Once again, the proposal to abolish privy purses was raised by introducing the 24th Amendment Bill. This barely received 2/3rd majority in the Lok Sabha (332 votes in favour and 154 against) but was defeated in the Rajya Sabha (149:75) on 5th September, 1970. The same night an order was prepared derecognizing the Princes. President V.V. Giri was then in Hyderabad. An officer was sent by a special aircraft to get his signature. An order dated 6th September, 1970 was issued to all rulers withdrawing their recognition. Within a few days, Madhavrao Scindia (the Maharaja of Gwalior) and other princes filed a petition in the Supreme Court under Article 32 to strike down the Presidential order as unconstitutional. (Ironically, Madhavrao Scindia subsequently became a leader of the Congress party.) The matter was heard and judgment delivered by December, 1970. From the date of filing, disposal took less than four months ! The Supreme Court

²⁰ Austin, *Working a Democratic Constitution* (p. 220 – 227).

struck down the laconic order derecognizing the princes. A Bench of eleven judges heard this case and Justice A. N. Ray supported the Presidential order on almost all issues. The judgments of Chief Justice Hidayutallah and Justice J. C. Shah judgment deserve to be read. Thus, a maladroit attempt to abolish privy purses was unsuccessful.²¹

In 1971, Mrs. Gandhi won the election with a substantial majority. The 26th amendment was introduced to abolish privy purses. It sought to delete Articles 291 and 362 of the Constitution. (The former guaranteed payment of privy purse which was exempt from income tax and was charged to the Consolidated Fund of India under Article 362.) The 26th amendment also inserted Article 363A which formally derecognized the Princes and abolished privy purses. This was upheld on the ground that it put an end to the distinction between erstwhile rulers and others which is a *sine qua non* for achieving common brotherhood. The 26th Amendment, the court held, did not violate the basic structure.²²

§ 28th Amendment – another breach of trust

Perhaps even more shameful was the 28th amendment which sought to delete Article 314. This provision guaranteed to former civil servants, the same conditions of service as prevailed at the time of just before independence. In other words, former civil servants would be entitled to salary, pension etc. in accordance with the rules that prevailed before independence. The preamble to the 28th amendment stated that

“The concept of a class of officers with immutable conditions of service is incompatible with the changed social order. It is, therefore, considered necessary to amend the Constitution to provide for the deletion of Article 314 and for the inclusion of a new Article 312A which confers powers on Parliament to vary or revoke by law the conditions of service of the officers aforesaid and contains appropriate consequential and incidental provisions.”

Social orders may change but the guarantee given under the Constitution should be respected. Just as a guarantor cannot unilaterally revoke his guarantee on the ground that subsequent circumstances have changed, equally, the nation cannot go back on its promise on the ostensible ground of change of “social order”. In this context, it is interesting to recall a passage from a lecture delivered by Fali S. Nariman.²³

“... here were two aspects of British rule which we jettisoned with the

21 *Madhavrao Jiwajirao Scindia v Union of India* AIR 1971 SC 530.

22 *Raghunathrao Ganpatrao v Union of India* AIR 1983 SC 1267, 1287-1288.

23 Nariman F.S., *Quest for Justice*, First Nani A.Palkhiwala Memorial Lecture, 2004.

British Raj. They were mentioned – somewhat pompously- by a British historian, G.M.Trevelyan. He wrote that the reason why the British ruled India for so long was because (to quote him) “we were looked upon as a nation which kept our promises; and, as rulers, we took no bribes.”

§ 39th Amendment – Touching new lows

Mrs. Indira Gandhi, the former Prime Minister, had won the Lok Sabha election from the Rae Bareilly Constituency against Raj Narain. He challenged her election alleging certain corrupt practices. The details of this case are contained in an excellent book²⁴. In June, 1975, Justice J.M.L.Sinha of the Allahabad High Court set aside her election and she was disqualified for six years. The matter was challenged before the Supreme Court. Justice V.R. Krishna Iyer was the vacation judge and late Shri Nani Palkhivala appeared for Mrs.Gandhi along with Shri F.S. Nariman who was then the Additional Solicitor General. The Supreme Court refused to grant a complete stay of the operation of the Allahabad High Court judgment but granted only a limited stay. Two days later, Mrs.Gandhi proclaimed the Emergency.²⁵ The worst amendments to the Indian Constitution came during this period. Within six weeks of the declaration of Emergency, the Constitution (39th Amendment) Bill was presented to the Lok Sabha. The Statement of Objects and Reasons pointed out that the President was not answerable to a court of law for anything done while in office in the exercise of his powers. It then stated:

A fortiori, matters relating to his election should not be brought before a court of law but should be entrusted to a forum other than a court. The same reasoning applies equally to the incumbents of the offices of Vice-President, Prime Minister and Speaker. It is accordingly proposed to provide that disputes relating to the election of the President and Vice-President shall be determined by a forum as may be determined by a parliamentary law. Similar provision is proposed to be made in the case of the elections to either House of Parliament or, as the case may be, to the House of People of a person holding the office of Prime Minister or the Speaker. It is further proposed to render pending proceedings in respect of such election under the existing law null and void. The Bill also provides that the parliamentary law creating a new forum for trial of election matters relating to the incumbents of the high offices abovementioned shall not be called in question in any court.

24 Prashant Bhushan, *The Case that Shook India*, Vikas Publishing House Pvt. Ltd.

25 Nariman F.S., *Turning Points*, (2006) 8 SCC (J)13.

This reasoning is untenable. The President is not elected like the Prime Minister or Speaker. The purpose of making the President not answerable in a court of law is entirely different and has nothing to do with an election of a Member of Parliament being challenged on grounds of corrupt practices. The 39th Amendment sought to create a forum or authority for deciding the validity of such election. It expressly stated that this authority would not be the High Court which normally tried election disputes under Article 329(b).

The entire amendment was introduced with the sole objective of ensuring that the order of the Allahabad High Court was nullified. This is made clear by Article 329A(4) which stated that any law made by Parliament before the commencement of the Constitution (39th Amendment) Act would not apply to the election of the President, Vice President, Prime Minister and Speaker. *Further, any decision of a court declaring an election to be void would be of no effect.* Despite any such judgment, the election would continue to be valid in all respects and “shall be deemed always to have been void of no effect”. The amendment took no chances. At that time, Mrs. Gandhi’s appeal was pending before the Supreme Court and Clauses (4) to (6) of Article 329A read as follows:-

- (4) *No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election to any such person as is referred to in Clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has, before such commencement, been declared to be void under any such law notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.*
- (5) *Any appeal or cross appeal against any such order of any court as is referred to in Clause (4) pending immediately before the commencement of the Constitution (Thirty Ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of Clause (4).*
- (6) *The provisions of the Article shall have effect notwithstanding anything contained in this Constitution.*

This amendment illustrates the complete disregard for the Constitution. It is the most glaring example of how the Constitution could be subverted to save the election of one individual.

The 39th amendment was presented to Parliament on 6th August 1975. The entire process of obtaining the necessary majority in the Lok Sabha, Rajya Sabha and the Presidential assent was completed within four days! With most of the opposition in jail, a rubber stamp Parliament passed the 39th Amendment without any discussion or debate.

The validity of the 39th amendment was considered by the Supreme Court in *Indira Nehru Gandhi*²⁶ and Article 329A(4) was held unconstitutional.

Khanna J. observed that Article 329A(4) violated the principle of free and fair elections which were an essential postulate of democracy and part of the basic structure. He held:-

- (i) Clause (4) abolished the High Court's jurisdiction without providing for another forum for going into the disputes relating to validity of election of Mrs. Indira Gandhi;
- (ii) It prescribed that the dispute of Mrs. Gandhi's election would not be governed by any election law and the validity of the said election was absolute and not liable to be assailed;
- (iii) It extinguished both the right and remedy to challenge the validity of election.

Mathew J. termed Clause (4) as a legislative judgment, which, like a bill of attainder, disposed of a particular election dispute (that of Mrs. Gandhi). The essential feature of a democracy included the resolution of an election dispute by the exercise of judicial power after ascertaining the adjudicative facts and applying the relevant law for determining the real representative of the people. When there was a dispute between parties as regards adjudicative facts, there could be no legislative validation of an election. Mathew J. in the context of the basic structure made an interesting observation. He held that basic structure was a "terrestrial concept" having its habitat within the four corners of the Constitution.

Chandrachud J., third member of the majority, delivered an equally well reasoned judgment. He described Clauses (4) and (5) of Article 329A as an outright negation of the right to equality under Article 14. No doubt different rules would apply to different conditions and even a single individual, by his uniqueness, may form a class by himself. But in the absence

26 *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299.

of a differentia, reasonably related to object of the law, justice must be administered with an even hand to all. He rightly pointed out that a democracy is sustained by the common man's sense of justice. Our Constitution provided a system of salutary checks and balance. "Whatever pleases the emperor has the force of law" is not an article of democratic faith.

This judgment, delivered during the Emergency, rightly held Articles 329A(4) and (5) to be unconstitutional. It was an unfortunate attempt to amend the Constitution to save the office of one individual. The inclusion of the Speaker, Vice President and the President was only a façade to cover up the real object of the amendment. This case was the first instance of the basic structure doctrine coming to the rescue of the Constitution. If it had been held that the power to amend the Constitution was absolute, this amendment could not have been struck down.

§ 42nd Amendment – a Constitutional outrage:

The 42nd amendment made the largest number of changes in the Constitution. It was also the worst in the history of the republic and it is hoped that such an exercise is never repeated again. The amendment was based on the recommendations of the Swaran Singh Committee. The Statement of Objects and Reasons makes remarkable reading and deserves to be reproduced in full.

1. *"A Constitution to be living must be growing. If the impediments to the growth of the Constitution are not removed, the Constitution will suffer a virtual atrophy. The question of amending the Constitution for removing the difficulties which have arisen in achieving the objective of socio-economic revolution, which would end poverty and ignorance and disease and inequality of opportunity, has been engaging the active mention of Government and the public for some year's now."*
2. The democratic institutions provided in the Constitution are basically sound and the path for progress does not lie in denigrating any of these institutions. However, there could be no denial that these institutions have been subjected to considerable stresses and strains and that vested interests have been trying to promote their selfish ends to the great detriment of public good.
3. It is therefore proposed to amend the Constitution to spell out expressly the high ideals of socialism, secularism and the integrity of the nation, to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing

the directive principles. It is also proposed to specify the fundamental duties of the citizens and make special provisions for dealing with anti-national activities.

4. Parliament and the State Legislatures embody the will of the people and the essence of democracy is that the will of the people should prevail. Even though Article 368 of the Constitution is clear and categorical with regard to the all inclusive nature of the amending power, it is considered necessary to put the matter beyond doubt. It is proposed to strengthen the presumption in favour of the Constitutionality of legislation enacted by Parliament and State Legislatures by providing for a requirements as to the minimum number of judges for determining questions as to the Constitutionality of laws and for a special majority of not less than two-thirds for declaring any law to be Constitutionally invalid. It is also proposed to take away the jurisdiction of High Courts with regard to determination of Constitutional validity of Central laws and confer exclusive jurisdiction in this behalf on the Supreme Court so as to avoid multiplicity of proceedings with regard to validity of the same Central law in different High Courts and the consequent possibility of the Central law being valid in one State and invalid in another State.
5. To reduce the mounting arrears in High Courts and to secure speedy disposal of service matters, revenue matters and certain other matters of special importance in the context of the socio-economic development and progress, it is considered expedient to provide for administrative and other tribunals for dealing with such matters while preserving the jurisdiction of the Supreme Court in regard to such matters under Article 136 of the Constitution. It is also necessary to make certain modifications in the writ jurisdiction of the High Courts under Article 226.
6. It is proposed to avail of the present opportunity to make certain other amendments which have become necessary in the light of the working of the Constitution.
7. The various amendments proposed in the Bill have been explained in the notes on clauses.
8. The Bill seeks to achieve the above objects.”

An examination of the first five paragraphs indicates that every reason mentioned therein was totally unsound. It was never demonstrated that a provision of the Constitution had been an impediment to growth and social justice. The absence of adequate growth in later 60s and 70s was the

consequence of pursuing the wrong policies. Social justice had not been delivered due to the extensive corruption at the Centre and State Governments. Large funds which were meant for providing basic infrastructure were simply siphoned off. There is no point in blaming the Constitution for the continuance of poverty, ignorance, disease and inequity of opportunity. Unfortunately, these continue to be rampant even after 60 years of independence.

It is difficult to understand how a Constitution “to be living must be growing”. The Constitution is not a child that has to grow to survive. The Statement does not spell out the possible impediments to the growth of the Constitution. Indeed, there can be none and it does not require even elementary intelligence to understand that no country has achieved socio-economic development by amending the Constitution.

The real object of the 42nd amendment was to substantially reduce the power of judicial review of the High Courts and Supreme Court. It was a direct attack on the judiciary. Several amendments are shocking to read and what is worse is that they were passed without any discussion whatsoever. There was no reference to any Parliamentary Committee for careful discussion on the need for these amendments and their consequences. The Supreme Court of India was not entitled to consider the Constitutional validity of any such law under Article 32. It could do so only if the Constitutional validity of any Central law was also in issue in such proceedings. Now, when the validity of a State law is challenged, it is very unlikely that a Central law is also challenged at the same time. Consequently, the power of the Supreme Court to decide the validity of a State law was taken away. No person could approach the Supreme Court directly for any violation of his fundamental right if these were breached by any State Government. Article 131A provided that only the Supreme Court could decide the Constitutional validity of any Central law. If any case was pending before the High Court, concerning the Constitutional validity of a Central law, it had to be referred to the Supreme Court. The High Courts could not deal with the validity of any Central legislation.

To add insult to injury, Article 141A stipulated that the minimum number of judges of the Supreme Court who have to sit to determine any question as to the Constitutional validity of any Central law was seven. The Central/State law could not be declared Constitutionally invalid unless a majority of two third of the seven Judges held so! This was obviously to get over the 6:5 or 7:6 verdicts that were rendered in *Golaknath*²⁷ and *Kesavananda*

27 AIR 1967 1643.

*Bharati*²⁸. In the US Supreme Court, a number of important cases on Constitutional law have been decided by a 5:4 majority. If such a majority was required, many laws would not have been declared as unconstitutional.

The campaign to humiliate the Supreme Court touched new lows. Article 77 was amended prohibiting any court (including the Supreme Court or a High Court) to require production of any rules of business. In other words, the Supreme Court could not direct the production of any rule that may be relevant for the decision of a case before it.

The onslaught on the High Courts was even worse. The power of the High Court to decide the validity of any Central law was excluded. The writ jurisdiction was substantially curtailed and Article 226 was resubstituted. The power to grant interlocutory order was drastically limited.

Another amendment which had sinister implications went unnoticed. Part XIV-A, relating to Tribunals, was inserted. This introduced Articles 323A and 323B of the Constitution providing for administrative and other Tribunals. In fact, both the Articles 323A and 323B sought to exclude the jurisdiction of all courts. Under Article 227, the High Court had the power of superintendence over courts subordinate to it as well as Tribunals. The superintendence of Tribunals was excluded. Thus, the intention was to create a parallel justice system which was outside the purview of the High Courts. It may be noted that this amendment was made in 1976 when we did not have the benefit of the Supreme Court judgment in *L.Chandra Kumar*²⁹ wherein it was held that the writ jurisdiction was part of the basic structure and could not be taken away.

Like the Supreme Court, in the High Court only a bench of five Judges could decide the Constitutional validity of a State law and, even there, the decision had to be by a 2/3 majority. If the High Court had less than five Judges, then all the Judges have to sit to decide the issue and the verdict would have to be unanimous.

A part of Article 31C (inserted by the 25th Amendment) was held unconstitutional in *Kesavananda Bharati*. Parliament could not merely declare that the law purported to give effect to such abolition and put it beyond judicial review. The 42nd amendment expanded the scope of earlier part of Article 31C. While the erstwhile Article 31C was to give effect only to directive principles under Article 39, the 42nd amendment protected laws that purported to implement any of directive principles and make them immune from attack on grounds of Articles 14, 19 and 31. The consequence was that directive

28 AIR 1973 SC 1461: (1973) 4 SCC 225.

29 *L.Chandra Kumar v Union of India* AIR 1997 SC 1125: (1997) 3 SCC 261.

principles would prevail over fundamental rights. This provision was struck down in the *Minerva Mills* case³⁰.

The 42nd amendment made another devastating change. It sought to insert Clauses (4) and (5) in Article 368 which made *any* Constitutional amendment made at *any* time, unquestionable in *any* court on *any* ground. The provisions are so shocking that they deserve to be reproduced.

- (4) *No amendment of this Constitution (including the provisions of Part-III) made or purporting to have been made under this article [whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976] shall be called in question in any court or any ground.*
- (5) *For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.*

This amendment was also declared as unconstitutional in the *Minerva Mills* case.

Thirty years later, it is hard to believe that any one could make such amendments to the Constitution. H. M. Seervai observed that “from any point of view, the 42nd amendment can only be described as a Constitutional outrage”. The Janata party which came to power in 1977 had promised to repeal the entire 42nd amendment as part of its election manifesto but Seervai points out that the Janata party did not make this attempt because they did not have the requisite majority in the Rajya Sabha.³¹ Much of the damage done by the 42nd amendment was rectified by the 44th amendment. Strangely, the 44th amendment did not delete Clauses (4) and (5) of Article 368. As mentioned above, these were struck down in 1980 by the *Minerva Mills* case.

§ Reservation and the issue of backward classes:

The reservation of seats in educational institutions and reservation in public sector employment for other backward classes has been a sensitive political issue. In 1992, the *Mandal* case³² considered 11 issues pertaining to reservation in public employment. While rightly emphasising the need for reservation for the socially and economically backward classes, the Supreme Court has also emphasised the need to exclude the creamy layer and held

30 *Minerva Mills Ltd. v Union of India* AIR 1980 SC 1789 : (1980) 3 SCC 625.

31 Seervai H.M. “*The Emergency, future safeguards and the Habeas Corpus case: A criticism*”, (1978).

32 *Indra Sawhney v Union of India* AIR 1993 SC 477 : (1992) Supp (2) SCC 212.

that reservations should neither exceed 50% nor could there be reservation in the matter of promotion. In several subsequent cases, the Supreme Court has repeatedly emphasised the need to exclude the creamy layer. Arun Shourie has pointed out that there are serious flaws in the manner in which the Mandal Commission of 1980 and the Kalelkar Commission of 1952 had identified the castes which would be classified as the backward classes. After 1931, there has been no caste-wise census of the population. The Mandal Commission assumes that the same percentage on the total Hindu population would continue in 1980.³³ If Articles 15 and 16 are to be implemented in the spirit in which they were enacted, it is necessary to identify the castes that are really socially and educationally backward and ensure that the benefit of reservation reaches them. There are enough studies to indicate that the creamy layer has cornered the substantial benefit of reservation.

No political party has yet been able to take an objective stand on this issue and every judgment of the Supreme Court has been nullified in the recent past. The 77th amendment nullified the view taken in the *Mandal* case that reservations could not be made in matters of promotion. The 85th amendment also ensured that persons who had the benefit of accelerated promotion would also get consequential seniority. This amendment nullified the view taken in another Supreme Court judgment.³⁴ Similarly, the 81st amendment permitted the carry forward of backlog vacancies which were not to be taken into account for calculating the ceiling limit of 50% laid down in the *Mandal* case. Finally, the 82nd amendment inserted a proviso in Article 335 to enable relaxation of qualifying marks and standards of evaluation. The Supreme Court had pointed out that relaxation in qualifying marks or lowering standards was not permissible.³⁵ The 82nd amendment nullified this sensible and common sense view.

All these amendments have been upheld by the Supreme Court with certain limitations. It is outside the scope of this article to discuss the scope of these amendments and the recent judgment of the Supreme Court.³⁶

What is objectionable is the tendency to overrule Supreme Court decisions for politically expedient reasons. There has been no objective examination of any mistake or flaw in the Supreme Court decisions before the Constitution is amended. There has also been no examination of the consequences of carry forward of vacancies without the 50% limit or the effect of relaxation of qualifying marks. In the years to come, the country

33 Arun Shourie, *Falling over Backwards*, Rupa & Co. (2006).

34 *Union of India v Virpal Singh Chawhan* (1995) 6 SCC 684 : AIR 1996 SC 448.

35 *Vinod Kumar v Union of India* (1996) 6 SCC 580.

36 *I.R.Coelho v State of Tamil Nadu*, (2007) 2 SCC 1.

will have to pay dearly for amendments that have sacrificed Constitutional principles at the altar of vote-bank politics.

In contrast, decisions of the US Supreme Court have been overruled only five times in over 230 years.³⁷

Conclusion:

The Constitution has thus survived despite tragic attacks. The basic structure doctrine has repeatedly saved its integrity and sanctity. There is now a proposal in certain quarters to have a new Constitution to achieve “social objectives”. The Constitution has not failed us but it is us who have failed the Constitution. It is absurd to expect that conditions of millions of Indians will change by having a new Constitution. Our Constitution does not contain any provision that obstructs a genuine measure to improve the economic and social conditions of our people. I can only conclude with the words of Joseph Story that were quoted by Sachidananda Sinha in his inaugural address as the Provisional Chairman of the Constituent Assembly on 6th December, 1946:

“The structure has been erected by architects of consummate skill and fidelity; its foundations are solid; its compartments are beautiful as well as useful; its arrangements are full of wisdom and order; and its defences are impregnable from without. It has been reared for immortality, if the work of man may justly aspire to such a title. It may, nevertheless, perish in an hour by the folly, or corruption, or negligence of its only keepers, THE PEOPLE. Republics are created – these are the words which I commend to you for your consideration – by the virtue, public spirit, and intelligence of the citizens. They fall, when the wise are banished from the public councils, because they dare to be honest, and the profligate are rewarded, because they flatter the people, in order to betray them.”³⁸

37 The Eleventh Amendment (the only amendment removing part of the jurisdiction of federal courts) was passed in response to the Court’s decision in *Chisholm v Georgia* (2 Dallas 419,1793); the passage of the Thirteenth and Fourteenth amendments overturned *Dred Scott v Sandford* 60 U.S. 393 (1856); the Court’s decision striking down a federal income tax, in *Pollock v Farmers’ Loan and Trust Co.* (158 U.S. 601, 1895), was overturned by the Sixteenth Amendment; and the Twenty-sixth Amendment, extending the franchise to eighteen-year-olds, overturned the Court’s five-four decision in *Oregon v Mitchell* (400 U.S. 112, 1970) – extracts from *Views from the Bench – The Judiciary and Constitutional Politics*, Asian Books, New Delhi.

38 *Constituent Assembly Debates*, Vol.I.

RUSSIAN LAW ON EMERGENCY POWERS AND STATES OF EMERGENCY

*Alexander N. Domrin**

§ Part I

Before the 1990's there existed no parliamentary statute in the Soviet Union for dealing with emergencies, for example, such as those arising as a result of popular unrest or in the wake of a natural disaster.

The previous USSR Constitution of 1977 (sometimes called 'Brezhnev's Constitution') did not contain any provisions dealing with a 'state of emergency'. It distinguished between two regimes of exception: a 'state of war' (*sostoianie voiny*) and a 'state of martial law' or just 'martial law' (*voennoe polozhenie*). Questions of peace and war, including the power to declare war, were assigned to the exclusive jurisdiction of Union authorities¹. Simply put, this was the sole prerogative of the USSR Supreme Soviet..

In the alternative, Article 121(17) provided that "during the time between the sessions of the Supreme Soviet of the USSR", a 'state of war' could be proclaimed by its permanently working Presidium. Such a proclamation could be issued in the "event of a military attack on the USSR" or when it was necessary for fulfilling "treaty obligations concerning mutual defence against aggression".

In contrast to such a 'state of war', the Presidium of the USSR Supreme Soviet was authorised to proclaim martial law in specific localities or in the whole country when it was demanded by the USSR defence interests².

General rules regarding a 'state of martial law' were contained in a Decree of the USSR Supreme Soviet Presidium of 22 June 1941, "*On Martial Law*" (*O voennom polozhenii*)³. Even though it was introduced on the day

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1 Article 73 (8) of the USSR Constitution.

2 Article 121 (15) of the USSR Constitution.

3 Decree of the Presidium of the USSR Supreme Soviet of 22 June 1941 "On a State of Martial Law" (*O voennom polozhenii*) (*Vedomosti Verkhovnogo Soveta SSSR*, No.29, 1941); Resolution of the USSR Council of People's Commissars of 1 July 1941 "On Additional Powers of the USSR People's Commissars During the War Period" (*O rasshirenii prav narodnykh komissarov SSSR v usloviyakh voennogo vremeni*).

when Nazi Germany began its undeclared aggression against the Soviet Union, the 1941 decree didn't deal exclusively with the defence of the country during the Great Patriotic War (1941-1945) but stayed in effect long after the end of the war. It was partially superseded by subsequent legislation, notably by the Statute "*On Military Tribunals*" (*O voennykh tribunalakh*) of 1958.

According to the 1941 decree, the proclamation of a state of martial law in the USSR (or in some of its areas) was to lead to the following consequences: competence and responsibility in matters of public order and state security being transferred to military authorities; military authorities acquiring broadly defined powers to take over ('requisition'⁴ without compensation) means of transportation and to conscript civilian labour force; and in all fields of administration under military control, the military authorities were authorised to back up their orders by the imposition of administrative fines and short-term detentions.

Existence of a declared state of martial law during the Great Patriotic War did not preclude the USSR Supreme Soviet Presidium from occasionally proclaiming an additional state of exception - a 'state of siege' (*osadnoe polozenie*) - within certain defined territories: Moscow, Crimea, Stalingrad Oblast', etc.⁵ A state of siege could be regarded as a stricter form of a state of martial law and had more extreme consequences. For instance, it entitled the military to shoot looters, spies, and saboteurs, on the spot.

The 1988 amendments broadened the justification for martial law to

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- 4 Speaking about requisition, we must remember that the socialist legal doctrine prescribed that the right of the Soviet state to seize any property in the USSR was superior to any individual's right of ownership over the property in question. Aware of the potential for misuse of this right, the Soviet state consented to certain self-imposed limitations. Accordingly, under the Civil Code of the Russian Federation (art.149) requisition was defined as the seizure by the state of an owner's property in the interests of the state or public, with reimbursement for the value of the property. Requisition was permissible only in the instances specifically designated and pursuant to established procedure. Instances under which requisition was permissible could be found both under federal law and law of the fifteen republics constituting the USSR (like Russia, Ukraine, Moldova, etc.) In all of those instances, the taking of property was permitted only if it was "in the public interest" or if there were no other adequate alternatives to requisition. The determination of whether a planned requisition was in the public interest, or whether an adequate alternative to requisition existed, fell within the exclusive prerogative of the state. No such determinations could be challenged in a court.
- 5 See, e.g., Resolution of the USSR State Committee on Defence of 19 October 1941 "On Introduction of a State of Siege in the City of Moscow" (*O vvedenii osadnogo polozenia v g. Moscve*), in *Kommunisticheskaia partia v period Velikoy Otechestvennoy voiny (iun' 1941 g. - 1945 g.)*. *Dokumenty i materialy* [Communist Party in the Period of Great Patriotic War (June 1941-1945). Documents and Materials] (Moscow: Gospolitizdat, 1961), pp. 97-98.
- 6 As a result of the 1988 constitutional amendments, the revised and expanded martial law powers were found in Article 119(14). After the 1989-1990 amendments, those powers migrated to the new Art.127(3)(16), becoming a 'presidential power'. For a translation, see Gordon B. Smith, *Soviet Politics* (NY: St.Martin's, 1992. 2nd ed.), pp. 370-72.

include ensuring the domestic security of the country's citizens, while adding the requirement that the Presidium of the USSR Supreme Soviet (and subsequently – the USSR President) had to consult with the relevant republican Supreme Soviet Presidium before taking an action⁶. The Union authorities never actually had a chance to use that power.

A new regime of exception - a 'state of emergency' - was introduced to the USSR constitutional law as a result of the most fundamental constitutional reform of the *perestroika* period. In December 1988, the USSR Law "*On Changes and Amendments of the USSR Constitution (Fundamental Law)*"⁷ changed about a third of the whole text of the USSR Constitution introducing permanently working legislature and other innovations for the Soviet transition to the rule of law. Establishment of a constitutional mechanism of a state of emergency became an integral part of such transition. Similar changes were made to the constitutions of the USSR republics, including the RSFSR Constitution of 1978. As a result of this radical reform of December 1988 and numerous subsequent changes, the Constitutions of the USSR and Russia effectively stopped being 'Brezhnev's' and became the most progressive and democratic constitutional documents in history of the country, including the current Constitution of 1993.

In 1990, further amendments established Presidency in the USSR (in Russia it happened in 1991) and transferred emergency powers of the USSR Supreme Soviet Presidium to the new office. In addition, the President was given the authority to proclaim 'temporary presidential rule' (*vremennoe prezidentskoe pravlenie*) as a form of a state of emergency⁸.

The Act "*On the Legal Regime of a State of Emergency*" (*O pravovom regime chrezvychainogo polozenia*)⁹, was adopted by the USSR Supreme Soviet on 3 April 1990, to fill an apparent legal vacuum. Its seventeen articles defined the nature of a state of emergency, and provided enabling legislation that gave the Union authorities the operational language, definitions, and procedures for using emergency powers, as Article 1 stated, "in accordance with the USSR Constitution".

Interpreted strictly, the law on a 'state of emergency' could not be invoked against peaceful demonstrations or other legitimate actions. In reality, however, as Gorbachev made clear in his comments on the situation

7 Vedomosti Verkhovnogo Soveta SSSR, No.49, 1988, item 727.

8 For a commentary on 'temporary presidential rule', see Elizabeth Fuller and Stephen Foye, "Special Status, State of Emergency and President's Rule", 3 Report on the USSR (Radio Liberty /Radio Free Europe, Munich), No.5, 1991, p.33-35.

9 Vedomosti S'ezda narodnykh deputatov SSSR i Verkhovnogo Soveta SSSR, No.15, 1990, item 250.

in Lithuania, he put so broad a construction on the ‘safeguarding of citizens’ security’ that the letter of the law was essentially vitiated. In general, the act allowed the central authorities to override the constitutional and legal protection of Soviet citizens. A number of Soviet and foreign legal and political experts disagreed with the official interpretation of the act as the “extreme legal form for ensuring the safety of citizens and normalising conditions”¹⁰. They called the 1990 Act ‘draconian’, and concluded that “a measure that should provide a legal basis for the actions of the government in the event of a natural disaster or of large-scale public disorders has been formulated in such a way as to give the authorities *carte blanche* to flout basic human rights”¹¹.

Ironically, the Act was used against its strongest supporter – USSR President Gorbachev himself, in August 1991 on the verge of signing a new Union Treaty, and in the wake of a 10 per cent reduction of GDP (in the first half of 1991), and a more than 50 per cent growth of prices for food and the most basic consumer goods. An extra-constitutional Committee for the State of Emergency (GKChP), headed by the USSR Vice-President Gennady Yanaev ‘temporarily’ replaced Gorbachev and announced a state of emergency in Moscow and ‘some areas’ of the country for a period of six months¹².

Nevertheless, adoption of special legislation on emergency powers and a state of emergency was a sign of serious political changes in the Soviet Union, a breakthrough on the way of Soviet transition to the rule of law. Legislation on emergency powers and states of emergency could not be drafted and adopted before the beginning of *perestroika*, because there was no necessity of a *legal* regulation of such questions in the authoritarian regime of ‘de facto emergency’ that existed in the former Soviet Union for about seven decades.

Just like it happened with introduction of Presidency, adoption of a special USSR act on a state of emergency created a precedent that was

10 See V.N. Grigor'ev, “Pravovoy rezhim chrezvychainogo polozhenia” [Legal Regime of a State of Emergency], *Pravovedenie*, 2 (1991), p.87.

11 Paul Goble, “Draconian State of Emergency Law”, Report on the USSR (Radio Liberty / Radio Free Europe, Munich), 4 May 1990.

12 For opposing views on the ‘putsch’ see, e.g., Mikhail S. Gorbachev, *Avgustovskiy putsch. Prichiny i sledstvia* [August Putsch: Reasons and Consequences] (Moscow: Novosti, 1991); *Uroki avgusta 1991 goda. Narod i vlast'* [Lessons of August of 1991: People and Power] (Moscow: Yuridicheskaya literatura, 1994); Alexander Lebed', “Spektakl' nazyvalsya putsch” [The Farce Was Called Putsch], *Literaturnaya Rossiya*, No.34-36, 1993; Oleg Shenin, Vladimir Kryuchkov, Valentin Varennikov, *Process po delu GKChP* [The Case of GKChP] (Mahachkala: ‘Golos Pravdy’, 1995).

13 *Vedomosti S'ezda Narodnykh Deputatov RSFSR*, No.22, 1991, item 773.

followed by the largest of the Union republics – Russia. On 17 May 1991, the Russian Federation Supreme Soviet passed its own act, “On a State of Emergency” (*O chrezvychainom položanii*)¹³. Observers of the New York-based Lawyers’ Committee for Human Rights (now Human Rights First) acknowledged that “like many other laws” adopted by the Russian parliament in 1990-1993, the Emergency Law “relied heavily on international human rights norms, and in particular on the International Covenant on Civil and Political Rights”¹⁴.

Very symbolic is the fact that the Law was drafted by the parliamentary Committee on Human Rights rather than by the Committee on Law and Order, or by the Committee on Defence and Security, or, for that matter, by some executive agency. Indeed, the Russian Law of 1991 was probably one of the most liberal acts in this sphere in the world. The act introduced strong safeguards against its possible abuse by either branch of the government, especially in case of a collision between the branches themselves.¹⁵

As required by international law instruments, no regime of emergency powers can be instituted unless it is ‘necessary or even indispensable’ to the preservation of the state and its constitutional order. Given the danger, it is demanded that emergency powers should be the last resort and that the executive should bear the burden of showing this kind of necessity. As it was shown before, an absolute majority of constitutions include clauses for determining when these powers can be triggered. Though these ‘trigger clauses’ are often not drafted with clarity, the concepts of ‘imminent danger’ and ‘self-defence’ are universally present either implicitly or explicitly.

The 1990 Soviet legislation defined a state of emergency as “a temporary measure declared, in accordance with the USSR Constitution and the present law, in the interests of safeguarding the security or safety, *bezopasnost*, of the USSR citizens in the event of natural disasters, major accidents or catastrophes, epidemics, outbreaks of epizootic disease, and also mass disorders” (art.1).

Article 1 proclaimed that the goal of a state of emergency was “the swiftest possible normalisation of the situation and the restoration of legality and law and order”. In other words, following the letter of the law, explicit goals of state of emergency in the country could be not preservation of the state itself and constitutional order (or restoration of constitutional normalcy),

14 Human Rights and Legal Reform in the Russian Federation (New York: Lawyers Committee for Human Rights, March 1993), pp. 80-81.

15 It was no surprise then, that in September-October 1993, an emergency regime (which included dissolution of the Russian parliament and a partial suspension of the Constitution), and de facto state of emergency, were imposed by President Yeltsin not in accordance with the 1991 Russian Law, but rather in violation of it.

but rather 'security' (or 'safety'), 'normalisation of the situation', 'legality' and 'law and order'. More notably absent was any provision limiting declaration of emergency powers to situations of an imminent danger.

In contrast, article 56 of the 1993 Russian Constitution provided that emergency powers could be declared in order to "ensure the safety of citizens and the protection of the constitutional system"¹⁶. By including language about preserving the Constitution, Article 56 could be considered a major step forward from the 1990 Soviet legislation. However, absent again was any provision limiting declaration of emergency powers to situations of imminent danger.

For comparison, let us briefly consider the French legal experience in this sphere. Constitutional Law of France holds special relevance to this analysis since the USSR Presidency (introduced by a constitutional amendment in 1990) was based mainly on the French model. Article 16 of Constitution of France (of the Fifth Republic, 1958) requires that the President may exercise his emergency power only when "the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfilment of its international commitments" are threatened in a "grave and immediate" manner and the "proper functioning of the constitutional governmental authorities" is interrupted (sec.1). In addition, the same article provides that the goal of such emergency powers must be to "ensure within the shortest possible time that the constitutional governmental authorities have the means of fulfilling their duties" (sec. 3).

In 'defence' of the Soviet legislation, one may argue that although the French Constitution uses more definite and precise language and limitations in declaring emergency powers, it is still rather open ended. The meaning of 'institutions' of the republic and 'international' commitments seems rather vague and open to great latitude of interpretation. However, the danger of uncertainty of the language of the French norm is minimised by provisions requiring consultation with the Prime Minister, Constitutional Council, and chairs of chambers of the parliament (sec.1), immediate meeting of the parliament *ipso jure* (sec.4) and a ban on dissolution of the National Assembly (sec.5).

One of the most important conclusions of Clinton Rossiter's classic

16 "The Constitution of the Russian Federation" (adopted by referendum on 12 December 1993), in: *The Constitutions of the World* (Dobbs Ferry, NY: Oceana Publications, Inc., 1970-1997. Albert P. Blaustein & Gisbert H. Flanz, eds.). Volume 16 (Release 94-3, May 1994), p.14.

17 Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948), p.299.

study of emergency powers was that “the decision to institute a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictator”¹⁷. Rossiter was not alone in this respect. The same position was expressed by Carl J. Friedrich: “There should be clear and adequate provision for constitutionally safeguarded emergency powers. These powers should be exercised not by those who proclaim the emergency, but by others, duly designated in the basic law”¹⁸. In other words, the right *to declare* a state of emergency should not belong to those who will be authorised *to exercise* emergency powers. Apparently, this kind of limitation may be able to compensate for a more vague ‘trigger language’. If, for instance, only the legislature can introduce a state of emergency, then it might have the same kind of limiting effect as a narrowly drafted trigger clause.

Article 2 of the 1990 USSR legislation specified three kinds of states of emergency.

The first one could be declared “on the territory of a Union or autonomous republic or in various locations” by the legislature of a Union or autonomous republic (ASSR) with a notice being given to the USSR Supreme Soviet, the president of the USSR, and, in the case of an ASSR, to the legislature of the Union republic concerned.

The second one could be declared by the USSR President in “various locations” of the USSR “upon a request or with a consent” of the Supreme Soviet Presidium of the respective Union republic. If necessary, a state of emergency can be introduced without such ‘consent’ by a two-thirds majority of the USSR Supreme Soviet over the objections of the republic involved.

The last one was an all-Union state of emergency, which could be declared only by the USSR Supreme Soviet.

At first glance, one could argue that Article 2 compensated for the extreme vagueness of Article 1. However, this argument would assume a separation of powers. In reality, back in 1990 (especially before elections in the USSR republics), it would be difficult to suggest that the Supreme Soviet (especially the USSR Supreme Soviet which was formed as a result of partially free and fair elections of 1989) was really independent of the USSR (Gorbachev’s) presidency.

According to Article 3, the declaration of a state of emergency was to

18 Carl J. Friedrich, *Constitutional Reason of State: The Survival of the Constitutional Order* (Providence, RI: Brown University Press, 1957), p.117-118.

be accompanied by an announcement specifying: the reasons (*motivy*) for the measure, the period it was to last, and the area to which it was to apply. The article, however, created a massive loophole and provided that each of those conditions could be modified at its discretion by the body that had declared the state of emergency, thus seriously diminishing the value of this provision.

Under Article 16, the USSR Ministry of Foreign Affairs was to “immediately inform” the UN Secretary-General of an introduction, extension or termination of a state of emergency.

In contrast, under the Russian 1991 law, a state of emergency could be introduced by either executive or legislative branches of government - the President and the Presidium of the Supreme Soviet - with the “immediate notification” of the other of such act (art.5). The act introduced an effective mechanism of checks and balances. If a state of emergency had been imposed by the President, the Supreme Soviet was to review the decree within 24 hours if in session, or within 72 hours if not in session. The Supreme Soviet was to approve the decree by resolution, or the decree would automatically lose its force (art.11 and 12). The President could not extend a state of emergency beyond the stated time periods without the Supreme Soviet’s authorisation. The law set forth maximum time limits for a state of emergency, such as 30 days for the republic as a whole, or 60 days for a portion of the republic. Those periods could be extended only by a new authorising resolution of the Supreme Soviet (art.13).

Once a state of emergency was declared, an important question arose regarding *how* and *to what extent* the government might legitimately re-constitute itself. Article 5 of the 1990 Russian Act stated that the higher organs of state power were empowered to “revoke any decision of lesser organs operating in localities where a state of emergency” had been declared. It also gave broad power to the “higher-level authorities” to set up alternative administrative bodies (‘special temporary agencies’) “to coordinate” the situation, thus effectively suppressing normal operations of republican and local governments. Unfortunately, the statute failed to indicate any limits to the jurisdiction of these ‘agencies’ or to explicitly specify if their existence was limited by the duration of the state of emergency.

The new Russian Constitution of 1993 took an altogether different and more vague approach to institutional adaptation during a state of emergency or martial law. The constitution is silent on the creation of ‘special temporary agencies’; and it is certainly a step forward that it forbids the president to dissolve the Duma during a state of emergency. However, the

constitution, by its silence, appears to leave wide open exactly *what* changes in governmental and constitutional structure the president can make. The document states only that “the regime of martial law shall be defined by the federal constitutional law” (art. 87(3)) and that a state of emergency is to be instituted “in accordance with the procedure stipulated by federal constitutional law” (art. 88). Yet, the Constitution fails to define, or simply hint at, what such ‘regime’ and ‘procedure’ should be. To evaluate these provisions in a vacuum, outside the *realpolitik*, they seem to be extremely vague and open ended.

Also absent from the 1990 Act, and the 1993 Constitution, is any provision like Article 150(7) of the 1977 Malaysian Constitution, which requires that: “At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the Proclamation and, to the extent that it could not have been validly made but for this Article, any law made while the proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period”¹⁹.

This kind of provision can be really important in limiting a possible abuse of emergency powers by the executive, especially in a legal and political system that lacks strong federal legislature, as in Russia since 1993. While illustrations from nations like the United States show that the judiciary is not always willing to invalidate government abuses in times of dire emergency²⁰, such courts will not usually tolerate gross excesses in situations of non-emergency. The kind of ‘restoration provision’ found in the Malaysian Constitution would be extremely helpful to such courts to restrict enforcement of emergency powers in ‘normal times’.

The 1990 USSR legislation made an attempt to specify rights and guarantees that were subject to derogation during a state of emergency. Article 4 established a list of twenty measures that could be applied “depending on the concrete circumstances, the organs of state power and

19 See S. Jayakumar, “Emergency Powers in Malaysia: Development of the Law 1957-1977”, *The Malayan Law Journal*, January 1978, p. xxiv.

20 The U.S. Supreme Court’s refusal to hold unconstitutional - in *Hirabayashi v. United States* (320 U.S. 81 (1943)), *Korematsu v. United States* (323 U.S. 213 (1944)), *Duncan v. Kahanamoku* (327 U.S. 304 (1946)) - the government’s internment of 119,803 Japanese-Americans (70,000 of whom were full-fledged U.S. citizens) during World War II is one of the most graphic illustrations of this observation. Rossiter prophetically observed: “The next time it may be a slightly larger minority group. Whatever it was for its citizens of English, German, Jewish, or Chinese descent, the government of the American Republic was a naked dictatorship for its 70,000 Japanese-American citizens of the Pacific Coast” (Clinton L. Rossiter, *op.cite*, p. 283). For details see, e.g., Jacobus tenBroek, Edward N. Barnhart and Floyd W. Matson, *Prejudice, War and the Constitution: Causes and Consequences of the Evacuation of the Japanese Americans in World War II* (Berkeley & Los Angeles: University of California Press, 1970).

administration". Taken together, and even more so by extension, they gave the authorities the power to take over virtually all institutions in the territory affected: to suspend activities of any "political and social organisations, mass movements" (sec.18), impose quarantines (sec.13), introduce censorship and restrict or ban use of audio and video equipment, copying machines (sec.14, 15), prohibit assemblies, meetings, demonstrations and strikes (sec.6, 10), seize resources (sec.9), exercise business reorganisation (sec.8) and shift workers from one area to another (sec.11), engage in search-and-seizure operations without a warrant (sec.20), temporarily deport population (sec.2), enforce protection of certain objects and areas (sec.1), temporarily confiscate weapons and other materials (sec.5), restrict movement and transportation (sect. 3, 16), and to ban any "armed formations" (sec.19).

Article 6 empowered the authorities to transfer workers and employees "without their consent", and Article 7 specified that a total curfew may be imposed. In addition to a regular criminal liability, Article 8 prescribed administrative fines (of up to 1,000 roubles) and detention (of up to 15 days) for violations of Article 7 and sections 3, 4, 6, 10, 12-16 of Article 4.

The next two articles introduced more severe penalties for "dissemination of provocative rumours, actions that provoke a disruption of law and order or that stir up national discord and the active hindering of citizens and officials in the exercise of their lawful rights and the performance of their duties, as well as persistent failure to obey lawful orders or demands" by members of law-enforcement agencies, "or any other actions of this sort that violate public order or tranquillity" (art.9). Such persons could be fined up to 1,000 roubles or held for up to 30 days. Finally, persons involved in "leading a banned strike" or "otherwise preventing" an emergency regime from "operating normally" were announced liable to criminal penalties, including fines of up to 10,000 roubles, two years of 'corrective labour', or three years of imprisonment. Besides, Article 14 allowed the central authorities to change the territorial jurisdiction in all civil and criminal cases.

The USSR and Russian acts on a state of emergency have certain similarities. Both of them (art.11 and 21, respectively) permitted the use of military personnel, as well as the military formations of the Ministry of the Interior and KGB upon a decision of the USSR Supreme Soviet or the USSR President (in Russia's case - RSFSR Supreme Soviet or Russian President). Articles 12 and 18 of the USSR and Russian laws (respectively) provided for the establishment of a joint command in such situations. In addition, Article 13 of the 1990 Law empowered the USSR Minister of Defence to draft specialists in the reserves for up to two months to deal with natural disasters or accidents. He was presumably not permitted to do so in cases of public

unrest. Article 15 of the Russian law provided for compensation to victims of disasters.

While there were no additional provisions in any other Soviet legislation of that period shedding light on emergency powers in the USSR, as they were laid down in the 1990 Act, one could certainly argue that the statute contained an exhaustive list of restrictions and limitations (especially those in Articles 4 and 9 of the Act) that could be imposed in a state of emergency. The problem was that, even though 'exhaustive', the list was very broad. It is hard to imagine what rights and freedoms could not be affected if the government would have decided to use that legislation. The phrasing of a provision prohibiting any "actions" that could "provoke a disruption of law and order" seems to be especially vague and ripe for use as a vehicle for abuse (art.9).

Perhaps the most dubious provision of the USSR 1990 Act was contained in Article 16, which specified that "in cases where the organs of state power and government are not functioning properly in places where a state of emergency has been declared, the president of the USSR can introduce temporary presidential rule".

Under the provisions of the article, the president of the USSR could 'suspend' the authority of regional bodies and appoint an alternative power structure that would exercise all the powers specified in Article 4. Moreover, this body, and presumably its creator, could make proposals for changing virtually everything in a republic and could take direct control over any enterprises, institutions, and organisations in the relevant area. The only restriction on this virtually unlimited grant of power to the president was a provision saying that he couldn't violate the "sovereignty or the territorial integrity of the Union republic concerned".

Although the Russian law of 1991 specified the same restrictions (as the USSR act of 1990) that could be imposed on Russian citizens in a state of emergency - special regime of exit and entry; increased security; restrictions on assembly and the right to strike; restrictions on transportation; a curfew and restrictions on the press and media, etc. (art.23 and 24), - there was a major and principal difference between the Russian and USSR laws. The Russian Act clearly and in explicit terms proclaimed that a state of emergency could not be the basis for derogation of "fundamental" rights protected by the ICCPR, including the right to be free from torture; cruel, inhuman, or degrading punishment; or freedom of thought, conscience, or religion (art.27). In fact, the 1991 Russian Act "*On a State of Emergency*" became the very first law among any other similar legislation in the 15 constituent republics of the USSR that included a 'non-derogable clause'.

The Russian law set other limits on the state of emergency:

prohibiting introduction of emergency courts (art.34) and death penalty (“the death penalty may not be imposed during the state of emergency, or for 30 days after its conclusion” (art.36));

making changes to the Constitution or to electoral laws, prohibiting elections or referenda until the end of a state of emergency (art.38);

in accordance with the ICCPR, obliging the President to inform the UN Secretary-General (within three days of the imposition of a state of emergency), to provide the latter with the detailed information about the reasons for an introduction of a state of emergency and about the restrictions that were to be imposed in the republic (art.41).

Thus, the Russian 1991 act represented an outstanding legal development and a remarkable improvement over the USSR legislation.

The 1993 Constitution has kept and repeated the best provisions of Part 5 ‘Guarantees of Rights and Responsibility of Citizens and Officials in a State of Emergency’ of the 1991 Russian law. Article 56 enlists the rights and freedoms that cannot be affected by a state of emergency and deserves a title of the ‘non-derogable clause’ of the Russian Constitution.

Specifically, Article 56(3) mentions sixteen rights that “shall not be subject to restriction”. Included in this list are: the right to life (art.20); protection of human dignity and ban on “torture, violence or any other harsh or humiliating treatment or punishment... medical, scientific or other experiments without his or her free consent” (art 21); “right to privacy, to personal and family secrets, and to protection of one’s honour and good name” (art 23(1)); prohibition to “collect, keep, use and disseminate information on the private life of any person without his consent” (art.24(1)); freedom of information (art.24(2)); freedom of conscience and freedom of religious worship, “including the right to profess, individually or jointly with others, any religion, or to profess no religion, to freely choose, possess and disseminate religious or other beliefs, and to act in conformity with them” (art.28); right to occupation (art.34(1)); right to housing (art.40(1)).

The article also includes the most basic and fundamental criminal procedural rights: “everyone shall be guaranteed protection of his or her rights and liberties in a court of law” (art.46); “no one may be denied the right to having his or her case reviewed by the court and the judge under whose jurisdiction the given case falls under the law” (art.47); right to legal counsel from the moment of detention or indictment (art.48); presumption of innocence (art.49); prohibition to be repeatedly convicted for the same offence and right to have the sentence reviewed by a higher court (art.50);

right not to testify against himself or herself, for his or her spouse and close relatives (art.51); protection of the “rights of victims of crimes and abuses of power” (art.52); right to compensation by the state for the “damage caused by unlawful actions (or inaction) of state organs, or their officials” (art.53); prohibition of retroactive force for laws “instituting or aggravating the liability of a person”; no one may be held liable for an action which was not recognised as an offence at the time of its commitment” (art.54).

Naturally, not all rights and freedoms can be protected in a state of emergency. Among the rights which are not given this constitutional protection are freedoms of speech, association, democratic elections, and various social and economic rights, including social security, education and health care.

However, as with other provisions in the Constitution, the problem is that the President is the body that has the right to declare a state of emergency under Article 88, and under Article 80(2) he is also the one who serves as the “guarantor of the Constitution of the Russian Federation, and rights and freedoms of man and citizen”. According to the latter article, it’s the President again who “shall take measures to protect the sovereignty of the Russian Federation, its independence and state integrity”.

Without a well-established system of checks and balances and separation of powers, as is the case in the post-1993 Russia, one has to seriously question the enforceability of all the rights and freedoms guaranteed in Chapter Two of the Constitution, including Article 56 that proclaimed that “in the period of martial law citizens enjoy all rights and freedoms established by the Constitution of the Russian Federation except those rights and freedoms that are restricted by this Federal Constitutional Act and other federal legislation” (Art.18(1)).

§ Part II

In the last two decades, states of emergency and emergency regimes have been introduced by the USSR and republican authorities approximately thirty times. In general, emergency powers have been invoked at three different levels of the constitutional systems of the USSR and former Soviet republics.

An invocation at the *all-union level* occurred in Lithuania when, on 11 March 1990, this Baltic republic declared its ‘independence’ from the USSR. President Gorbachev first unsuccessfully appealed to the leadership of the unruly republic not to violate its constitutional subordination within the Union, and then invoked his new constitutional power to impose an economic

embargo, a form of political coercion, on the secessionist republic. The embargo was in effect for several months in 1990. On 7 January 1991, the President of the USSR ordered Soviet airborne troops into Lithuania (as well as into Latvia, Estonia, Armenia, Georgia, Moldavia and some areas of Ukraine) to 'enforce the draft', and on 13 January 1991, the Soviet army assisted a shadowy Lithuanian 'National Salvation Committee' in taking over several strategic buildings in Vilnius, the Lithuanian capital. Reports indicated that 13 or 14 people were killed, and some 100-150 others wounded. In characteristic fashion, Gorbachev denied that he had given prior authorisation for the crackdown in Lithuania, but defended it as a 'necessary defensive action' and denied any responsibility for the events in Vilnius.

At the union republic level, on 22 September 1988 the USSR Supreme Soviet declared a 'state of exception' (*osoboe polozhenie*) and curfew in the Nagorno-Karabakh Autonomous Oblast' (NKAO) and district (*agdam raion*) of Azerbaijan (east of Karabakh), which by then had been rent by interethnic conflicts for months²¹. On 23 November 1988, the Presidium of the USSR Supreme Soviet issued a decree '*On Immediate Measures for the Establishment of Public Order in the Azerbaijan SSR and Armenian SSR*' extending the state of exception to Baku, the capital of Azerbaijan, some other cities and districts of the republic, as well as to Yerevan, the Armenian capital. Simultaneously, federal Ministry of the Interior troops were deployed to Yerevan, Baku, and Karabakh. These measures failed to produce the desired results, and "in view of the continuing tension in interethnic relations in and around NKAO and in order to prevent their further aggravation and to stabilise the situation in the region", the Presidium of the USSR Supreme Soviet on 12 January 1989 decreed the introduction of a 'special form of administration' in accordance with Article 119(14) of the USSR Constitution. All government powers over the autonomous region were transferred to the Committee for the Special Administration of the NKAO headed by Arkady Volsky²², a member of the CPSU Central Committee of Gorbachev's draft (since 1986), and a former economic aide to CPSU General-Secretaries Yuri Andropov (1983) and Konstantin Chernenko (1984). In May 1989, federal Army troops were deployed in Stepanakert, the Karabakh 'capital'.

Although the very first paragraph of the decree of 12 January 1989

21 NKAO is a predominantly Christian Armenian enclave within the borders of Azerbaijan, which is predominantly Muslim. In February 1988, the NKAO Supreme Soviet called for its transfer to the jurisdiction of Armenia under the slogan of the 'right to self-determination' of ethnic Armenians in NKAO. Gorbachev and the governments of the USSR and Azerbaijan based their opposition to internal border changes and the annexation NKAO by Armenia upon Article 78 of the USSR Constitution which stated that 'the territory of a union republic cannot be changed without its consent'.

22 *Vedomosti Verkhovnogo Soveta SSSR*, No.47, 1988, item 711; No.3, 1989, item 14.

23 *See Sovetskaya Kirgizia*, 8 June 1990.

described the measure as ‘temporary’, it set no time limit upon the measure. In several cases, this distressing tradition continued even after adoption of the parliamentary statute in 1990. For instance, a decree of the Presidium of the Supreme Soviet of the Kirghiz SSR of 7 June 1990 declaring a state of emergency in Frunze, capital of Kirgizia, did not specify how long the state of emergency was to last²³. This was an obvious violation of Article 3 of the 1990 USSR Law.

Looking back, it would be fair to say that quite often (if not usually) the imposition of a state of emergency was a reaction to civil unrest and other forms of internal strife that had led to grave violations of human rights. In some cases, the declaration of a state of emergency provoked clashes between the civil population and illegal paramilitary formations on the one side, and internal troops and/or the army on the other. ‘Black January’ in Azerbaijan is a typical example of such a situation. Responding to an official declaration (on 1 December 1989) by the Armenian Supreme Soviet that Azerbaijan’s province of Karabakh was an ‘integral part’ of Armenia, the Popular Front of Azerbaijan (PFA), then a nationalist opposition party with armed militia units, began a railroad blockade of Armenia and NKAO, severely restricting the delivery of food and fuel. On 13-14 January 1990, anti-Armenian violence broke out in Baku, where the PFA was in control, and resulted in between 60 (the official figure) and 100 deaths. Radical PFA members led attacks on the Communist Party and government buildings in Baku and other cities, and outposts of the USSR border guards were attacked on the Soviet-Iranian border. On 15 January, the USSR Supreme Soviet Presidium continued its experimentation with its emergency powers and introduced a new regime of exception (the third in the space of 16 months), this time a ‘state of emergency’²⁴. Among other measures, the Union authorities declared a curfew and dispatched thousands of federal troops to Baku to restore normalcy and ensure safety in the region. Their attempts to disarm militia and dismantle barricades and other makeshift devices proved to be ineffective. According to official reports, 124 people were killed and

24 Vedomosti Verkhovnogo Soveta SSSR, No.3, 1990, item 40.

25 In her report to U.S. Congress C. Migdalovitz gave excessive numbers of victims: 150 dead and “thousands” wounded (Carol Migdalovitz, Armenia-Azerbaijan Conflict (CRS Report for Congress IB92109; Washington, D.C.: Congressional Research Service, The Library of Congress, updated 16 June 1994), p.3). By mistake, Migdalovitz called a state of exception (*osoboe polozhenie*) imposed in Karabakh “martial law”, but she was absolutely right in her conclusion that it was “Michail Gorbachev’s policy” that “unleashed long-suppressed hostility between Armenia and Azerbaijan, and between each republic and Moscow” (p.3).

26 El’chibey’s government ended in chaos, when in June of 1993 he fled to a remote village in the mountains and was stripped of presidential powers by the parliament. On 29 August 1993, more than 90 percent of the electorate reportedly turned out for a national referendum, overwhelmingly expressing a lack of confidence in El’chibey’s rule.

some 700 wounded²⁵. What was viewed as a 'Soviet intervention' further alienated the Azeri population from Moscow, and later helped the Popular Front leader Abul'faz El'chibey temporarily come to power in the republic²⁶.

As an example of a regime of exception within a union republic, we should consider the state of emergency that was introduced on 12 December 1990 within the territory of the 'South Ossetian Autonomous Oblast', an autonomous region of Georgia with a large concentration of non-Georgians. The imposition was carried out in accordance with Article 113(7) of the 1978 Georgian Constitution.

The disintegration of the USSR in December 1991 along administrative demarcation lines, which are often illusory, rather than *state* (national) borders, led to the division of several ethnic groups living on the territory of the Soviet Union amongst new 'independent' countries. The Ossetian nation, in this respect, was divided between the Russian Federation (North Ossetia) and Georgia (South Ossetia). Interestingly, the *Wall Street Journal* committed an error when claiming that South Ossetia (and Abkhazia, another region of Georgia) had broken away from Georgia in wars that followed the collapse of the Soviet Union in 1991²⁷. In reality, the conflict in South Ossetia had deeper roots, and was caused by a general discriminatory policy of the government of Georgia against its ethnic minorities. The Ossetian side claims, for instance, that while in the 1920s there were as many Ossetians in North Ossetia as in South Ossetia, by 1991 there were 350,000 Ossetians in the North, leaving only 68,000 in the South. Many had moved to Northern Ossetia from the South to avoid the discriminatory treatment of the Georgian authorities.

The situation was exacerbated more than two years before disintegration of the Soviet Union by the Language Act (adopted in August 1989) that made Georgian the only 'official' language in the republic, including within schools and other educational institutions. There were plans of further 'Georgianization' of the region. Attempting to prevent this, the South Ossetia Oblast (Council) requested the Georgian Supreme Soviet to grant South Ossetia the status of an 'autonomous republic' which implies a higher level of self-administration than an 'autonomous oblast'. The leader of the Georgian nationalists, Zviad Gamsakhurdia, replied by calling the South

27 Hugh Pope and Guy Chazan, "Georgia Sets Path of Confrontation. New President Saakashvili Angers Russia, Courts U.S. With Caucasus Ambitions", *Wall Street Journal*, 6 August 2004.

28 Members of the current government of President Mikhail Saakashvili continue referring to South Ossetia as the 'Tskhinvali region': "Georgian Prime Minister Zurab Zhvania rejected any attempts to interfere with the Georgian-South Ossetian relations from the outside. 'It's nobody's business what military units Georgia will deploy to the Tskhinvali region'". (See, "Georgia to Deal with Rebellious Autonomy Alone?", *RIA Novosti*, 2 June 2004).

Ossetians ‘ungrateful guests’ of Georgia, alluding to the claim that they have lived in the area for ‘only a few centuries’.

As a next step, the Georgian government refused even to use the name ‘South Ossetia’, and began referring to the region as ‘Samochablo’ (an older Georgian name for the region) or the ‘Tskhinvali Region’ (after the regional capital city Tskhinvali)²⁸. In November 1989, groups of Georgian youth held a ‘march on Tskhinvali’. Arrival of some 15,000 armed men on trucks, buses and cars led to severe clashes and the injuries of hundreds of people. In September 1990, the government of South Ossetia proclaimed the independence of the ‘Soviet Republic of South Ossetia’ (within the USSR), and in October boycotted the Georgian elections that brought Gamsakhurdia and the ‘Round Table Free Georgia’ coalition to power.

On 11 December 1990, the Gamsakhurdia government stripped South Ossetia of *any* autonomous status, and a day later, imposed a state of emergency on the stated ground that two Georgians and one Ossetian had been murdered in Tskhinvali under mysterious circumstances²⁹. Deployment of 3,000 to 6,000 Georgian militia to Tskhinvali, ostensibly ‘to maintain order’ in the region, was viewed by the South Ossetians as an ‘intervention’ and ‘occupation’. The resulting resistance led to three weeks of all-out urban warfare, until the Georgian militia was pushed out of the city. Initially declared for a period of one month in the city of Tskhinvali and Javsky district, the state of emergency was repeatedly extended. The continuous struggle that included armed clashes and the shelling of Ossetian villages, and the economic and military blockade of the area, made thousands of Ossetians flee the region and find shelter in North Ossetia, located within the territory of the Russian Federation.

A *coup d’etat* staged in Gamsakhurdia (December 1991 - January 1992) by Edward Shevardnadze and his allies, which included the notorious convicted criminals Tenghiz Kitovani and Jaba Ioseliani, did not succeed in changing the nationalities policy of Georgia. In fact, as revealed in a report of a Swedish-American fact-finding mission to Georgia, more people were killed in South Ossetia after Shevardnadze’s accession to power than during the earlier phase³⁰. A peacekeeping mission of the Organisation for Security and Cooperation in Europe (OSCE) has been deployed in South Ossetia since 1992. However, several rounds of talks between Georgian and South

29 The Emergency Proclamation was published in *Molodezh’ Gruzii*, No.49, 14 December 1990.

30 *Georgia on Our Minds* (Report of a Fact-Finding Mission to the Republic of Georgia, July 1994, under the auspices of the Psychologists Against Nuclear Arms for Peace and Ecological Balance and the Transnational Foundation for Peace and Future Research), p.17. For the background of the Georgian-South Ossetian conflict, *see, e.g.*, Ronald Grigor Suny, *The Making of the Georgian Nation* (Bloomington, IN: Indiana University Press, 1988).

Ossetian representatives have made little progress toward an agreement on South Ossetia's future status.

Similar to the Armenia-Azerbaijan conflict over Nagorno-Karabakh, the territorial problem relating to South Ossetia still lingers in Georgia. Since the latest coup in Georgia, directed against Shevardnadze, and the election in January 2004 of president Mikhail Saakashvili, the South Ossetian situation has shown the tendency of going from bad to worse.

§ Part III

Since the adoption of the Law "On a State of Emergency" of 1991, this special regime has been declared in Russia (or the RSFSR) thrice; in Chechnya in November 1991, Ossetia-Ingushetia in 1992-1995, and in Moscow in October 1993.

On the first occasion, it was introduced by President Yeltsin by way of Decree No.178 of 7 November 1991, intending to "put an end to mass disturbances, accompanied by violence, [and] stop activities of illegal armed formations, in the interests of guaranteeing safety of citizens and protection of constitutional order of the republic". A state of emergency with all its elements (including a curfew, the confiscation of weapons, and a ban on meetings, demonstrations and strikes) was to come into effect at 5 a.m. on 9 November and last for 30 days. In reality, it turned out to be the shortest emergency imposed within the territory of Russia, as the Russian Supreme Soviet refused to ratify it³¹. Setting aside the discussion concerning the political circumstances surrounding the introduction and termination of the emergency (the lack of coordination between branches of government, different interpretations of events in Chechnya, etc.), and the question of which decision was correct, this was the only instance where the Russian Parliament effectively exercised a 'termination clause' of the legal mechanism of a state emergency. However, it would be fair to say that an abrupt termination of emergency in 1991, just two days after its introduction by the Russian President, caused what may be termed 'Chechen syndrome', and became one of the reasons for the future reluctance of Russian federal authorities to use the 1991 law.

The longest state of emergency was in effect in parts of North Ossetia (the official name of the republic is 'North Ossetia - Alania') and Ingushetia between November 1992 and February 1995.

The imposition of a state of emergency for two-and-a-half years in the region resulted in the prevention of open fighting. In the first months after

31 Vedomosti S'ezda narodnykh deputatov RSFSR i Verkhovnogo Soveta RSFSR, No.46, 1991, items 1546, 1550.

the introduction of the state of emergency (November-December of 1992) only 26 persons were killed in the region, compared to 478 before 2 November 1992. In 1993, the number of victims was 124, including 40 Ossetians, 33 Ingush, 21 of 'other nationalities' (mainly Russian peacekeepers), and 30 of 'unknown nationalities'. In the first half of 1994, the number was reduced to 16. That was probably the most important result of the emergency regime.

Overall, the imposition of a state of emergency and its operation in parts of North Ossetia and Ingushetia between November 1992 and February 1995 was moderately effective in stopping armed fighting and preventing the worst scenario, open warfare between two ethnic groups. However, it proved to be unsuccessful in solving the underlying problem and eradicating the roots of the conflict, which were the territorial claims of Ingushetia upon Prigorodny district of North Ossetia.

Amongst all the instances of the imposition of the state of emergency within the territory of the former Soviet Union, observers can hardly identify a more dramatic and more significant emergency regime than the one imposed by President Yeltsin on 4 October 1993, after brutal suppression of the first democratically elected Russian Parliament³². The event truly became *a defining episode* in contemporary Russian politics.

On 21 September 1993, President issued Decree No.1400, which had the paradoxical title '*On the Gradual Constitutional Reform in the Russian Federation*' (*O poetapnoy konstitutsionnoy reforme v Rossiyskoy Federatsii*). By way of the Decree, the Congress of People's Deputies (the upper tier of parliament) and the Supreme Soviet (the permanently working legislative body) were declared dissolved and their activities "interrupted" (Art.1)³³. When the Parliament declared Yeltsin's actions a coup, the executive ringed the parliamentary building (White House) with police cordons, cut off telephone services, water, electricity, heating, and the emergency systems, as well as the telephone line of Chairman of the Constitutional Court in the Court's building.

The necessity to dissolve the Parliament, as it was stated in Decree 1400, was justified by the allegations that the Supreme Soviet had lost its

32 Democratic character of the first Russian parliament is beyond any doubt. According to the Central Election Commission, on 4 March 1990, 6,705 candidates ran for 1,068 seats in the Congress of People's Deputy (CPD) - an average of more than six per district. About 300 electoral districts had a race between more than four candidates; 24 electoral districts - more than twenty! (See, e.g., Human Rights and Legal Reform in the Russian Federation (New York: Lawyers Committee for Human Rights, March 1993), pp. 44-45).

33 Sobranie aktov Prezidenta n Pravitel'stva Rossiyskoy Federatsii, No.39, 1993, item 3597.

“ability to be a representative body”, and that “the security of Russia and its people” was “a higher value than formal observation of discrepant norms”, introduced by the Parliament. The problem with this explanation is that the Russian legislation adopted in 1991-1993 was signed into effect by the President himself. On a few occasions, he exercised his veto power. In instances where legislation was not vetoed, he accepted responsibility along with Parliament for all “discrepant norms”. In the final analysis, the very creation of the presidency in Russia in 1991 was also a ‘norm’ introduced by the Parliament. The extent to which the Supreme Soviet ‘represented’ Russian society, its wishes and interests, was demonstrated by Russian voters in the next parliamentary elections of December 1993, when 85 per cent of them voted *against* pro-Yeltsin’s ‘party of power’ (Egor Gaidar’s ‘Russia’s Choice’).

‘Gradual Constitutional Reform’ was aimed not against the legislative branch of the Russian government alone. In Article 10 of his Decree No.1400, Yeltsin also “advised” the Constitutional Court “not to convene” until after the December 1993 elections. The Constitutional Court did not follow that ‘advice’, which was a blunt violation of the separation of powers and an infringement of the court’s independence. In an emergency session that took place the same night³⁴, it voted 9 to 4 that the President’s action violated eleven articles of the Russian Constitution. The most important of those 11 counts was a violation of Article 121-6, one of the key provisions of a chapter on the presidency in the Russian Constitution. Originally, it was an article of the Law “*On the President of the RSFSR*” (*O prezidente RSFSR*) of April 1991, which introduced the presidency in Russia; later (in May 1991) the provision was included in the Constitution. According to the article, the President could not use his powers “to dismiss, or suspend the activities of, any lawfully elected agencies of state power”. Violation of the article would not merely subject the President to a long ‘impeachment’ procedure, as it is known in the U.S. and elsewhere. Article 121-6 was a much more powerful constitutional check on the authoritarian tendencies of the executive, which provided that in the case of a violation, the President’s powers were to be “discontinued immediately”.

In accordance with the Constitution, the tenth CPD convened in the White House, and with its Resolutions No.5780-1 and 5781-1 discontinued

34 Vestnik Konstitutsionnogo suda, No.4, 1994.

35 Rossiyskaya gazeta, 23 September 1993.

36 Next day Yeltsin issued two supplementary decrees: No.1578 “On Urgent Measures for Ensuring the Regime of a State of Emergency in Moscow” and No.1580 “On Additional Measures for Ensuring the Regime of a State of Emergency in Moscow”, and one more on October 9: No.1615 “On Extension of a State of Emergency in Moscow” (*See Sobranie aktov Prezidenta n Pravitel’sstva Rossiyskoy Federatsii*, No.40, 1993, items 3748, 3751; No.41, items 3909, 3923).

the Presidential powers of Boris Yeltsin (at 10 p.m. on 21 September 1993) and named Vice President Alexander Rutskoi 'acting President'³⁵.

At 4 p.m. on 3 October 1993, Yeltsin signed Decree No.1575 '*On Introduction of a State of Emergency in Moscow*'³⁶. This decree was far from being perfect in terms of legislative technique overall, and few of Yeltsin's decrees have been as poorly drafted as Decree No.1575. Although the decree appealed to several provisions of the Act "*On a State of Emergency*" of 1991, and although the declared regime was called a 'state of emergency', it was introduced in violation of both the Constitution and the 1991 Russian Law.

The decree appealed to a number of provisions of the Russian Act of 1991 (Arts.22-24; allowing suspension of certain rights and freedoms), but it lacked an exhaustive list of such suspended rights, as prescribed by the same Act "*On a State of Emergency*" (Art.10). The decree failed to give exact reasons that had made Yeltsin introduce a state of emergency, as prescribed by Article 4(a) of the 1991 law. The decree appealed to Article 24 of the law that named measures that might be undertaken under an emergency regime, even though according to the act such measures could be undertaken only when the emergency is caused by a natural disaster (and not by disturbances and political unrest, as was the case in October 1993). Yeltsin exceeded his powers and grossly violated the Russian legislation when he suspended the norms of laws on the status of parliamentarians and lifted their immunity. The President did not have a right to ban public organisations, seize their bank accounts, headquarters and property; this could be done only after giving 'a preliminary warning' to such organisations. Article 21 of the 1991 law allowed use of troops only with the consent of the Russian Supreme Soviet, and exclusively when an emergency was caused by natural disasters ('military aid to civil ministries', 'military aid to the civil community', and 'military aid to the civil power', as it is known in Britain), and not to shoot protesters. In error, the Russian law of 1991 was itself called an act of the "Russian Federation", whereas technically it was an RSFSR act. Finally, the emergency declaration was not approved by Parliament (for it had been dissolved and soon would be physically destroyed), and therefore what was introduced in Moscow was a *de facto* state of emergency - in the best tradition of juntas and similar dictatorial regimes - not *de jure*, as it should be in states governed by law.

Tanks were called in to shell the White House and burn it down, and

37 Nezavisimaya gazeta, 19 October 1993. British magazine The Spectator wrote about "1,000 arrested" ("Portrait of the Week", The Spectator, 9 October 1993, p. 4).

38 "Massovye narusheniya prav cheloveka v Rossii" [Mass Violations of Human Rights in Russia], Nezavisimaya gazeta, 23, 26 July 1994. One of those who was severely beaten by Moscow OMON (Special Police Unit) was a parliamentarian and Secretary of the Constitutional Commission Oleg Rummyantsev - "Russian James Madison", as David Remnick called him in The Washington Post in 1990.

in the days after the introduction of the state of emergency, scores of people were arrested. Approximately 35,000 were detained for violation of curfew regulations (curfew was declared at 11 p.m. on 4 October), and more than 54,000 were detained for 'administrative misdemeanours'. 9,779 persons were accused of violating the internal passport system and deported from Moscow³⁷. According to a Report of the Human Rights Commission, mass beatings of the detained were a common practice³⁸.

On 7 October 1993, Yeltsin signed Decree No.1612 '*On the Constitutional Court of the Russian Federation*'³⁹, stripping the court of its key powers. The only fault of the court was that it obeyed the Constitution, and it "ended up on the losing side when Yeltsin emerged victorious from the bloody events of October"⁴⁰. It was only 18 months later that the new Constitutional Court of Russia was able to resume its normal work.

Communist, nationalist and patriotic organisations were banned and barred from participation in the forthcoming elections⁴¹, and censorship was introduced. On 13 October, all the opposition dailies were banned, and criminal investigation was initiated against the editors of 15 periodicals.

The number of victims of those days of 'civil war' in Moscow vary from the 'official' number of 147 killed (half of whom were teenagers) and more than 700 wounded to an estimated "1500 killed". The precise numbers of those who were beaten and wounded "has not been reliably determined"⁴².

The evaluation by an authoritative human rights organisation concludes that: "The state of emergency... was a major blow to human rights... The state of emergency violated Russia's own domestic rules regarding states of emergency. It also violated the standards provided in Article 4" of ICCPR. "Among the non-derogable rights that were violated was the right to life... Moreover, the extent to which derogable rights, such as freedom of speech, were restricted also went beyond the boundaries of the covenant... A wide range of measures taken during the state of emergency involved discrimination solely on the ground of race or colour - all violations of the covenant... As the Russian human rights NGO *Memorial* has documented, the number of

39 Ibid, No.41, 1993, item 3921.

40 Justice Delayed. The Russian Constitutional Court and Human Rights (New York: Lawyers Committee for Human Rights, 1995), p. 6.

41 Sobranie aktov Prezidenta n Pravitel'stva Rossiyskoy Federatsii, No.43, 1993, item 4080.

42 Boris Kagarlitsky, Square Wheels. How Russian Democracy Got Derailed (New York: Monthly Review Press, 1994), p.218. As an eyewitness Kagarlitsky testified in his book that the official figure of victims (142 killed) "was a mockery - the real number of dead had to have been several times greater" (*ibid.*).

43 Information Prepared for the Human Rights Committee on the Periodic Report of the Russian Federation Under Article 40 of the Covenant on Civil and Political Rights by the Lawyers Committee for Human Rights (New York: Lawyers Committee for Human Rights, 1995), p.4.

cases that have been pursued by the Procurator's Office is insignificant, particularly when compared to the scope of violations⁴³.

§ Part IV

A Draft Constitution was quickly prepared to seize the moment and make Yeltsin's 'victory' even more monumental. The President offered a draft on 10 November, just a month before the referendum. Discussion of the draft in the mass media was prohibited, "hardly a sound precedent of democratic practice", as British analysts wrote⁴⁴. Further, for the very first time in Russian history since 1917, the minimum voter turnout needed for a valid parliamentary election was reduced from 50 to 25 per cent. The new Constitution, whose *actual* adoption by the Russian population is highly doubtful, provided for one of the strongest presidencies in Europe, "superpresidentialism" or "a modern-day czar", and was described as placing Russia once again under something similar to authoritarian rule.

As a 'victor's Constitution' (rather than a consensus- or social contract-based constitution), the 1993 Fundamental Law substituted the separation of powers and checks and balances with presidential supremacy, and placed the Executive above other branches of government⁴⁵. Among other things, the 1993 Constitution granted jurisdiction to the President over several areas which had traditionally been the preserve of the courts, such as the protection of civil rights and freedoms, and proclaimed him the "guarantor of... the rights and freedoms of the human being and citizen" (Art.80(2)). "Such delegation of authority to the Executive to protect constitutional rights "not only violates the doctrine of separation of powers, but also may give the President a justification, albeit tenuous, to usurp the Court's jurisdiction, and suspend judicial review in a time of crisis"⁴⁶. This unhealthy concentration of authority in the hands of the Executive took place in the context of emergency powers as well.

The Constitution provides for the adoption of a number of Federal Constitutional laws that would supersede some outdated acts. Article 88(2) of the Constitution specifically declared the necessity to adopt a new Federal

44 Stephen White and Ronald J. Hill, "Russia, Former Soviet Union, and Eastern Europe", in *The Referendum Experience in Europe* (London: Macmillan Press Ltd, 1996. Michael Gallagher and Pie Vincenzo Uleri, eds.), p.163.

45 In an alarming conclusion of another American scholar, Yeltsin "demonstrates how attempts to copy the American system are likely to end up in dictatorship, as they have so often in Latin America" (Robert V. Daniels, "Yeltsin's No Jefferson. More Like Pinochet", *The New York Times*, 2 October 1993, pp. 23).

46 See Amy J. Weisman, "Separation of Powers in Post Communist Government: A Constitutional Case Study of the Russian Federation", 10 *The American University Journal of International Law & Policy* (Summer 1995), p.1397.

constitutional law “*On a State of Emergency*” (*O chervychainom polozhenii*). The act was eventually adopted and signed into effect by President Putin on 30 May 2001 (No.3 – FKZ).

The first and the second State Dumas (elected in 1993 and 1995) made several attempts to pass that important piece of legislation (especially in the period of a state of emergency in North Ossetia and Ingushetia), but none of those attempts came to fruition. In 2000-2001, the State Duma considered two bills on the state of emergency. While one was introduced by President Yeltsin in 1997, the other draft was an ‘initiative bill’ endorsed on 11 April 2000 by a group of liberal State Duma deputies: Edward Vorobyov, Victor Pokhmelkin, Sergei Stepashin and the late Sergei Yushenkov.

The initiative bill (consisting of 6 chapters and 36 articles) was obviously inferior to the President’s bill, and was seriously and deservedly criticised by other Duma deputies as well as by legal experts (from the State Duma’s Law Department, and the Institute of Legislation and Comparative Law) for its poor legal quality. Subsequently, the authors of the initiative bill agreed with the criticism and recalled their bill. Therefore, the work in the State Duma concentrated on improving the remaining presidential draft.

The bill was eventually passed by the State Duma on 26 April 2001, and the Federation Council considered the Act on 16 May 2001. Despite its apparent significance to the country and its legal and political system, as well as to rights and freedoms of its citizens, only three deputies of the upper chamber of the Russian parliament actually raised any questions regarding some of the Act’s provisions.

The visible support extended to the act by two profile committees of the chamber pre-determined the decisive results of voting in the Federation Council. The act was passed by 154 votes in favour to just one against, with one abstention.

The new Federal Constitutional law “*On a State of Emergency*” maintains the main principles of the previous act of 1991, which was praised by the U.S. Lawyers’ Committee for Human Rights as relying “heavily on international human rights norms, and in particular on the International Covenant on Civil and Political Rights”.

The law (consisting of 7 chapters and 43 articles) defines the goals of a state of emergency, and the conditions attached to its introduction. According to Article 2, a state of emergency is aimed at “elimination of conditions that caused introduction of a state of emergency, maintenance of human rights and civil freedoms and defence of the constitutional regime of the Russian

Federation”. Emergency can be introduced only under conditions posing an “imminent threat to life and security of citizens or the constitutional regime of the Russian Federation”. The act divides such conditions into two groups. The first one includes attempts to effect a violent change in the constitutional regime of the country, armed mutiny, regional conflicts, etc. The second group encompasses non-political emergency situations like natural disasters, technological catastrophes, or epidemics (Art.3).

In legal terms it is an error, albeit a common one, when Russian and foreign reporters use the terms ‘state of emergency’ (*chrezvyhainoe polozhenie*) and ‘emergency situation’ (*chrezvyhainaiia situatsia*) interchangeably, as the Russian legislation makes a distinction between them. Unlike a ‘state of emergency’, which is declared for “protection of human rights and civil freedoms, defence of the constitutional regime”, etc., an ‘emergency situation’ occurs as a result of a natural or technological disaster or a catastrophe that “can lead or has led to human casualties, a damage to human health and environment, significant material losses and interruption of functioning of essential spheres of life” (Federal law No.68-FZ of 21 December 1994, art.1; Resolution of the RF Government No.516 of 30 April 1997, Art.1). Another federal law more precisely identifies one such technological disaster as being the collapse of a “hydrotechnological construction” (Federal law No. 117-FZ of 21 July 1997, Art.1).

Resolution of the RF Government No.1094 of 13 September 1997 introduced a classification of emergency situations depending on their magnitude, which may be assessed by taking into account the number of people affected, the extent of material loss or the size of the affected territory. An emergency situation can get the highest (‘federal’) status if it satisfies any of the following criteria: if it has led to “sufferings” (*postradali*) of more than 500 people; if it has caused the interruption of functioning of essential spheres of life of more than 1,000 people; if on the first day of an emergency situation, material losses exceeded 5 million minimum standard salaries (MROT); or if it has affected more than two regions of the Russian Federation (Art.2).

A state of emergency may be introduced by a Presidential decree affecting the whole territory of the Russian Federation for a period not longer than 30 days, or in certain localities for a period not longer than 60 days (Art.9(1)), with the possibility of an unlimited number of extensions by way of a new decree (art.9(2)).

For comparison, Article 201 of a similar American law (the National Emergencies Act of 1976) empowers the President of the United States to introduce a national emergency for 6 months, with the possibility of its

extension an indefinite number of times (50 U.S. Code 1621). This special regime was introduced by President Bush on 14 September 2001 by his ‘*Declaration of National Emergency by Reason of Certain Terrorist Attacks*’. The declaration introduced a national emergency “by reason of the terrorist attacks on the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States” (Proclamation 7463). The proclamation was accompanied by an executive order calling the ready reserve of the U.S. Armed Forces to active duty “for not more than 24 consecutive months” (Executive Order 13223)⁴⁷.

The new Russian law does not oblige the President to hold consultations with subjects of the Russian Federation prior to issuing a decree on a state of emergency, but the decree must be approved by the Federation Council. The upper chamber of the Federal Assembly is to be convened “as soon as possible, without a special call” (Art.7(1)), within 72 hours following the decree’s publication (*obnarodovanie*) (Art.7(3)). If not approved within three days, the decree automatically ceases to operate. As mentioned before, Bernard Siegan in his ‘emergency clause’ recommended that an emergency proclamation of the President should require parliamentary confirmation “within five days”⁴⁸. Russian law-makers appear to have been even more restrictive, and limited the term of the decree’s effect without the Federation Council’s authorisation to three days.

Drafters of the act may be praised for another major achievement. The act can be considered a major step towards the creation of the legal institution of a ‘federal intervention’, or ‘president’s rule in the states’ as it is known in India. The author of this article began writing about the necessity of introducing this legal mechanism back in 1994-95. That position was endorsed by the Council for Foreign and Defence Policy, an influential Russian think-tank, that published the author’s report under its auspices⁴⁹. Its shorter version was also published by *Nezavisimaya gazeta*, one of the most well-informed Russian newspapers at that time⁵⁰. A year later, that approach was strongly supported by a deputy chairman of the Federation Council Ramazan Abdulatipov (also in a full-page article in *Nezavisimaya*

47 Federal Register, 18 September 2001 (Vol.66, No.181). Presidential Documents. Page 48199.

48 Bernard H. Siegan, *Drafting a Constitution for a Nation of Republic Emerging into Freedom* (Fairfax, VA: George Mason University Press, 1994. 2nd ed.), p. 87.

49 Alexander Domrin, *Federal’noe vmeshatel’stvo v dela sub’ektov federatsii. Opyt pravovogo regulirovaniya i praktika primeneniya v zarubezhnikh stranakh* [Federal Interventions Worldwide: Transnational Law and Practice of Its Implementation] (Moscow: Council for Foreign and Defence Policy, [February] 1995).

50 Alexander Domrin, “Federal’noe vmeshatel’stvo v dela sub’ektov federatsii. Opyt pravovogo regulirovaniya i praktika primeneniya v zarubezhnikh stranakh” [Federal Interventions Worldwide: Transnational Law and Practice of Its Implementation], *Nezavisimaya gazeta*, No.36, 28 February 1995.

gazeta)⁵¹. In 1998, the absence of legal regulation of a federal intervention was recognised as one of the major ‘deficiencies’ of Russian Constitutional Law. Seven years, historically speaking, is not a very long period of time for the journey from the first publication dedicated to the issues surrounding a federal intervention, to the actual introduction of such a legal mechanism in Russia.

51 R.G. Abdulatipov, “Tol’ko zakon mozhet ostanovit’ bezzakonie. Ob institute federal’nogo vmeshatel’sтва v dela sub’ektov federatsii” [Only Law Can Stop Lawlessness. On the Institution of a Federal Intervention], *Nezavisimaya gazeta*, 16 July 1996.

REASON AND REACH OF THE OBJECTION TO *EX POST FACTO* LAW

Suri Ratnapala*

§ Introduction

On the 1st of October 2004, the High Court of Australia made two decisions that permitted the continued detention of persons already serving prison sentences for serious crimes. In the first decision, the Court rejected a challenge to Queensland legislation that authorised the State Supreme Court to order continued detention of a prisoner when it has reasonable grounds to believe that the prisoner poses a serious danger to the community.¹ In the second case, the High Court sanctioned New South Wales legislation that drastically limited the parole prospects of certain categories of offenders serving life imprisonment.² The two decisions expose the tenuous nature of the Australian public's protection against *ex post facto* law. A troubling aspect of these decisions was the scant attention paid by the majorities to the *ex post facto* nature of these laws. *Fardon* and *Baker* were decided on the narrow issue as to whether the powers given to the State courts were compatible with their exercise of Commonwealth judicial power. The cases highlight the need for a re-examination of the reason and reach of the objection to *ex post facto* law and this essay is a contribution to that end.

The term *ex post facto* law literally means '[arising] from past facts' but in its technical sense refers to a class of laws that retrospectively inflict harm on persons on account of past lawful conduct. The best known historical cases of the *ex post facto* law are the bill of attainder and its variant, the bill of pains and penalties, by which the legislature directly imposes punishment on named individuals. However the class of laws that has been judicially condemned, particularly in the United States, and is found objectionable for the reasons to be discussed presently is wider. It includes laws that do not name individuals for retrospective harm but leaves their selection to other agencies. The term *ex post facto* law refers to this wider class.

It does not take much science to know that the rule of law is unachievable without strong restraints on retrospective infliction of harm for lawful acts. Such impositions are not just assaults on the institutional structures that promote the rule of law but are direct negations of the rule of law. A law that undermines the separation of powers or representative government

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1 *Fardon v Attorney-General (Qld)* 210 ALR 50 (2004).

2 *Baker v R* 210 ALR 1 (2004).

will expose the rule of law to subversion but will not *per se* defeat it. On the contrary, an *ex post facto* law in its classic form is the epitome of the capricious exercise of authority. The moral objection to *ex post facto* law is not founded on constitutional pragmatics but on the most fundamental demand of the rule of law that a person is subject only to established and known law. Accordingly, Art 15(1) of the United Nations *Covenant on Civil and Political Rights* (ICCPR) condemns laws that hold a person ‘guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence, at the time when it was committed or impose a heavier penalty than the one that was applicable at the time when the criminal offence was committed’. Article 7(1) of the *European Convention on Human Rights* (ECHR) makes the prohibition applicable to acts and omissions ‘which did not constitute a criminal offence under national or international law at the time when it was committed’. The prohibition is part of the UK law under the *Human Rights Act 1998*. Article 20(1) of the Indian Constitution provides that ‘no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence’. Many other constitutional democracies have similar safeguards in their constitutions or general laws.³

These prohibitions prevent retrospective criminal charges and punishments but not other types of detriments imposed by law on persons who have committed no wrong. Professor Durga Das Basu states the Indian constitutional position as follows:

The prohibition [in Art 20(1)] is only against prescribing judicial punishment with retrospective effect. It does not prohibit the enforcement of any other sanction by a civil or revenue authority, e.g., the loss of deprivation of any business or forfeiture of property or cancellation of naturalization certificate by reason of act committed prior to the operation of the penal law in question or the imposition of some statutory penalty, to enforce a civil liability (as distinguished from criminal prosecution for an offence).⁴

The narrowness of this prohibition allows legislatures to inflict pain for innocent acts in the guise of civil liability. The positive constitutional law of most countries does not offer an effective defense against disguised penalties, the US being a notable exception. Hence, I argue that the rule of

3 See for example New Zealand Bill of Rights Act 1990 s 26(1); Canadian Charter of Rights and Freedoms s 11(g); German Grundgesetz Art 103.

4 D D Basu, *Shorter Constitution of India* (New Delhi: Prentice Hall of India, 2nd ed, 1989) 144-5.

law requires a more general constraint on retrospective imposition of harm than is prescribed by the ICCPR and ECHR standard. There is a strong case for a liberal interpretation of *ex post facto* clauses to protect citizens safeguard the citizen from legislative harm inflicted outside the criminal justice system. If such a construction is not open to a national court owing to its interpretive methodology, there is a case for the national legislature to practice self-restraint in this regard as a matter of constitutional principle and political morality.

The major impediment to the extension of the ban beyond the criminal process is the difficulty of distinguishing between injurious affectation resulting from legitimate regulation and punishment inflicted in the guise of civil liability. Consider a law that prohibits persons with the human immunodeficiency virus (HIV) from working as a nurse - with no compensation for loss of income. HIV positive persons who are already employed as nurses will lose their jobs. This law does not impose a retrospective punishment in the conventional sense of that term. Yet it inflicts harm on people who have committed no wrong by depriving them of their livelihoods. Such difficult questions are avoided by limiting the *ex post facto* ban to cases where a person is charged with a criminal offence. But that does not lay to rest the question of whether the law offends a basic constitutional value. This essay investigates whether it is possible to develop a set of rational and practical guidelines that will enable constitutional democracies to reconcile the need for necessary prophylactic measures with the value of preventing the retrospective infliction of detriment. The question whether in a given jurisdiction, limits on *ex post facto* law are requirements of positive constitutional law, constitutional convention or simply of political morality is important. My chosen aim though is to ask the questions: what kinds of retrospective laws are objectionable and why are they objectionable? The answers will help lawyers determine what doctrinal means are available in a given constitutional system to restrain the enactment of such laws. This essay is based primarily on the constitutional law of the United States and Australia. It is not possible exhaustively to define the objectionable class without knowing all the novel devices that may be generated by legislators in the future. However, a non-exhaustive list of objectionable types will emerge from this discussion.

In Part 2 of this essay I consider the principal reasons for condemning *ex post facto* law. The discussion is mainly theoretical with judicial reasoning serving where relevant to explain the reasons. In Part 3, I engage some of the key conceptual and practical problems in identifying laws that attract condemnation for the reasons discussed. There is a heavy focus on landmark cases in the United States and Australia as a means of illustrating problems and, where relevant, judicial error. In Part 4, I itemize non-exhaustively the

kinds of laws that are objectionable, if not in positive constitutional law, then in constitutional theory.

§ Theoretical objections to ex post facto law

Constitutional theory offers four reasons for the objection to *ex post facto* law. They overlap in some respects.

(1) *Ex post facto* law is not law

The idea of retrospective illegality makes any sense only if legality is understood as a provisional condition dependent on the future will of a legislative authority. If this is the case, the law's primary function of providing guidance to conduct is severely weakened. Individuals who cannot predict the legal consequences of their actions cannot coordinate their behavior in relation to each other. Therefore substantial restraint on the imposition of harm for past innocent acts is a necessary condition of civilized social life.

The idea of a law conjures a general rule; hence the frequent question whether an enactment directed at punishing a single person or condemning a single transaction can properly be called a law. Blackstone wrote that an 'act to confiscate the goods of Titius or to attain him of high treason does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only and has no relation to the community in general: it is rather a sentence than a law'.⁵ This rationale has received wide judicial recognition, the *locus classicus* being the US Supreme Court's Opinion in *Hurtado v. California*.

*Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, but ... the general law ... so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society ... Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or an impersonal multitude.*⁶

The Privy Council in *Q v. Liyanage* invalidated an Act of the Ceylon Parliament calculated to lessen the prosecutorial burden and to enhance punishment in a particular treason trial on the basis that it was a legislative usurpation of judicial power.⁷ In *Building Construction Employees' and Builders Labourers' Federation (NSW BLF Case)*, the New South Wales Court of Appeal

⁵ Sir William Blackstone, 1 *Commentaries on the Laws of England* (London: T. Cadell & W. Davies, 14th ed, 1803) 4445.

⁶ 110 U.S. 516, 535-536 (1884).

⁷ [1967] 1 AC 259

found legislation designed to defeat a trade union's action challenging its deregistration to be an exercise of judicial, not legislative power. The court controversially upheld the legislation on the ground that the NSW legislature's plenary power included judicial power.⁸ This reason is untenable as the NSW legislature could not inherit by the language of the Constitution Act 1955 the kind of sovereign power that historically accrued to the UK Parliament. More recently, Justice Deane in the High Court of Australia observed that a bill of attainder 'prohibits nothing, prescribes no rule of conduct and is incapable of being contravened since, by its terms, it is inapplicable to acts committed after its enactment'.⁹

(2) *Nullum crimen, nulla poena sine lege*

The maxim that there is no crime without a breach of the law is first a proposition of logic. If a crime is understood to be an act that is prohibited by law at the pain of a penalty, an act which is not so prohibited can never be a crime. The fact that Parliament visits the act with its retribution cannot make it a crime. The act is simply an event with reference to which Parliament elects to inflict pain on a person or group. However, the maxim *nullum crimen sine lege* is more than a proposition of logic. It is a substantive moral claim to humane treatment. Blackstone in his *Commentaries* observing that a person has no cause and cannot foresee a cause to abstain from doing what is legal wrote that in such cases 'all punishment for not abstaining must of consequence be cruel and unjust'.¹⁰ The maxim *nulum crimen sine lege* also condemns law that eliminates an exculpatory defence that was available at the time of the commission of the act.¹¹ A person commits no crime if he has a legal excuse and the retrospective removal of the excuse amounts to the punishment of a lawful act.

The principle *nulla poena sine lege* which condemns the retrospective increase in penalties is again a substantive claim of justice. It can also be seen as a logical extension of *nullum crimen sine lege*. A retrospective increase in punishment is an infliction of new pain not prescribed by law. It is not punishment of the offence as the punishment has already been suffered or is being suffered. If there is a cause, it is the fact that the offender is a person who has been punished or is being punished according to law. Suffering lawful punishment is not itself unlawful.

⁸ (1986) 7 NSWLR 372. See my criticism of this decision in S Ratnapala, *Australian Constitutional Law: Foundations and Theory* 2nd ed (Melbourne: Oxford University Press, 2007) 116-117.

⁹ *Polyukhovich v. Commonwealth* (1991) 172 CLR 501, 631.

¹⁰ W Blackstone, n 2 above, 46.

¹¹ *Kring v Missouri* 107 US 221 (1883); *Dobbert v. Florida* 432 US 282 (1977); *Carmel v. Texas* 529 US 513 (2000).

Subtle ex post facto violations

In *Collins v. Youngblood*, the Supreme Court declared that ‘subtle *ex post facto* violations are no more permissible than overt ones’.¹² This explains the Court’s extension of the *nullum crimen, nulla poena sine lege* principles to laws that ease the prosecutorial burden by retrospective changes to evidentiary rules. In *Calder v. Bull* Justice Chase included within the class of impermissible *ex post facto* laws, ‘Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender’.¹³ In *Carmel v. Texas* the Court ruled unconstitutional, a statute that retrospectively authorised conviction for certain sexual offences without corroboration of the victim’s evidence. The Court held that ‘a law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof’.¹⁴ In *Stogner v. California* the US Supreme Court overrode a strong dissent to annul a California statute that allowed the resurrection of time barred prosecutions for child sex offences. The complaint against Stogner concerned events that happened 22 years before the charges were laid. The majority saw the statute of limitations primarily as a safeguard against conviction on insufficient or unreliable evidence and thought that its removal exposed Stogner to conviction on a lesser quantum of evidence than was required by law before the statute was passed.¹⁵

The reasoning here is more complex and contestable. The legislature is not overtly criminalising an innocent act but is denying a class of alleged offenders certain evidentiary safeguards. If the safeguards in fact decrease the probability of curial error, their removal must logically increase the probability of innocent persons being punished, the kind of harm that the maxim seeks to prevent. However, as the dissent in *Stogner* pointed out, the theory founded on evidentiary concerns is weakened by the fact that the ban on *ex post facto* law as judicially accepted does not condemn laws that eliminate the time bar with respect to future offences or laws that extend unexpired limitation periods.¹⁶ Hence if it is to hold, the theory must be further refined. The majority viewed the revival of expired prosecutions as a retrospective aggravation of the crime as condemned in *Calder v. Bull* but so is the extension of unexpired limitation periods. More persuasively, the majority enlisted the notion of ‘reliance interest’ in aid of the theory. On the expiration of the

12 497 US 37, 46 (1990)

13 3 Dall. 386, 390 (1798).

14 529 US 513, 532 (2000).

15 539 US 607, 615.(2003)

16 Ibid 650.

time limit, persons have a reliance interest in the form of an expectation of immunity and hence may not preserve evidence of innocence.¹⁷ The dissent ridiculed the reasoning with the observation that it involves a presumption that 'criminals keep calendars so they can mark the day to discard their records or to place a gloating phone call to the victim'.¹⁸

Although diary keeping criminals may be hard to find, criminals who do not re-offend and who redeem themselves might not be so rare. In such cases the resurrection of expired prosecutions seems harsh. The point remains though that the extension of prosecutable periods or resurrection of time extinguished prosecutions as well as the retrospective easing of evidentiary burdens are not easily explained by the maxim *nullum crimen, nulla poena sine lege*.

(3) Failure of due process

This objection relates to bills of attainder and of pains and penalties. Whereas Blackstone denied these instruments the status of law, John Lilburne saw in them the vice of the legislative imposition of punishment without trial. 'To say that a freeman of England by Law may be tried by a Bill of Attainder, is irrational and unjust; for such a proceeding is no tryal, but rather a sentence, and is no act of jurisdiction, but an act of the legislative power, but no sentence can be past against an offender, but by some fore-declared visible, known rule of law; of which the supposed offender, either actually had, or might have had knowledge'.¹⁹ This objection was articulated by the US Supreme Court in *Selective Service System v Minnesota Public Interest Research Group* when it stated that a bill of attainder is 'a law that legislatively determines guilt and inflicts punishment upon an identified individual without provision of the protections of a judicial trial'.²⁰

The doctrinal formulation of this objection is not based on the institutional separation of powers, but on a distinction drawn between the type of decisions that do not require the curial method and the type that do. The first type consists of decisions generating rules of general application and the second type comprises decisions that apply a general rule to a particular case.²¹ The judicial method is unnecessary in the former case, but is essential to the latter. Tribe states that the distinction is 'between those

17 Ibid 631.

18 Ibid 670.

19 Quoted from W.B. Gwyn, *The Meaning of the Separation of Powers* (1965: New Orleans: Tulane University Press, 1965) 39.

20 468 US 841, 846-47 (1984) quoting *Nixon v. Administrator of General Services* 433 US 425, 468 (1977).

21 A Dershowitz, 'Comment: The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause' (1962) 72 *Yale Law Journal* 350.

processes of choice which have such wide public ramifications that adversely affected individuals need not participate personally, and those choice processes which so focus upon particular persons that their personal participation must be assured'.²²

Tribe's formulation of the objection does not fully explain its rationale. The objection holds even if the legislature grants the individuals targeted a comprehensive hearing before it enacts the *ex post facto* law. A legislative hearing does not overcome this objection for two reasons. Firstly, as Cooley observes, the legislature 'is not properly constituted to try with coolness, caution, and impartiality, a criminal charge, especially in those cases in which the popular feeling is strongly excited - the very class of cases most likely to be prosecuted in this mode'.²³ Secondly, even if it assumed that a representative legislature is impartial, it cannot act in the judicial mode without the guidance of pre-existing law. This highlights the fact that bills of attainder and of pains and penalties lack the qualities of both law and of adjudication but are cases of straightforward infliction of pain on chosen individuals.

(4) ***Ex post facto* law offends the separation of powers doctrine**

This objection is based on the claim that the enactment of certain forms of *ex post facto* law involves the exercise of judicial power. In countries where legislative and judicial powers are constitutionally reposed in separate organs, the legislative infliction of punishment or detriment on specified persons is unconstitutional as a matter of positive law. In England, where the Crown in Parliament had undivided power, the practice of enacting bills of attainder and of pains and penalties was abandoned as a matter of constitutional principle. It is worth noting that these Acts were not enacted to punish lawful acts but to punish criminal acts more expeditiously, more assuredly and more severely. The precedents collected by Hatsell²⁴ suggest that for the attainder procedure to be invoked, the party must have committed some act which by nature is a crime under the existing law. The practice (not always observed) was to allow the accused to defend themselves with counsel and witnesses before both Houses.²⁵ Sir John Hawles justified the practice on the ground that 'it is no injustice for the supreme power to punish a fact in a higher manner than by law established, if the fact in its

22 L H Tribe, *American Constitutional Law* (Mineola: Foundation Press, 2nd ed, 1988) 631.

23 T. Cooley, 1 *Constitutional Limitations*, vol 1 (Boston: Little, Brown & Co, 8th ed, 1927) 536-537.

24 J Hatsell, *Precedents of Proceedings in the House of Commons*, vol 4 (London: Luke Hansard & Sons, 1818) 85-96, 100-102, 235-249, 323-346

25 I May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, (London: Butterworths, 19th ed., 1976) 66.

nature is a crime, and the circumstances make it much more heinous than ordinarily such crimes are'.²⁶ Even so, Parliament in these proceedings was not bound by law with respect to the substance of the offence, the procedural and evidentiary rules or the punishment. The last bill of attainder was enacted to attain the Earl of Kellie and others in 1746 and the last bill of pains and penalties was enacted against Queen Caroline in 1820.²⁷

The framers of the US Constitution reacted to the post independence wave of *ex post facto* laws that victimised loyalists²⁸ by expressly forbidding *ex post facto* laws in its first article. However, in many cases, the Supreme Court has treated the ban as part of the Constitution's implementation of the doctrine concerning the separation of powers. In *Fletcher v. Peck*, the Court concluded that bills of attainder were 'legislative judgments and an exercise of judicial power'.²⁹ In *United States v. Brown*, the Court stated that the attainder clause was not intended as a narrow, technical prohibition, 'but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function'.³⁰

The view that the ban on *ex post facto* law is a necessary implication of the separation of powers is shared by the Privy Council and the High Court of Australia. The Privy Council made its definitive pronouncement in *Q v. Liyanage*, an appeal from the Ceylon Supreme Court.³¹ The constitution of Ceylon (now Sri Lanka) did not expressly prohibit *ex post facto* legislation. The two laws examined by the Privy Council constituted a legislative scheme designed to facilitate the trial, conviction and enhanced punishment of certain persons accused of an attempt to overthrow the lawfully established government of Ceylon. The Privy Council struck down the laws as repugnant to the separation of powers ordained by the constitution and observed that 'if such Acts as these were valid the judicial power could be wholly absorbed by the legislature'.³²

The early thinking in Australia was that the Commonwealth Constitution's division of powers did not prohibit *ex post facto* law. Thus in *The King v Kidman*,³³ a law that made the offence of conspiracy to defraud the Commonwealth an indictable offence with retrospective effect was questioned not on the grounds of attainder or separation of powers but on

26 Ibid, 99.

27 *Halsbury's Laws of England*, vol. 34 4th ed , 522.

28 Dershowitz, n 20 above, 331.

29 10 US 87, 136 (1810).

30 *United States v Brown* 381 US 437, 488 (1965).

31 n 6 above.

32 Ibid 291.

33 (1915) 20 CLR 425.

the basis that it did not fall within any of the enumerated the subjects of Commonwealth legislative power.³⁴ The argument found favour only with Chief Justice Griffith who found that in general *ex post facto* law was impossible to classify under any of the *placita* of powers vested in Parliament. The true category to which such laws belong he stated was ‘control over the liberty of the subject’ or ‘reward and punishment of citizens who deserve well or ill of the State’.³⁵ Nevertheless, he did not regard the impugned law as unconstitutional as it merely put into statutory form, an existing common law offence.³⁶ The other judges rejected the argument as a matter of construction stating that that the power to legislate on a subject contained the power to make laws having retrospective effect.³⁷

Kidman stood for 75 years until the Mason Court in *Polyukhovich v. Commonwealth* entertained the challenge to the War Crimes Act 1988 based on the separation of powers. Polyukhovich, an immigrant, was charged with war crimes that he allegedly committed during the German occupation of the Ukraine. The alleged acts were not punishable under Australian law as they were not committed in Australia. The charges were made possible by amendments to the War Crimes Act enacted in 1988. Polyukhovich challenged the Act on grounds, *inter alia*, that the Act was an invalid usurpation of judicial power of the Commonwealth. Five of the six judges agreed that the separation of powers doctrine barred the enactment of laws having retrospective penal effect³⁸ and Justice Dawson assumed it for the purpose of argument.³⁹ However, four of these judges concluded that the Act did not fall within the prohibited class of statutes. The common theme in their judgements was that a law that retrospectively makes an act punishable as a crime does not offend the separation doctrine provided it is general and not directed at specified individuals. Justice Dawson explained that under such law the ‘court is still left to determine whether an individual is guilty of having engaged in the prohibited activity, albeit an activity which took place before the law created the offence ...’⁴⁰ Justice McHugh observed: ‘Under such a law, it is still the jury, not the legislature which determines ... whether the accused is guilty or innocent of the charge against him or her’.⁴¹

As I argue later, retrospectivity necessarily involves a degree of specification of the persons targeted. That aside, the judges were plainly

34 Crimes Act 1915 ss 2 and 3

35 n 32 above, 434.

36 *Ibid* 436-437

37 *Ibid* 441-442 (Isaacs J), 453 (Higgins J), 455-456 (Gavan Duffy and Rich JJ), 460 (Powers J).

38 n 8 above, 539 (Mason CJ) 631 (Deane J), 689 (Toohey J), 706 (Gaudron J), 721 (McHugh J).

39 *Ibid* 648.

40 *Ibid* 647. Compare Mason CJ at 536, Toohey J at 685-686, and McHugh J at 721.

41 *Ibid* 721.

wrong in denying that the law was aimed at specific individuals. The preamble to the Act made it clear that its provisions were directed at persons who committed serious war crimes in Europe during World War II and who have entered Australia. The Act applied only to Australian citizens or residents accused of specified war crimes committed during the Second World War in the European theatre. (ss. 5, 9 and 11) Persons within this class were few and readily identified. It is also evident that the judges misunderstood the scope of the prohibition. Toohey J, echoed the other justices in concluding that 'there is not a scintilla of difference' between the roles of the judge and jury in a trial under this Act and the roles of the judge and jury in a trial under an identical law operating prospectively.⁴² That was correct but was not the point in issue. The question was not whether the court was assigned a non-judicial task but whether the legislature had performed a judicial (or non legislative) function in selecting an identifiable group for its sanctions. Let us consider a less emotive hypothetical case. Statute A makes the sale of a standard loaf of bread at a price in excess of \$1 an offence carrying a penalty of \$500. It is prospective in operation and the legislature has not passed judgment. Compare this to Statute B made in 2005 that penalises all persons who in 2004 sold a standard loaf for more than \$ 1. Under each law, the courts have the function of determining whether an accused person in fact sold bread at the prohibited price. However, in enacting the second law legislature has made a determination of its own - that all persons who in 2003 sold bread above the stipulated price have committed crimes. There is no escape for these persons. They remain liable to the penalty on conviction as long as the law is in force. As Deane J wrote in his dissenting judgment, such a law 'prohibits nothing, prescribes no rule of conduct and is incapable of being contravened since, by its terms, it is inapplicable to acts committed after its enactment'.⁴³ It is this kind of law that current American jurisprudence regards as legislative judgments.

The Court could have upheld the law on the basis of the Nuremberg exception to the constitutional ban, namely the punishment of acts *mala in se*, or to employ the words of the ICCPR, acts that are 'criminal according to the general principles of law recognised by the community of nations'.⁴⁴ It is a reasonable presumption that Polyukhovich, had he committed the alleged acts would have known that they were crimes. Hence, the law did not violate the assurance that the *ex post facto* ban provides 'that no future retribution of society can occur except by reference to rules presently known'.⁴⁵ In contrast,

42 Ibid

43 Ibid 631.

44 See for example International Covenant on Civil and Political Rights art 15 para 2.

45 n 8 above, 689.

the retrospective price control law punishes persons who had no idea that their actions were wrongful at the time they committed them.

The theoretical objection based on the separation of powers may be restated as follows. When the legislature enacts an *ex post facto* law, it does not act in a judicial manner, though sometimes such enactments follow a parliamentary inquiry. It does not determine the matter according to pre-established law, which is the hallmark of the judicial function. The legislature in such cases passes political judgment on particular individuals and in that sense subjects them to an inquisition without due process. Hence when we say that the enactment of such laws involves the exercise of judicial power, what we mean is that the legislature is making in a non-judicial manner, a decision that ought to be made by a court in a judicial manner.

The prohibited class of laws

I have discussed so far the reasons in constitutional theory for condemning *ex post facto* law but have not considered, except in very general terms, the types of law that are condemned. The following discussion addresses some of the conceptual difficulties attending the delineation of this class.

The chimera of the criminal-civil distinction

The ban in the US Constitution applies to any 'Bill of attainder or *ex post facto* law'.⁴⁶ The words '*ex post facto* law', unless superfluous must refer to laws other than bills of attainder. The question whether the ban applies only to retrospective punishment for crimes or extends to similar impositions of 'civil' deprivations is one that continues to challenge judicial minds.⁴⁷ In *Calder v Bull*,⁴⁸ the first case in which the question arose, the majority of the US Supreme Court concluded that the ban was limited to the retrospective punishment of crimes. Justice Chase thought that if the ban on *ex post facto* law was intended to apply to civil cases, the Fifth Amendment's ban on uncompensated taking of private property for public use would have been unnecessary⁴⁹ and Justice Paterson argued that the ban on contract impairment indicated 'that the framers of the constitution ... understood and used the words in their known and appropriate signification, as referring to crimes, pains and penalties, and no further'.⁵⁰ Justice Iredell was emphatic that 'The

46 Art I § 9 cl 3 and Art I § 10 cl 1

47 For an essay devoted to the argument that the ban on *ex post facto* law should be confined to 'criminal' offences, see Raoul Berger, 'Bills of attainder: a study of amendment by the Court' (1978) 63 *Cornell Law Review* 355-404.

48 n 12 above.

49 *Ibid* 394.

50 *Ibid* 397.

policy, the reason and humanity of the prohibition' did not extend to civil cases or 'cases that merely affect the private property of citizens'. The Judge thought, erroneously in my view, that such an extension would trump some of the most necessary and important acts of legislation.⁵¹ According to this approach, the critical question is whether the law inflicts punishment for a crime or merely imposes a 'civil liability'. The Supreme Court has never formally departed from this test.⁵² Presently, I argue from the theoretical standpoint that this test is wholly misconceived. But first, it is necessary to show how the Supreme Court itself erased this distinction in its later rulings.

In dealing with retrospective imposition of civic disabilities, the Supreme Court has uncoupled 'punishment' from 'crime' and made retrospective punishment the criterion of invalidity. In two cases following the American Civil War, *Cummings v. Missouri*⁵³ and *Ex parte Garland*,⁵⁴ the Supreme Court struck down laws that excluded persons from specified professions unless they swore that they did not take part in the rebellion against the Union. In *Cummings*, the complainant was a priest and in *Garland*, a lawyer. Each claimed that he was prevented by the ethics of his profession from taking the oath that was the condition for remaining in their profession. There was no question of criminality in these cases and the deprivations were not in the forms usually associated with crime namely: monetary penalty, confiscation of property, imprisonment or death. In *Cummings* the Court stated that the 'deprivation of any rights, civil or political, previously enjoyed, may be punishment', and included in this category disqualification 'from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian'.⁵⁵

The unconstitutionality of this category of laws was confirmed in the leading 20th century cases on the attainder clause. In *United States v. Lovett*⁵⁶ the Court struck down a federal law that prohibited the payment of future salary to three named government employees on the ground that in the past they engaged in subversive activities. The Court found that the provision constituted a 'permanent proscription from any opportunity to serve the Government' and 'a punishment of a most severe type'.⁵⁷ In *United States v.*

51 Ibid 400

52 For a list of cases in which the Court has stated that the attainder clause is confined to punishment for crimes, see A. Mueller, 'Supreme Court's view as to what constitutes an *ex post facto* law prohibited by Federal Constitution' 53 L Ed 2d 1146 (Annotation). See also *Collins v. Youngblood* 497 US 37, 42 (1990).

53 71 US 277 (1866).

54 71 US 333 (1866).

55 n 52 above, 320.

56 328 US 303 (1946).

57 Ibid 315-316.

*Brown*⁵⁸ the Court invalidated a law that made it a crime for a member of the Communist Party to hold office in a labour union during membership or within five years of the termination of membership. In *Fletcher v. Peck*⁵⁹ the court ruled unconstitutional a law that rescinded a land grant considered to have been tainted with corruption although the current owner was innocent of wrongdoing. In *Burgess v Salmon* the Court invalidated a law that applied a tobacco tax retrospectively and allowed the penalty for non-payment to be recovered by a civil suit. The Court stated that the ban on *ex post facto* law cannot be evaded by giving a civil form to an essentially a criminal penalty.⁶⁰ These decisions extend the ban to enactments that impose deprivations having little resemblance to punishments traditionally associated with crime.

I argued previously that the notion of a retrospectively created crime makes no sense for a given meaning of crime. The legal concept of crime is of relatively recent origin. Until recently the law did not differentiate wrong into tort and crime. Wrongs existed as Winfield notes in the state of 'viscous admixture'.⁶¹ The genesis of crime is traceable to the start of Crown prosecutions. The Crown always prosecuted wrongs against itself such as treason. The reason why the Crown intervened to prosecute wrongs committed by subjects on other subjects is less clear, though, as Benson suggests, it gained financially by the forfeitures that resulted from convictions.⁶² Later as the state progressively took on the role of social and economic regulator and provider, parliament legislated to create crimes in furtherance of policy.⁶³

Blackstone's distinction between *mala in se* (acts wrong by their nature) and *mala prohibita* (acts prohibited by the state) remains useful.⁶⁴ *Mala in se* are acts that are wrongs according to the moral values of the community. In England these were established as legal wrongs through the build up of common law precedent. The idea of a retrospective offence *mala in se* makes no sense at all. There can be technical reasons why a particular incident of *mala in se* escapes punishment. The most dramatic examples concern war crimes or crimes against humanity where defendants often advance the defence of lawful orders. Crime committed beyond the limits of national

58 n 29 above.

59 n 28 above.

60 97 US 381, 385 (1878).

61 P Winfield, *Province of the Law of Tort* (Cambridge: Cambridge University Press, 1931- 190).

62 B L Benson, *Enterprise of Law: Justice without the State* (San Francisco Pacific Research Institute for Public Policy, 1990) 62.

63 J W C Turner, *Kenny's Outlines of Criminal Law* (Cambridge: Cambridge University Press, 19th ed 1996) 4.

64 Blackstone, n 2 above, 54, 57.

jurisdictions offer other examples. Retrospective legislation to provide for redress or punishment in these cases is not considered repugnant to the ban on *ex post facto* law. This is the 'Nuremberg principle' implemented by international treaty law on human rights. Thus the ICCPR and the ECHR permit 'the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.'⁶⁵ The logic of this exception is apparent. Persons who commit these kinds of acts usually know that they are serious wrongs against the general norms of society. Hence retrospective trial and punishment of such acts do not defeat legitimate expectations but only the hopes held by wrongdoers of getting away with their heinous acts.

Mala prohibita raise by far the more difficult issues. In theory, the state can make any act a crime in the sense of *mala prohibita*. As Lord Atkin observed, 'The domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.'⁶⁶ There is always the problem of circularity in defining a crime. Glanville Williams regards a crime as a 'legal wrong that can be followed by criminal proceedings which may result in punishment'.⁶⁷ A crime by this definition is an act declared by the legislator to be a crime entailing punishment. Williams denies that this is a circular definition pointing out that a criminal proceeding is one that attracts special procedural and evidentiary rules not applied in civil proceedings.⁶⁸ Williams is mistaken to think that the attachment of procedural and evidentiary requirements cures the circularity of the definition. It simply means that the law maker can make any act a crime which then attracts the procedural and evidentiary constraints. The central element of Kenny's definition of a crime is harm caused by human conduct that the sovereign power desires to prevent by means including the threat of punishment. He also notes that the prosecution of crimes attract legal proceedings of a special kind.⁶⁹ All these definitions postulate that a crime in the modern sense is any act designated as a crime by the state but by the same token they indicate that the state cannot convert past innocent acts into crimes, as crime must concern a prohibited act. A retrospective crime makes sense only if crime is differently defined as any act, past or future, that the state chooses to punish whether or not it is lawful.

⁶⁵ International Covenant on Civil and Political Rights Art 15(2) and European Convention on Human Rights Art 7(2).

⁶⁶ *Proprietary Articles Trade Association v Attorney-General of Canada and others* [1931] AC 310, 324.

⁶⁷ G Williams, *Textbook of Criminal Law* (London: Stevens, 1978) 14.

⁶⁸ *Ibid* 14-15.

⁶⁹ n 62 above, 5.

Such a definition carries the monstrous proposition that the state may at its discretion lawfully inflict pain on any person for doing what is lawful.

If it makes little sense to talk of retrospective crimes, it makes even less sense to speak of retrospective civil liability. The most important feature of civil liability is that it is not punishment but reparation. Civil wrongs give rise to obligations to repay debts, to compensate for loss caused by wilful or negligent actions or breach of contract, to render specific performance of contractual undertakings or to effect restitution of unjust gains. In each case the obligation is to make reparation, to restore the party harmed, as far as possible, to the position before the wrong was committed. A person cannot incur such an obligation if he has acted lawfully. Where there is no breach of obligation, there is no question of civil liability and the legislative imposition of detriment amounts to the infliction of pain on innocent citizens. Hence, the civil-criminal distinction is unsustainable as a test of unconstitutional attainder. Lehmann proposes that the proper question is whether the statute is punitive or regulatory in nature,⁷⁰ but this test has its own serious limitations.

Punishment – a useful but insufficient test

The orthodox view is that the ban prevents *ex post facto* imposition of 'punishment' but not regulatory devices.⁷¹ Punishment in its ordinary sense is not synonymous with harm but is associated with response to wrong doing. Punishment may be motivated by retribution, rehabilitation, prevention, deterrence or a combination of them.⁷² In the case of laws that offend *nulla poena sine lege*, the increased punishment relates to previous wrongdoing. Strictly speaking laws that offend *nullum crimen sine lege* do not impose punishment but inflict harm. Infliction of pain for an innocent act is punishment only in a perverse sense. A child is punished for behaving badly and a criminal is punished for committing a crime. On the contrary, a sadist who inflicts pain on a victim or a robber who takes property does not impose punishment but causes wrongful harm. Likewise a legislature that imposes detriments on selected individuals out of spite or for political gain or indeed in the prosecution of state policy does not impose punishment but causes intentional harm to a selected individual or group. It is evident that punishment in the conventional sense is an inadequate concept on which to enforce the principle *nullum crimen sine lege*. The more general concept of detriment better explains the operation of this rule.

70 M.P. Lehmann, 'The Bill of Attainder Doctrine: A Survey of the Decisional Law', (1978) 5 *Hastings Constitutional Law Quarterly* 834.

71 Tribe, n 21 above, 651.

72 *United State v. Brown*, n 29 above, 458.

The types of detriment that has attracted the ban include disqualification from office,⁷³ forfeiture of property,⁷⁴ disenfranchisement,⁷⁵ and retrospective tax penalty.⁷⁶ As against these, the Supreme Court has upheld laws that take away the right of convicted felons to practice medicine⁷⁷ and to be employed in waterfront labour organisations⁷⁸ although the laws clearly operated to impose detriments in addition to penalties already prescribed by law. In an influential student comment in the *Yale Law Journal*⁷⁹ Dershowitz urged the abandonment of the 'punishment' test saying that it involves inexact and emotive distinctions that in some cases are difficult to achieve. He proposed instead that the attainder clause should be understood as banning legislative trial and not legislative punishment.⁸⁰ Dershowitz asks how the following two statutes can be distinguished. (1) 'No person afflicted with a contagious disease shall teach school' and (2) 'John Jones, because he has a contagious disease, shall not teach school'. Only the second law is contrary to the attainder ban, but Dershowitz argues it is no more punitive than the first law. He says that the second statute offends the attainder clause not because of the legislature's intent to punish but because of the legislature's application of its general legislative mandate to a specific individual. Dershowitz's assessment that the two laws are equally detrimental is questionable. Firstly, under the second law Jones cannot avoid the detriment by showing that he is free of disease and secondly the first law does not discriminate against him whereas the second does. The test of legislative trial remains inadequate even when the two statutes are assumed to be equally detrimental.

Legislative trial - an inconclusive test

The first and obvious point to make is that when the legislature selects a person or group for punishment, it does not always conduct a trial. The most abhorrent instances of *ex post facto* law are not those where a person is accused and tried by the legislature but those where the legislature punishes without trial, where no charges are laid and no defence is heard. It is unhelpful to equate the enactment of these laws to trials as they represent the classic cases of punishment without trial. A law that retrospectively punishes all persons who supported the Communist Party will fail the attainder clause not because of legislative trial but because the target group are identifiable

73 *Cummings*, n 52 above; *Garland*, n 53 above.

74 *Fletcher v. Peck*, n 28 above.

75 *Johannessen v. United States* 255 US 227 (1912).

76 *Burgess v. Salmon*, n 59 above.

77 *Hawker v. New York* 170 US 189 (1898).

78 *De Veau v. Braisted* 363 US 144 (1960).

79 n 20 above.

80 *Ibid* 356.

and are denied a legal way of avoiding punishment. The legislature in this case has not ‘tried’ this group but has determined as a matter of policy that they ought to be punished if indeed the courts find them to have supported the Communist Party. In *United States v Brown* the Supreme Court stated that ‘Congress may weed out dangerous persons from the labour movement but must do so by rules of general applicability. Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals’.⁸¹ A necessary implication of this injunction is that the legislature also cannot impose detriment as an arbitrary projection of its power.

The problems with the ‘punishment versus regulation’ test

The US Supreme Court has sought to exempt from the attainder clause, regulatory or prophylactic measures that have no punitive end but retroactively defeat vested rights. This test like the others discussed, fails to account for all of the Court’s decisions. The Supreme Court has upheld laws that took away the right of convicted felons to practice medicine and to be employed in waterfront labour organisations in addition to penalties already prescribed by law. These laws were regarded as prophylactic although permanent exclusion from occupations is a known form of punishment. Conversely, in *United States v Brown*, a purportedly prophylactic measure involving the exclusion of past communists from labour organisations was struck down on the ground that the legislature had thereby determined that past membership in the Communist Party made persons unsuitable to engage in designated occupations.

How is the exclusion of communists from public office different to the exclusion of persons with contagious diseases from school teaching or grand mal epileptics from driving? As Dershowitz points out, in the latter cases the legislature does not have to engage in a ‘trial’ since the danger to society is conveyed by the established meaning of the term employed to describe the group.⁸² A contagious disease is communicated on contact. Grand mal epilepsy results in sudden fits. The effects of these disabilities are so well known that the only question for a court is whether the excluded person suffers the disability.

The corollary of the last discussed proposition is: where the danger to society from the disability is not palpable, the exclusion without judicial trial of the issue amounts to unfair treatment and hence a form of detriment without trial. In the law which proscribes sufferers of grand mal epilepsy from driving motor vehicles, the words ‘sufferers of grand mal epilepsy’ is

81 n 29 above, 461.

82 n 20 above, 352.

actually shorthand for the condition which makes persons incurably prone to unpredictable and uncontrollable fits. Behind the apparent specificity of the words lies a rule of such generality that its enactment properly belongs to the legislative branch. In contrast, as the Supreme Court states in *Brown* it is a fallacy 'that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics'.⁸³ The law that disenfranchises communists does not enact a general rule but imposes an arbitrary sentence.

The effect of *United States v Brown* is that a law will be treated as regulative only if: (a) it is not retributive in aim or motive and is not punishment in the conventional sense (b) does not arbitrarily select persons for detriment and (c) does not adjudge an individual or group to be dangerous to society without a judicial except when they suffer a condition that is the semantic equivalent of the danger.⁸⁴ Many laws previously upheld by the Supreme Court would have failed this test. In particular, the test throws in serious doubt, the cases concerning the disqualification of convicted felons.⁸⁵ It is arguable that 'convicted felon' is not the semantic equivalent of a person with undesirable character, as it is not universally accepted that a person who commits one felony is incapable of redemption and reform.

If this approach is accepted, it calls into question the practice of legislative impositions based on findings of a tribunal that does not follow the curial process. In these cases the legislature does not conduct a trial but imposes detriment without granting the affected persons the benefit of a judicial trial. In the Ceylon case of *Kariapper v Wijesinha*,⁸⁶ the Privy Council considered whether a law that imposed civic disabilities (including expulsion from Parliament and disenfranchisement) on the basis of findings of corruption reported by a Royal Commission of Inquiry, violated the attainer ban implied in that country's constitution. The judges rejected the challenge on two grounds. They held that the imposition of the civic disabilities was not punishment but a measure to 'keep public life clean for the public good'.⁸⁷ On the question of legislative judgement, their Lordships stated that 'it is the commission's finding that attracts the operation of the Act' and that Parliament 'did not make any findings of its own'.⁸⁸ This decision is

83 n 29 above, 455.

84 Wormuth develops a similar test in treating the imposition of disqualifications as inherently valid when there is no implicit censorial judgment of individuals, but only the derivation of presumptions about character from aspects of common knowledge or principles of general psychology. F D Wormuth, 'Legislative Disqualifications as Bills of Attainder', (1951) 4 *Vanderbilt Law Review*, 603, 610.

85 *Hawker v New York* n 77 above.

86 [1968] AC 717.

87 *Ibid* 736.

88 *Ibid*.

questionable as Parliament in adopting the commission's findings arguably made a judgment of its own. The commission did not follow the normal rules of evidence and criminal procedure and did not convict the plaintiff of any criminal offence. His civic rights were extinguished by a political act following an extraordinary process established *ex post facto*.

Can the ban on attainder apply to prospective provisions?

An *ex post facto* law visits persons with detriment on account of past conduct. Dershowitz in the *Yale Law Journal* comment argued that that retrospectivity is not essential for a law to be called a bill of attainder. He points to the example of the *Act for the Attainder of the pretended Prince of Wales of High Treason 1700* that besides attainting the prince made it treason for a person to correspond with him in the future.⁸⁹ The example in my view is unsound. The Act was prospective insofar as it created a new obligation on subjects to refrain from corresponding with the prince. However, it was retrospective in relation to the prince himself. It imposed on him an additional retrospective detriment on account of past conduct namely, the loss of his freedom of communication by correspondence. As I argue presently, retrospectivity occurs whenever an individual is selected for punitive treatment.

Dershowitz's concern was that the requirement of retrospectivity may defeat the object of the attainder ban. It was fuelled by certain decisions of the Supreme Court that validated penalties imposed on specified persons on the ground that the penalties serve to prevent future harm that may be caused by such persons. However, these decisions do not stand up to close scrutiny and since Dershowitz wrote his essay, the Supreme Court has disapproved of them. The main offending case is *American Communications Association v Douds*,⁹⁰ in which the Supreme Court considered the validity of a law that disadvantaged labour organisations whose officers had not filed the so called 'non-communist' affidavits. This precedent was overturned by the Supreme Court in *United States v. Brown*.⁹¹ It is hard to find a clearer example of Congressional judgment of guilt on account of past conduct, than the law considered in *Douds*. Congress having investigated the activities of communists determined that they were not fit to hold office in labour unions. The disqualification from office was based on past conduct. This is the view that the Supreme Court reached in *Brown* when it found that the law disqualifying communists was 'to purge the governing boards of labour unions of those whom Congress regards as guilty of subversive acts and

89 n 20 above, 338.

90 339 US 382 (1949).

91 n 29 above.

associations and therefore unfit to fill the positions which might affect interstate commerce'.⁹²

Specification causes retrospective effect

Specification of persons for detriment may be done by naming the persons or by defining a class in a way that enables the identification of the persons targeted for detriment. A law that directly inflicts detriment on specified persons is necessarily retrospective in effect. How so? The critical distinction to notice here is between *prescription* of detriment and *infliction* of detriment. While detriment can be prescribed for future conduct, it is impossible to inflict detriment on account of future conduct that may or may not occur. If detriment is inflicted on specified persons, it takes effect irrespective of what happens in the future. Therefore, the reason for inflicting the detriment must relate to the past. The motivator may be past reprehensible conduct or there may not be a discernible reason for inflicting pain. If it is the latter, the pain is inflicted on the persons for being who they are and who they have been. Either way, the law is retrospective in operation.

What if the law that selects specified persons is prophylactic? Let us consider the following laws. Law 1 states that 'any person who in the opinion of the mental health tribunal is likely to engage in harmful behaviour may be interned by order of court'. Law 2 states that 'If in the opinion of the mental health tribunal Titius is likely to engage in harmful behaviour he may be interned by order of court'. Both laws promote public safety. Law 1 is prospective and defensible against the attainder ban. Law 2 is not as it makes Titius uniquely liable to its process leaving out others in that class. Assuming that this is detriment, there is no reason for inflicting it except that Titius is who he is and has been.

Judicial detention orders - the dangerous prisoner cases

Deprivation of liberty by detention is a central case of punishment and usually involves the aims of retribution or deterrence. Hence the detention of prisoners beyond their initial sentence presumptively offends the principle *nullum crimen, nulla poena sine lege*. There are certain types of detention that are considered outside the ban. They include detention on grounds of mental illness, communicable disease, illegal immigration, national security, criminal investigation and remand pending trial. Security related detention is usually executively determined while detention on health grounds and remand are judicial acts. Except in the problematic case of national security detention, detainees are treated differently from prisoners

92 Ibid 460.

on punishment and are kept subject to strict conditions concerning treatment and release.

In *Kansas v Hendricks*, the US Supreme Court unanimously found the detention provisions of the Kansas Sexually Violent Predator Act did not violate the substantive due process, *ex post facto* and double jeopardy provisions of the Constitution. The Act was saved by its limited scope and its panoply of safeguards. The Act authorised 'civil commitment' of convicts who, due to 'mental abnormality' or 'personality disorder' are found likely to engage in 'predatory acts of sexual violence'. In the Opinion delivered by Justice Thomas the Court ruled that 'a finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite commitment' and observed that civil commitment has been allowed when statutes have combined 'dangerousness' with an additional factor such as 'mental illness or mental abnormality'.⁹³ The Kansas statute required proof of the mental condition beyond a reasonable doubt, limited detention to one year at a time and provided effective recourse against orders.

In sharp contrast, the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) considered in *Fardon v Attorney-General (Qld)* dispenses with the mental health qualification and allows the court to impose continuing detention on a prisoner if it is satisfied that there is serious danger in the form of 'an unacceptable risk that the prisoner [would] commit a serious sexual offence'.(s.13(2)) The court may take account of the prisoner's criminal history and while it may consider medical, psychiatric and psychological reports it need not come to a finding of mental illness.(s.45(4)) The detainee is deemed to remain as a prisoner (s.14(2)) and as the dissenting Justice Kirby stated, 'After the judicial sentence has concluded, the normal incidents of punishment continue'.⁹⁴ The majority did not disagree with this characterisation but focused on the prophylactic aspect of the detention. There is no reason to doubt the protective goal of the law. Yet, a protective measure can also be punitive, especially when it is disproportionate or ill adapted.⁹⁵ Such a law offends the *ex post facto* principle in two ways. It exposes future offenders to multiple punishments for the same offence and it makes serving prisoners retrospectively liable to additional punishments.

Whereas the Queensland law allowed extended imprisonment by further detention, the Sentencing Act 1989 (NSW) considered in *Baker* provided for the denial of parole rights to prisoners of a defined class who are subject to 'non release recommendations' (euphemism for never to be

93 521 US 346, 358 (1997)

94 n 1 above, 98.

95 Ibid.

released) by the trial judge. These prisoners are not eligible to parole unless the State Supreme Court finds ‘special reasons exist that justify’ the making of parole orders. Much time was spent on the question whether ‘special reasons’ imported an intelligible standard. The majority found that it did but their laboured case has no bearing on the question whether this law offends the principle *nulla poena sine lege*.

Neither statute was challenged on grounds of *ex post facto* effect. The reason was the High Court’s long held view that State parliaments possessed indivisible plenary power within their jurisdictions including the competence to enact *ad hominem* law and *ex post facto* law. Counsel for the prisoners relied instead on the much narrower ground established by *Kable v DPP*.⁹⁶ The High Court in that case struck down the Community Protection Act 1994 (NSW) which was designed to secure the further detention of a single named prisoner for public safety reasons. Confronted by its own dogma concerning the plenary power of State parliaments, the Court found means of invalidating the statute in the implications of the separation of powers doctrine in the federal Constitution. Observing that State courts were integral parts of the federal judicial hierarchy the majority concluded that the power to detain a named individual was incompatible with the court’s exercise of federal judicial power and hence could undermine public confidence in the federal judicature in a way that offended the separation of powers in the federal Constitution.⁹⁷

In *Fardon* and *Baker* the Court regarded the more general power to impose preventive detention on classes of prisoners as compatible with the federal judicial role of state courts. It is possible to take the contrary view. Under the legislation examined in *Kable*, the Court’s power was exhausted with one prisoner whereas under the laws considered in *Baker* and *Fardon* the court has continuing authority to make detention orders with respect to a class. It is arguable that if the law in *Kable* was bad for the exercise of federal judicial power, the laws in *Baker* and *Fardon* are worse. Each of these laws would presumably fail if enacted as federal legislation enlisting federal courts. They would have failed for investing non-judicial powers in federal courts contrary to the rule in *Boilermakers’ Case*.⁹⁸ They would also fail on the *nullum crimen, nulla poena sine lege* rule under the authority of *Polyukhovich*. The High Court’s position regarding State courts as revealed by the judicial detention cases is that *ex post facto* State laws are not unconstitutional except to the extent that they compromise the federal judicial role of State courts.

96 (1995-1996) 189 CLR 51

97 Ibid 108, 109

98 *Attorney-General (Cth) v R; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

Legislative intervention in judicial proceedings

Judicial proceedings are instituted to vindicate rights and enforce duties. Hence every law that alters the rights in issue before a court imposes detriment on a party with retrospective effect and hence *prima facie* invites condemnation for *ex post facto* effect. However, if the intervening law is purely prophylactic in aim it may not offend the ban. Take the case of the grand mal epileptic whose application for a driving licence is rejected. If the law does not permit the licensing authority to deny the sufferer a licence on this ground and its decision is challenged, the public interest may require the disqualification of grand mal epileptics generally and further validate the refusal of licences to such persons in the past. Such a law is purely prophylactic although it may impact on pending cases. It does not select persons in similar conditions for dissimilar treatment and has no punitive intent.

In *Nelungaloo Pty Ltd v Commonwealth*,⁹⁹ the High Court considered the validity of an order for the acquisition of wheat made under a war time regulation.¹⁰⁰ There were serious doubts on the question whether the law authorised the acquisition of future as opposed to existing crops. The validity of the acquisition order was challenged but while the case was pending Parliament enacted legislation to clarify the law and to validate orders already made.¹⁰¹ The plaintiff argued, *inter alia*, that the retrospective validation of the regulation under challenge in the court was a usurpation of judicial power. It was critical to the decision that the acquisition order was not directed exclusively at the wheat grown by the plaintiff, but applied to the entire Australian harvest. The only judge to consider the question, Dixon J, dismissed the objection stating: 'It is simply a retrospective validation of an administrative act and should be treated in the same way as if it said that the rights should be the same as they would be, if the order was valid'.¹⁰² The law would have survived a challenge on *ex post facto* grounds as it was prophylactic in nature, had no punitive aim and did not involve the legislature in a 'trial'.

In *Nicholas v The Queen*¹⁰³ the High Court upheld the Crimes Amendment (Controlled Operations) Act 1996 (Cth) that required courts to disregard offences committed by official agents in anti-narcotics operations in exercising discretion to admit evidence of importation. The enactment followed the High Court's re-iteration, in *Ridgeway v The Queen*, of the public

99 (1947-1948) 75 CLR 495

100 Order made under regulation 14 of the National Security (Wheat Acquisition) Regulations authorised by the National Security Act 1939.

101 Wheat Industry Stabilization Act 1946 s 11.

102 n 99 above, 579.

103 (1998) 193 CLR 173.

policy discretion to exclude evidence of official wrong doing.¹⁰⁴ Nicholas did not claim that the amendment would affect the jury's verdict but argued that the law infringes or usurps the judicial power of the Commonwealth in two ways. Firstly, it was contended that the limitation of the public policy discretion denied courts the authority to protect their integrity and dignity which is an attribute of judicial power. Although the Justices McHugh and Kirby agreed, the majority viewed the limitation as one of procedure and evidence and hence ultimately within legislative power.¹⁰⁵ Secondly, it was argued for Nicholas that the law, though facially general, was directed at a small group of known persons who were subject to 'controlled operations', hence it was similar to the usurpation of judicial power condemned in *Liyana*. The argument found no favour with the majority mainly due to the prospective operation of the law.

Whereas in *Nelungaloo* and *Nicholas* the legislation was general and impacted incidentally on a pending case, the law challenged in *The Queen v Humby; Ex parte Rooney*¹⁰⁶ was directed at specified judicial decrees. It had the aim of extinguishing the constitutional right of the plaintiffs to have their cases under Commonwealth law heard by a judge. Section 72 of the Australian Constitution allows Parliament to vest federal judicial power in State courts. In *Knight v Knight*,¹⁰⁷ the High Court had ruled that the constitutional separation of powers required that federal judicial power devolved on State courts must be exercised by judges of the State court and that the Master of the Supreme Court of South Australia was not a judge. One effect of the decision was to call in question all the maintenance orders made by the Master under section 84 (1) of the Matrimonial Causes Act 1959 (Cth). The Commonwealth Parliament responded by enacting the Matrimonial Causes Act 1971 with the sole purpose of validating the Masters' decrees notwithstanding *Knight v Knight*. The Act was promptly challenged. In my view, the Act was patently unconstitutional as it sought to validate specific orders that had been judicially determined to be unconstitutional. The judges who addressed this issue engaged in exercises of mind boggling casuistry to deny that the Act had this effect. McTiernan J claimed that the impugned decrees were validated not as judicial decrees but as legislative enactments.¹⁰⁸ Stephen J maintained that the orders of the Master remained ineffective but 'the sub-section operates by attaching to them ... consequences which it declares them to have always had and it describes those consequences

104 (1995) 184 CLR 19.

105 Ibid 188-189, 202, 210-211, 238, 275-276.

106 (1973) 129 CLR 231.

107 (1971) 122 CLR 114.

108 n 110 above, 239.

by reference to the consequences flowing from the making of decrees by a single judge of the Supreme Court of the relevant State'.¹⁰⁹ Mason J declared that the order of the Master does not acquire validity 'merely because the statute attributes to it the effect it would have had, had it been a judicial determination'.¹¹⁰ The judges evidently saw a distinction between validation of an order and the statutory attachment to an invalid order of consequences which the order would have generated had it been valid. The legal effect though was exactly the same. The critical differences between the laws considered in *Nelungaloo* and *Humby* is that the former was general and prophylactic whereas the latter was specific and non-prophylactic. In fairness it must be noted that the Matrimonial Causes Act 1971 had no sinister design and had no punitive intent. It was enacted to cure a defect that resulted from earlier understanding of the effect of s. 72 of the Constitution that federal jurisdiction vested in State courts could be exercised by officers of the court. Nevertheless the Act denied certain parties of a constitutional right albeit one they did not know they had until *Knight v Knight*.

In contrast the law considered in *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth (Cth BLF Case)*¹¹¹ was straightforwardly punitive. The law was made for the sole purpose of destroying the status of the BLF as a registered trade union. The BLF was considered a rogue union by the Commonwealth and State governments and by the Australian Council of Trade Unions (ACTU). BLF was registered under the *Conciliation and Arbitration Act 1904*. Registration conferred an extensive range of rights and privileges. The Act provided for two methods of deregistration, one judicial, and the other quasi-judicial. The judicial mode led to a determination by the Federal Court on objective criteria set out in the Act.¹¹² The quasi-judicial method culminated in a determination of the Conciliation and Arbitration Commission based on a more broadly expressed set of social concerns.¹¹³ In its determination to strip the BLF of its statutory status, the federal government secured the passage of the Building Industry Act 1985 that made special provision for deregistering the BLF. The Act empowered the Commission, on the application of the Minister, to make a declaration that the BLF or an officer or employee thereof had engaged in industrial action. Following such a declaration, the Minister was authorised on public policy grounds to order the cancellation of registration and to impose certain other deprivations on the BLF. The BLF and its members

109 Ibid 231.

110 Ibid 249.

111 (1986) 161 CLR 88

112 Ss. 143(2) and 118A(1)

113 S. 143A(1) and (2)(a)

were selected for harsher treatment under the law. The Act would have been struck down in the US even on the most stringent construction of the attainder ban. Yet, it was challenged in the High Court only on the narrow ground that it was not within the 'conciliation and arbitration' power set out s. 51 (xxxv). The court rejected the argument.¹¹⁴

The Commission duly made the requisite declaration authorising the Minister to deregister the BLF. The BLF went back to the High Court complaining of a denial of natural justice and sought orders to quash the declaration and to prohibit the Minister from ordering the deregistration of the union. While this case was pending, Parliament passed two more laws, the Builders Labourers' Federation (Cancellation of Registration) Act 1986 and the Builders Labourers' Federation (Cancellation of Registration - Consequential Provisions) Act 1986. The first Act directly cancelled the registration of the BLF and the second Act imposed consequential disabilities on the officers and members of the union. BLF returned to the High Court complaining that the two Acts amounted to an exercise of judicial power and ... an interference with [the] Court's exercise of the power ...'.¹¹⁵ The challenge was unanimously rejected on the premise that the legislation simply deregistered the Federation, thereby making redundant the legal proceeding and observed: 'It matters not that the motive or purpose of the Minister, the Government and the Parliament in enacting the statute was to circumvent the proceedings and forestall any decision which might be given in those proceedings'.¹¹⁶ The *ex post facto* nature of the law escaped the court's attention. In enacting these laws, Parliament itself adjudged that the BLF was deserving of punishment in the form of deregistration. It is hard to find a clearer case of a legislative trial and punishment in modern times.

Summary

The discussion of the theory and practical reasons for objecting to *ex post facto* law exposes the following types of law to condemnation.

1. *Ad hominem* laws by which the legislature directly imposes punishments on named individuals for existing offences with or without a trial by the legislature. The bills of attainder and of pains and penalties typify this class but it includes laws that impose detriments on specified individuals on the basis of adverse findings of tribunals where the tribunal is not required to determine unlawful conduct according to established law.

114 *Queen v Ludeke and others* (1985) 159 CLR 636.

115 n 108 above 94-95.

116 *Ibid* 96-97.

2. Laws that, retrospectively increase punishments for existing offences.
3. Laws that do not directly punish persons but which create new liabilities for past conduct as judicially determined. Such liabilities may be criminal or civil in nature and will include laws that impose civic disabilities. This category does not include laws designed to bring to trial persons accused of committing acts *mala in se* or, to use the words of the ICCPR ‘criminal according to the general principles of law recognised by the community of nations’.
4. Laws that retrospectively remove defences or exceptions to civil or criminal liability.
5. Laws that in respect of a class of offences lessen the prosecutorial burden by retrospectively modifying procedural or evidentiary rules.
6. Laws that impose future non-prophylactic obligations on selected individuals. The arbitrariness of the selection reveals punitive intent and for reasons explained, the selection is necessarily based on past events.
7. Laws that are facially prospective and prophylactic but which select for its attention some but not all agents thought to be the source of potential harm. If named HIV positive persons are excluded from an occupation while others with the condition are not, the law will be open to the objection that it is imposing the disability on persons for who they are, rather than for what they cause.
8. Laws that select a class of persons for the imposition of disqualifications with reference to a named impairment when the name of the impairment is not the semantic equivalent of a universally recognised and relevant disability.
9. Laws that affect the outcome of pending legal proceedings by dictating the decision or by retrospectively altering the rights of the parties. Such a law will escape condemnation if it applies generally or to all members of a class and has a purely prophylactic effect.

It is not surprising that *ex post facto* laws of the kind criticised in this essay are uncommon in countries that maintain acceptable levels of constitutional government. Yet, the attraction of this type of law as means to short term ends, both good and bad, is ever present. It is tempting to think that democracy is a sufficient safeguard against gross abuse of *ex post facto* law but history cautions against such faith. Hence even where constitutions place no formal limits, the rule of law demands that lawmakers adopt restraints on retrospective legislation as a matter of constitutional practice.

Constitutional practice owes much to the pressure of public opinion and I hope that this discussion will be a helpful contribution to public understanding of the reason and reach of the objection to *ex post facto* law.

A 'CONSTITUTION' IN SEARCH OF ITS LIMITS: THE GRADUALLY EXPANDING REACH OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

*Rick Lawson**

§ Introduction

To witness the process of European integration must be a startling experience for any foreign observer. A high degree of economic integration goes hand in hand with an incoherent foreign policy; a sophisticated system for the protection of human rights exists in the absence of a clear constitutional framework. There is no single federation-like structure, but instead several regional organisations coexist – such as the European Union (EU), the Council of Europe, the Organisation for Security and Cooperation in Europe (OSCE), the NATO and so on. Co-operation between these organisations exists, but at the same time each seems determined to defend its mandate and strengthen its own position, if necessary at the expense of others.

Against this confused background, the present contribution will concentrate on one particular instrument: the European Convention on Human Rights (ECHR). As is well-known, the ECHR was adopted in 1950 in the framework of the Council of Europe. It contains a fairly limited set of 'classic' human rights and fundamental freedoms, such as the right to life, the prohibition of torture and the right to a fair trial.¹ Its main asset is the European Court of Human Rights in Strasbourg, which is competent to rule on individual complaints and which delivers binding judgments. What started as a project between ten mainly Western European States was joined by States in Central and Eastern Europe after the fall of the Berlin Wall. The Convention now embraces 46 States such as the Russian Federation, Armenia and Azerbaijan – that is, all European States except Belarus (which does not satisfy the Council's requirements in terms of democracy and respect for the rule of law). Hence, over 800 million individuals enjoy the protection offered by the Convention, from Reykjavik to Vladivostok.

What is perhaps less well known is that the Strasbourg Court described the ECHR in 2005 as "a constitutional instrument of European public order (ordre public) for the protection of individual human beings".² The launch

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1 For general information see www.echr.coe.int. For a recent academic analysis see Van Dijk & Van Hoof et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, 2006).

2 ECtHR, 30 June 2005, *Bosphorus Airlines v. Ireland* (Appl. No. 45036/98), § 156. All ECtHR cases cited are judgments unless indicated otherwise. For the sake of convenience, only reference is

issue of the Indian Journal of Constitutional Law seems to be an excellent place to dwell on this statement: where does it come from and what does it signify? In paragraph 2 we will seek to answer that question.

The central question of this article, however, is a different one – although it is quite related to the constitutional nature of the ECHR. Does the Convention actually protect more than the 800 million individuals from Reykjavik to Vladivostok? Is it conceivable that persons in Iraq, Afghanistan, Sierra Leone and East Timor can rely on the ECHR? This question arises as a consequence of various military operations carried out by European States in recent years. Both UN led peace-keeping operations and the ‘fight against terrorism’ have brought European forces to all quarters of the world. It is clearly of great practical significance to analyse the rules of law by which the relevant forces are bound. Indeed there has been a heated debate in recent years about the question to what extent the ECHR applies to extra-territorial acts of its signatory States. The case of *Bankovic* (2001) offered an occasion for the Strasbourg Court to address this matter in considerable detail.³ Since then academic writing on this issue – which had been almost non-existent prior to *Bankovic* – has been quite prolific.⁴

In this contribution, I will try to analyse the Strasbourg case-law on this issue. Although the jurisprudence is still in a state of development,⁵ some trends may be discerned. I will argue that the Court is gradually distancing itself from *Bankovic*; that the more recent case-law suggests that the Convention does apply to extra-territorial acts of States parties, also in times of armed conflict; and that future discussions should concentrate on the question what it actually means to say that the Convention applies.

To avoid misunderstanding I should mention at the outset that I was involved in the *Bankovic* case, as legal advisor to the applicants. Since the case ended – in the applicants’ perspective at least – in a glorious defeat, I may not be well-positioned to give an objective account of the case and the

made to the application numbers of cases, and not to their official publication in *Series A* (until 1996) or the *Reports* (thereafter). All cases cited are easily accessible, in full text, at www.echr.coe.int by using the ‘HUDOC’ search engine.

- 3 ECtHR, 12 Dec. 2001, *Bankovic a.o. v. Belgium and 16 Other Contracting States* (Appl. no. 52207/99; adm. dec.). All decisions and judgments of the Court can be found on www.echr.coe.int.
- 4 See esp. F. Coomans & M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004); D. Lorenz, *Die territoriale Anwendungsbereich der Grund- und Menschenrechte* (Berliner Wissenschafts-Verlag, 2005); M. Gondek, “Extraterritorial application of the ECHR: Territorial focus in the age of globalization?”, in *Neth. Int’l Law Rev.* vol. 52 (2005), p. 349-387; S.I. Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Intersentia, 2006); L. Loucaides: “The influence of factual situations on the evolution of jurisprudence: The *Bankovic* case”, in *Eur. Human Rights Law Rev.* 2006, p. 397.
- 5 On 15 November 2006, the Court’s Grand Chamber heard oral argument in two highly relevant cases: *Behrami & Behrami v. France* and *Saramati v. France, Norway and Germany*.

Court's subsequent case-law. Of course I like to believe that the Court is moving away from *Bankovic*. Yet, it seems difficult to arrive at any other conclusions.

2. The European Convention legal order: a network, a family, a community, a zone?

As was mentioned above, the Strasbourg Court described the ECHR in 2005 as “a constitutional instrument of European public order”. This statement invites all sorts of questions. Does “a constitutional instrument” effectively mean “the constitution”? What is meant with “European public order”? Is that the same as a common legal order? The beginning of an answer may be found in the famous case of *Ireland v. the UK* (1978), in which the Court considered:

Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective enforcement’.⁶

The Court did not explain what exactly is “above” this “network”. But the quote seems to echo the seminal *Van Gend & Loos* judgment of the Court of Justice of the European Communities (ECJ), delivered 15 years before:

The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is *more than an agreement which merely creates mutual obligations between the Contracting States*. This view is confirmed by the Preamble which refers not only to Governments but to Peoples. (...) The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage.⁷

A comparison of *Ireland v. UK* with *Van Gend & Loos* immediately shows the differences between Strasbourg and Luxembourg. The Strasbourg Court did *not* speak of “a new legal order”, although the precedent was there. It did *not* oblige Contracting Parties to incorporate its provisions into

⁶ ECtHR, 18 January 1978, *Ireland v. UK* (Appl. No. 5310/71), § 239, emphasis added.

⁷ ECJ, 5 February 1963, *Van Gend & Loos* (case 26/62), emphasis added.

national law.⁸ Only in 2006 – i.e. at the time that the ECHR had finally been incorporated by all Contracting States – did the Court state that the Convention “directly creates rights for private individuals within their jurisdiction”.⁹ Only in one case the Court stated that Article 10 ECHR is “directly applicable” in Greece, but this was probably a slip of the pen.¹⁰

So what is the European Convention? If it did not establish “a new legal order” in the *Van Gend & Loos* sense, then what did it create? In the case-law we do not find a straightforward answer. Instead we come across poetic expressions such as the “European family of nations”. In *Tyrer* the argument was made that local public opinion was in favour of retaining judicial corporal punishment. The Court noted that this type of punishment was not used elsewhere in Europe:

If nothing else, this casts doubt on whether the availability of this penalty is a requirement for the maintenance of law and order in a European country. The Isle of Man not only enjoys long-established and highly-developed political, social and cultural traditions but is an up-to-date society. Historically, geographically and culturally, the Island has always been included in the European family of nations and must be regarded as sharing fully that “common heritage of political traditions, ideals, freedom and the rule of law” to which the Preamble to the Convention refers.¹¹

It is great from a rhetorical point of view, but it is hard to maintain that the “European family of nations” is a clearly defined legal notion.

To make matters worse, the Court is not very consistent in its poetry. In its 1971 *Vagrancy* judgment the Court observed that scrupulous scrutiny is necessary “when the matter is one which concerns *ordre public* within the Council of Europe”¹² – without explaining what this *ordre public* is. But only a few years later the Court, referring back to the *Vagrancy* case, mentioned “the public order (*ordre public*) of the member States of the Council of Europe”.¹³ So to whom does the public order belong? To the Council of Europe, to its Member States, to the Member States collectively?

8 See, e.g., ECtHR, 27 September 1995, *McCann v. UK* (Appl. No. 18984/91), § 153.

9 ECtHR, 8 March 2006, *Blečić v. Croatia* (Appl. No. 59532/00), § 90. As an authority for this statement the Grand Chamber referred to “*inter alia*” *Ireland v. UK*, cited above, § 239, but there the Court was actually more cautious: “the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States [...]. That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law [...]”.

10 ECtHR, 15 November 1996, *Ahmet Sadik v. Greece* (Appl. No. 18877/91), § 31.

11 ECtHR, 25 April 1978, *Tyrer v. UK* (Appl. No. 5658/72), § 38.

12 ECtHR, 18 Juni 1971, *De Wilde, Ooms & Versyp v. Belgium* (Appl. No. 2832/66), § 65.

13 ECtHR, 18 Juni 1980, *De Weer v. Belgium* (Appl. No. 6903/75), § 49.

In *Loizidou* the Court elaborated upon this theme and described the Convention as “a constitutional instrument of European public order (*ordre public*)”.¹⁴ The expression “European public order” is a clever way to avoid the difference between the *Vagrancy* formula and subsequent variations. In addition *Loizidou* was the first time that the Court referred to the Convention as a “constitutional” instrument. The same turn emerged, as we saw, in 2005. But it was, again, unclear what the Court actually meant. The fact that the *same* judgment also described the Convention as “an instrument of European public order (*ordre public*)”¹⁵ (i.e. without the adjective “constitutional”) only served to increase the confusion.

Yet another concept entered the stage in the final phase of the *Loizidou* case, when the Court gave a separate judgment on just satisfaction. The Government of Cyprus, which had intervened in the case, had asked for reimbursement of its costs. The Court dismissed that request with the following consideration:

The Court recalls the general principle that States must bear their own costs in contentious proceedings before international tribunals (...). It considers that this rule has even greater application when, in keeping with the special character of the Convention as an instrument of European public order (*ordre public*), High Contracting Parties bring cases before the Convention institutions (...). In principle, it is not appropriate, in the Court’s view, that States which act, *inter alia*, in pursuit of the interests of the Convention community as a whole, even where this coincides with their own interests, be reimbursed their costs and expenses for doing so. Accordingly the Court dismisses the Cypriot Government’s claim for costs and expenses.¹⁶

On the one hand it is interesting to note that the adjective “constitutional” was again left aside. On the other hand, a new concept was introduced: “the Convention community as a whole”. The credit for the discovery of this notion – the contents of which is yet to be revealed – goes to former Bulgarian judge Dimitar Gotchev, who mentioned it in a dissenting opinion in 1997.¹⁷ It is somewhat peculiar that, since *Loizidou*, “the

14 ECtHR, 23 March 1995, *Loizidou v. Turkey* (Preliminary Objections) (Appl. No. 15318/89), § 75. This expression was repeated by the Grand Chamber in *Bosphorus*, cited above, § 156.

15 *Loizidou*, § 93.

16 ECtHR, 28 July 1998, *Loizidou v. Turkey* (Just satisfaction) (Appl. No. 15318/89), § 48.

17 Judge Gotchev dissenting in ECtHR, 28 November 1997, *Mentes v. Turkey* (Appl. No. 23186/94): “The above considerations have gained particular importance in the light of the recent expansion of the Convention community and the resultant need to establish a relationship of cooperation between the Strasbourg Court and the courts in the Contracting States which have recently acceded to the Convention”).

Convention community” has only featured in cases involving Norway, a country which is, coincidentally, *not* an EU member.¹⁸

Evasive expressions continue to pop up. In 2003 the Court, when dealing with the death penalty, observed that “*the territories* encompassed by the member States of the Council of Europe *have become a zone* free of capital punishment”.¹⁹ This cautious language may be contrasted with the more confident assertions of other Council of Europe organs, which do not hesitate to speak of a “death penalty-free continent”.²⁰

The most recent, and most outspoken, passage to date can be found in the *Bankovic* case. This deserves special attention, because it also of key importance to the discussion on the extraterritorial reach of the ECHR. The case originated in an attack, in April 1999, on a building of *Radio Televizije Srvije (RTS)* in Belgrade, Federal Republic of Yugoslavia (FRY). The television station was hit by a cruise missile launched from a NATO forces’ aircraft in the context of ‘Operation Allied Force’. Sixteen people were killed and another sixteen were seriously injured. Five relatives of the deceased and a survivor of the bombing brought a complaint before the Strasbourg Court against the NATO member states, in so far as they were bound by the ECHR. The applicants argued that the television station had not been a legitimate target; they alleged breaches of notably Article 2 (the right to life) and Article 10 (the freedom to impart information). The respondent states primarily contended that the applicants and their deceased relatives were not, at the relevant time, within their ‘jurisdiction’ and hence did not enjoy the guarantees offered by the Convention.

As it happened the hearing in this case took place in October 2001, i.e. weeks after the terrorist attacks on the United States. It was clear at the time that military reactions, notably in Afghanistan, were bound to follow. The applicants realised the potential impact on their case: if the Court were to accept the *Bankovic* claim, then possibly the next person to lodge an

18 Judges Palm, Fuhrmann and Baka dissenting in ECtHR, 20 May 1999, *Bladet Tromsø v. Norway* (Appl. No. 21980/93) (“the Court has played an important role in laying the foundations for the principles which govern a free press within the Convention community and beyond”). And see: ECtHR, 11 February 2003, *Ringvold v. Norway* (Appl. No. 34964/97), § 38 (“Such an extensive interpretation would not be supported either by the wording of Article 6 § 2 or any common ground in the national legal systems within the Convention community. On the contrary, in a significant number of Contracting States, an acquittal does not preclude the establishment of civil liability in relation to the same facts.”). A similar passage was included in ECtHR, 11 February 2003, *Y v. Norway* (Appl. No. 56568/00), § 41.

19 ECtHR, 12 March 2003, *Öcalan v. Turkey* (Appl. No. 46221/99, Chamber judgment), § 195 (emphasis added), confirmed by the Grand Chamber in its judgment of 12 May 2005 in the same case, § 163.

20 See Recommendation 1187 (*Europe: a death penalty-free continent*) of the CoE Parliamentary Assembly, adopted on 26 May 1999. “The Council of Europe is a death penalty free area”, the CoE website asserts (<http://www.coe.int/T/E/Com/Files/Themes/Death-penalty/>, accessed 22 Sept. 2005).

application might be Osama bin-Laden. This might not be an incentive for the Court to accept *Bankovic*. In an attempt to convince the Court that it should ignore recent events, the applicants reminded the Court of the *public ordre* mission of the Convention. The Court did not agree:

In short, the Convention is a multi-lateral treaty operating (...) in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.²¹

Two conclusions may be drawn. The first time that the Court came close to circumscribing a legal order of its own, it primarily defined it by stating what it was *not*: the ECHR was not designed to be applied throughout the world. Secondly, the Court did not actually refer to the legal space of the Convention: it spoke about the legal space *of the Contracting States*.

3. The basics of extra-territoriality: Article 1 ECHR and *Loizidou*

Before we analyse *Bankovic* in greater detail, it seems useful to recapitulate a number of basic concepts. The key question in all discussions on the territorial reach of the ECHR is how one should interpret the word "jurisdiction" in Article 1 ECHR. Article 1 provides that the Contracting Parties shall secure to everyone "within their jurisdiction" the rights and freedoms defined in the Convention. Accordingly, for an individual to be able to rely on the Convention, he must demonstrate that he was "within the jurisdiction" of the State concerned at the relevant time. In the vast majority of cases, this is not even an issue: if someone complains that his trial before the Dutch courts was unfair, no-one will even think of the possibility that the applicant was not "within the jurisdiction" of the Netherlands. But the question becomes crucial when a State conducts a military operation abroad and is alleged to have violated human rights in the process. Was the alleged victim "within the jurisdiction" of the State concerned? Can he rely on the Convention?

²¹ ECtHR, 12 December 2001, *Bankovic a.o. v. 17 NATO Member States* (Appl. no. 52207/99, adm. dec.), § 80. It should be noted that the present author acted as legal advisor to the applicants in this case.

In the case of *Loizidou*, which we also encountered in the previous paragraph, the Strasbourg Court made clear that the notion of “jurisdiction” is not identical to the territory of a State. The facts of the case are well-known: Ms Loizidou owned land in northern Cyprus but left her property following the Turkish intervention in 1974. She brought a complaint in Strasbourg against Turkey, arguing that Turkish forces prevented her from returning to her property. Turkey rejected all responsibility for the situation. It advanced many arguments, the most relevant of which is for present purposes that the question of access to property was obviously outside the realm of Turkey’s “jurisdiction”. [...] the mere presence of Turkish armed forces in northern Cyprus was not synonymous with “jurisdiction” any more than it is with the armed forces of other countries stationed abroad. In fact Turkish armed forces had never exercised “jurisdiction” over life and property in northern Cyprus.

Any complaints, Turkey argued, should be directed against the ‘Turkish Republic of Northern Cyprus’ (‘TRNC’) which was established in 1983. The Court rejected this preliminary argument as follows: [...] although Article 1 sets limits on the reach of the Convention, the concept of “jurisdiction” under this provision is not restricted to the national territory of the High Contracting Parties. [...]. Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.²²

Thus the Court’s test focused on *effective control over territory*. For the Court’s assessment it was not so relevant whether the Turkish military presence on Northern Cyprus was lawful under international law or not; nor did the Court examine whether Ms Loizidou was actually prevented from returning to her property by Turkish forces or by ‘TRNC’ officials. The Court avoided difficult questions of proof by emphasising the fact that Turkey was in control anyhow.

The *Loizidou* ruling has been consistently confirmed.²³ In its *Bankovic* decision the Court summarised its own jurisprudence as follows:

²² ECtHR, 23 March 1995, *Loizidou v. Turkey* (*prel. obj.*) (Appl. No. 15318/89), § 62.

²³ See e.g. ECtHR (GC), 10 May 2001, *Cyprus v. Turkey* (Appl. No. 25781/94), § 77; ECtHR, 20 Feb. 2003, *Djavit An v. Cyprus* (Appl. No. 20652/92), §§ 18-23; ECtHR, 6 April 2005, *Xenides-Arestis v. Turkey* (Appl. No. 46347/99), § 22.

In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.²⁴

It may be noted that the Court on this occasion silently introduced a new element: the exercise of “all or some of the public powers normally to be exercised by [the] Government” of that territory – an element that was not mentioned in *Loizidou* or in any of the cases that followed it. It is not entirely clear what the Court has in mind – some sort of surrogate “jurisdiction”? What if a Contracting Party occupies a territory and secures effective control over it, but fails to exercise normal public powers, for instance at the early stages of the occupation?

4. A closer look at the *Bankovic* decision

Even if we leave aside this particular aspect of *Loizidou*, it will be clear that this branch of case-law did not answer all questions. What about extra-territorial operations in a situation where the State concerned does not exercise prolonged “effective control” over foreign territory? Here one may think for example of ad-hoc operations on foreign territory, or of hostilities in the course of an armed conflict.

The *Bankovic* case, which was already briefly described above, seemed destined to become the landmark case for this category of cases. In order to argue that the very bombing of the RTS building had brought them “within the jurisdiction” of the NATO Member States, the applicants developed a ‘gradual’ and context-related approach to “jurisdiction”. In the context of military operations it would certainly go too far to expect the respondent States to secure all rights and freedoms included in the ECHR, the applicants argued – but at the very least one could expect these States to refrain from acts that endangered their right to life beyond the limits set by the European Convention.²⁵ It may be noted that the applicants did not express any view on the legality of ‘Operation Allied Force’ under public international law; they confined their complaint to the bombing of the RTS building. Similarly, they did not dispute that in times of war the substantive norms of the Convention may have to be adapted. Even in the absence of a formal

²⁴ *Bankovic* (*supra* note 1), § 71.

²⁵ For a more elaborate discussion of this approach, see my contribution to the Coomans/Kamminga volume mentioned in footnote 2.

derogation under Article 15 ECHR, it is quite conceivable, for instance, that the Court leaves the States a wide margin of appreciation.²⁶ But these are issues related to the merits of the complaint; the first hurdle was to pass the admissibility test.

This first hurdle was never passed, however. The Court rejected the idea of a context-related understanding of “jurisdiction”. In a lengthy admissibility decision it stated that the applicants position was “tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention”. With some caution, the Court said it was “inclined to agree” with the defending Governments that the text of Article 1 does not accommodate such an approach to “jurisdiction”. But without much caution it continued: the Court is of the view that the wording of Article 1 does not provide any support for the applicants’ suggestion that the positive obligation in Article 1 to secure “the rights and freedoms defined in Section I of this Convention” can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question.²⁷

Apparently the Court favoured a ‘digital’ approach: one is either within the jurisdiction of a Contracting State (and consequently entitled to full protection of his rights and freedoms), or one is outside the jurisdiction altogether (and hence not protected at all). *Tertium non datur*.

It was on this occasion that the Court also stated, as we have seen above, that “the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States”.²⁸ At first sight this statement gives an uneasy feeling: is the Court really saying that it is not prepared to review complaints concerning conduct which is allegedly in breach of human rights, if it takes place in non-European countries – no matter how deliberate the acts or heinous the violations? But a closer look reveals that the Court does *not* say this. The Convention was not *designed* to be applied throughout the world, but that does not mean that its application outside Europe is *excluded*.

Yet one cannot deny that the Court took a restrictive approach. A likely explanation may be found in a speech of the Court’s President, Mr Wildhaber, on the occasion of the opening of the judicial year 2002 of the European Court of Human Rights:

26 Cf. ECtHR, 26 March 1987, *Leander v. Sweden* (Series A, vol. 116), § 59; ECtHR, 26 May 1993, *Brannigan and McBride v. the UK* (Series A, vol. 258-B), § 43.

27 *Banković* (*supra* note 1), § 75.

28 *Id.*, § 80, emphasis in original.

Our perception of last year is coloured by the tragic events of 11 September and their aftermath. Terrorism raises two fundamental issues which human rights law must address. Firstly, it strikes directly at democracy and the rule of law, the two central pillars of the European Convention on Human Rights. It must be therefore be possible for democratic States governed by the rule of law to protect themselves effectively against terrorism; human rights law must be able to accommodate this need. The European Convention should not be applied in such a way as to prevent States from taking reasonable and proportionate action to defend democracy and the rule of law.²⁹

Referring more specifically to *Bankovic*, President Wildhaber continued:

We do have to realise that the Convention was never intended to cure all the planet's ills and indeed cannot effectively do so; this brings us back to the effectiveness of the Convention and the rights protected therein. When applying the Convention we must not lose sight of the practical effect that can be given to those rights.

The quotes give the impression that the Court may have been afraid, in the days immediately following '9/11', to be sidelined in the struggle against terrorism. It was only after a lapse of time that the discourse changed: by the summer of 2002 the Council of Europe had developed its official position into the view that the struggle against terrorism must be waged, but always within the bounds set by the European Convention.³⁰

5. Moving beyond *Bankovic*: *Öcalan*, *Issa* and *Ilaşcu*

On a number of occasions the Court reconfirmed *Bankovic*: for instance in December 2002, when deciding the cases of *Kalogeropoulou* (which concerned a number of Greek citizens who brought a claim for damages against Germany, before Greek courts, in connection with a Nazi massacre in World War II)³¹ and *Gentilhomme* (which originated in a refusal by a French State school in Algiers to continue to enrol three children).³² None of these cases, however, related to the kind of situations under review here.

4.1 *Öcalan*

The case of *Öcalan* seemed more relevant. Former PKK leader Mr *Öcalan*'s complained, *inter alia*, that his arrest in Kenya by Turkish security forces was in breach of Articles 3 and 5 of the Convention. The key question

²⁹ Speech of 31 Jan. 2002.

³⁰ See esp. the *Guidelines on Human Rights and the Fight against Terrorism*, adopted by the Committee of Ministers in July 2002.

³¹ ECtHR, 12 Dec. 2002, *Kalogeropoulou a.o. v. Greece and Germany* (Appl. No. 59021/00; adm. dec.).

³² ECtHR, 14 May 2002, *Gentilhomme a.o. v. France* (Appl. no. 48205/99 a.o.).

in this respect was of course whether Mr Öcalan was “within the jurisdiction” of Turkey at the moment of his arrest. In a somewhat ambiguous passage a 7-judge Chamber of the Court distinguished the case from *Bankovic*.

In the instant case, the applicant was arrested by members of the Turkish security forces inside an aircraft in the international zone of Nairobi Airport. *Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the “jurisdiction” of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.* The Court considers that the circumstances of the present case are *distinguishable from* those in the aforementioned *Bankovic and Others* case, notably in that *the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey (...)*.³³

The Court then proceeded to review the circumstances of Mr Öcalan’s arrest under Articles 3 and 5 ECHR. But the passage quoted here begs the question: does it matter, for the purposes of Article 1 of the Convention, that Mr Öcalan was forced to return to Turkey following his arrest? Two opposite answers seem possible:

- (a) No, the first sentence suggests: “directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the ‘jurisdiction’ of that State”; or
- (b) Yes, the second part argues: the present case is distinguishable from *Bankovic* because Mr Öcalan “was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey”.

The practical importance of this ambiguity may be clear if one thinks of the hypothetical case of a ‘hit and run’ operation: forces penetrate into the territory of another country, seize a person and kill him on the spot – i.e. without bringing him over to their own territory. Would the Convention apply to the event? Yes, if we follow the first sentence. Or no, if the second sentence is relied upon.

Unfortunately the issue was hardly clarified by the Grand Chamber, which delivered judgment in *Öcalan* case in 2005: directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the “jurisdiction” of that

33 ECtHR, 12 March 2003, *Öcalan v. Turkey* (Appl. No. 46221/99), § 93 (emphasis added).

State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey (see, in this respect, ... by converse implication, the *Banković and Others v. Belgium and 16 Other Contracting States* decision).³⁴

Again the two consecutive sentences seem to radiate a very different message. But one thing is clear: the Convention may not have been *designed* to be applied throughout the world, as the Court stated in *Banković*, but *Öcalan* demonstrated that its application outside Europe is certainly not *excluded*. After *Öcalan* it is safe to say that there are at least two situations where the forces of a Contracting State continue to be bound by the Convention, even when operating abroad: (a) the *Loizidou* situation, where forces exercise “effective control” of an area, and (b) the *Öcalan* scenario where forces arrest a person. In the latter case it may be of relevance whether the person was subsequently forced to return to the territory of the State concerned.

4.2 *Issa*

Meanwhile the Court had delivered judgment in the case of *Issa*. The case is about the conduct of – again – Turkish forces, which this time had crossed into northern Iraq during an operation that lasted for approximately four weeks. The Turkish forces had allegedly arrested and killed a number of Iraqi shepherds. The Turkish government confirmed that an operation of Turkish military forces had taken place in northern Iraq at the relevant time, but denied that Turkish soldiers had been present in the area indicated by the applicants. In the end it was indeed the element of proof that decided the case: the Court did not find it established beyond reasonable doubt that Turkish forces were actually accountable for the death of the applicants’ relatives.

Yet *Issa* contains a very intriguing passage. After reconfirming its *Loizidou* judgment (which was probably not applicable to the case at hand, as the element of effective overall control of the region was arguably lacking), the Court continued: a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter State (see, *mutatis mutandis*, *M. v. Denmark*, application no. 17392/90, Commission decision of 14 October 1992, DR 73, p. 193; *Illich Sanchez Ramirez v. France*, application no. 28780/95, Commission decision of 24 June

34 ECtHR (GC), 12 May 2005, *Öcalan v. Turkey* (Appl. No. 46221/99), § 91.

1996, DR 86, p. 155; *Coard et al. v. the United States*, the Inter-American Commission of Human Rights decision of 29 September 1999, Report No. 109/99, case No. 10.951, §§ 37, 39, 41 and 43; and the views adopted by the Human Rights Committee on 29 July 1981 in the cases of *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*, nos. 52/1979 and 56/1979, at §§ 12.3 and 10.3 respectively). Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory (*ibid.*).³⁵

This passage too is not devoid of ambiguity – when is one “under a State’s authority and control”? But it is the last sentence that is most striking: in passing the Court refers to “the fact” that Article 1 ECHR cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory. How should we reconcile this with the finding in *Bankovic*? Assuming that it is not permissible to bomb a television station in the State’s own territory, why did the Court refuse to review the attack on the RTS station?

What is also interesting about the passage is Court’s extensive reference to earlier case-law and the jurisprudence of other international human rights bodies. Each of these authorities had been cited by the applicants in *Bankovic* in support of their argument, but on that occasion the Court did not find it necessary to mention them expressly.³⁶

A last remark about *Issa* relates to the consequences of the Court’s new position (if that is what it is). If the Court still rejects the ‘gradual’ and context-related approach to “jurisdiction” as advocated by the applicants in *Bankovic*, it seem unavoidable that the European Convention applies across the board as soon as an individual finds himself “under” a Contracting State’s “authority and control through its agents”. One may wonder about the consequences: is the Court really saying that the Turkish forces operating at the time in northern Iraq – under difficult circumstances, one may presume – were bound to secure the entire set of rights and freedoms (including the right to a fair trial, the right to marry, positive obligations and so) to those who found themselves under their authority?

35 ECtHR, 16 November 2004, *Issa v. Turkey* (Appl. No. 31821/96), § 71.

36 See § 26 of *Bankovic*: “the Human Rights Committee has sought to develop, in certain limited contexts, the Contracting States’ responsibility for the acts of their agents abroad”, as well as § 48 “Citing one case of the Human Rights Committee...”.

4.3 *Ila^ocu and Treska*

Finally the case of *Ila^ocu* merits discussion here. In this case four Moldovan citizens brought a complaint about their treatment in the ‘Moldovan Republic of Transdnistria’ (‘MRT’), a region of Moldova that is led by separatists. They claimed that they had been arrested and convicted and that their property had been confiscated, because of their political activities in support of unification of Moldova and Romania. The applicants complained that they had not had a fair trial and that they were subjected to inhuman prison conditions.

The applicants considered that Moldova was responsible for the alleged violations since the Moldovan authorities had not taken adequate measures to put a stop to them. In their submission, the Russian Federation shared that responsibility as the territory of Transdnistria was *de facto* under Russia’s control owing to the stationing of its troops and military equipment there and the support the Russian Federation gave to the ‘MRT’.

In a lengthy judgment, delivered in 2004, the Court’s Grand Chamber essentially accepted these arguments. Both Moldova and the Russian Federation were found responsible, albeit it to different degrees, for a number of violations of the European Convention. With respect to Moldova, the Court observed: even in the absence of effective control over the Transdnistrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.³⁷

Given our present topic – the applicability of the Convention to *extraterritorial* acts – it is highly interesting to note that the Court repeated this passage in its 2006 *Treska* decision with a small but significant change:

Even in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention (see *Ila^ocu and Others v. Moldova and Russia* [GC], no. 48787/99, § 331, ECHR 2004-VII).³⁸

The obligation which the Court in *Ila^ocu* had accepted to exist as regards a territory *within* a State’s border, was thus exported to a territory *outside* its borders!

37 ECtHR (GC), 8 July 2004, *Ila^ocu and Others v. Moldova and Russia* (Appl. No. 48787/99), § 331.

38 ECtHR, 29 June 2006, *Treska v. Albania* (26937/04, adm. dec.), p. 13.

5. Reading between the lines: *Saddam Hussein*

If cases like *Issa* and *Ila'cu/Treska* suggest that the Court is moving away from its *Bankovic* decision, some indirect support for that theory was offered in the spring of 2006. This we owe to no-one less than Saddam Hussein, the former dictator of Iraq. After his arrest by American troops, in December 2003, Mr Hussein brought a complaint against 21 States Parties to the European Convention, challenging his arrest, detention, handover to the Iraqi administration and the trial to which he was subjected.

As a preliminary point Mr Hussein argued that he fell within the jurisdiction of the 21 States: since the 'coalition States' were the occupying powers, they were and continued to be responsible for respecting human rights in Iraq. The case was rejected on this very point: the Court considered that these "jurisdiction arguments" were not substantiated. The Court noted that Mr Hussein did not address each respondent State's role and responsibilities or the division of labour/power between them and the US. Nor did he indicate which respondent State (other than the US) had any influence or involvement in his impugned arrest, detention and handover.

What makes the case interesting for present purposes, is the way in which the *Bankovic* decision was dealt with. When summarising Mr Hussein's argument, the Court included the following:

Bankovic and Others v. Belgium and 16 Other Contracting States ((dec.) [GC], no. 52207/99) was, he argued, incorrect and had to be reconsidered.

Now that in itself is not very persuasive: Mr Hussein has never enjoyed a reputation as a human rights expert. But it is revealing to see that the Court, after having mentioned this statement, does not bother to reconfirm of its *Bankovic* decision. Apparently the Court preferred to refer to its *Issa* and *Öcalan* judgments, which, as we have seen, have a very different emphasis:

The Court considers that he [i.e. Mr Hussein] has not demonstrated that those States had jurisdiction on the basis of their control of the territory where the alleged violations took place (*Loizidou v. Turkey*, judgment of 18 December 1996, *Reports of decision and Judgments* 1996 VI and *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001). Even if he could have fallen within a State's jurisdiction because of his detention by it, he has not shown that any one of the respondent States had any responsibility for, or any involvement or role in, his arrest and subsequent detention (*Issa and Others v. Turkey*, no. 31821/96, §§ 71-82, 16 November 2004 and *Öcalan v. Turkey* [GC], no. 46221/99, § 91, ECHR 2005 ...).

6. Conclusions

A number conclusions may be drawn from the foregoing. There are contradictory trends in the case-law of the European Court of Human Rights. On the one hand the Court is well-known for its progressive interpretation of the Convention and its efforts to ensure that rights are practical and effective. The Court's contribution to the development of international human rights law and to the strengthening of the rule of law in Europe cannot be overestimated. On the other hand the Court has left a degree of uncertainty as to what it actually seeks to achieve. The question whether the Convention has established a 'legal order' of its own is difficult to answer as the case-law is evasive and inconsistent. But at any rate it is clear that the Court never developed a consistent and purposive doctrine in the way that the ECJ did.

As to the extraterritorial reach of the ECHR, it would seem that the Strasbourg Court is distancing itself from *Bankovic*. In that case the Court found that the applicants, despite their having been bombed by Contracting States, could not rely on the Convention: they had never been "within the jurisdiction" of the States concerned. Behind that technical argument there was a clear reluctance to be involved in cases about extraterritorial operations: "The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States".

In hindsight, it would seem that *Bankovic* was an immediate reaction to '9/11': the Court heard the case in October 2001 and defined its position at a time when the 'war on terrorism' was about to start. It is conceivable that the judges did not want to be drawn into that context.

But it did not take long before the attitude changed. *Öcalan* (2004-2005) shows unambiguously that the Convention may indeed apply "throughout" the world. There are at least two situations where the forces of a Contracting State continue to be bound by the Convention, even when operating abroad: (a) the *Loizidou* situation, where forces exercise "effective control" of an area, and (b) the *Öcalan* scenario where forces arrest a person. In the latter case it may be of relevance whether the person was subsequently forced to return to the territory of the State concerned.

If *Öcalan* was fairly specific, the cases of *Issa* (2004) and *Ila'cu* (2004)/*Treska* (2006) contain more general language. In *Issa* the Court referred to "the fact" that Article 1 ECHR cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory; in *Ila'cu* and *Treska* reference was made of a positive obligation to take the diplomatic, economic, judicial or other measures that it is in a State's power to take to secure the

rights guaranteed by the Convention. Both statements are evidently hard to reconcile with the outcome of *Bankovic*.

The Court did not say with so many words that *Bankovic* needs to be reconsidered – it left it to Saddam Hussein to say that – but cases like *Issa* and *Treska* clearly suggest that *Bankovic* would be decided differently when reviewed by the Court today.

This brings us to a final observation. It is one thing to say that the Convention applies to overseas operations – but it is quite another thing to define what this actually means. It is high time that the debate focuses on the latter question. The present state of the case-law clearly does not offer a sensible answer. Remember that the Court in *Bankovic* rejected the idea of a gradual, context related approach: ... Article 1 does *not* provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure "the rights and freedoms defined in Section I of this Convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question

If one does not "divide and tailor" the obligations under the Convention when States are conducting military operations abroad, how can one comply with the very sensible proposition that President Wildhaber made early 2002: "When applying the Convention we must not lose sight of the practical effect that can be given to those rights"?

PROTECTION OF THE RIGHT OF PRIVATE PROPERTY IN THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA

*Han Dayuan**

§ Status of the Right of Private Property in the Fundamental Rights System

In modern states with rule of law, the Right to Property, together with the rights of life and of freedom, constitutes the three fundamental right systems that ultimately embody the basic dignity and values of human beings. As the fundamental law of a state and the supreme values system of a commonwealth, the Constitution usually takes the protection of private property as a starting point and the basis of its social pursuits. To achieve the fundamental values embodied by the Right to Property, constitutions worldwide generally provide for the guarantee of the right of private property in principle, boundary and scope, and by laws make corresponding constitutional principles specified, laying legal foundations of the realization of the Right to Property. In the Constitution of China, the right of private property refers to the right of citizens to gain property from their own labor or by other lawful means as well as the right to own, use and dispose that property.¹ It is a vital right in all fundamental rights, and as such, indicates that citizens enjoy the liberty and have access to economic benefits in social life. Generally speaking, the Right to Property stipulated in the Constitution covers all rights that are of property value in both public law and civil law.² In Chinese jurisprudence, however, it falls into two categories: the Right to Property in the Constitution and the Right to Property in Civil Law³. They are different in nature and function, and belong to separate system of rights respectively. The Right to Property as a fundamental right mainly protects the citizens against public power; while once the Right to Property in civil

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1 Article 13 of the Constitution provides that: The state protects the right of citizens to own lawfully earned income, savings, houses and other lawful property. The state protects by law the right of citizens to inherit private property. See The Constitution of The People's Republic of China, <http://english.peopledaily.com.cn/constitution/constitution.html>.

2 See Han da-Yuan(ed), *Advanced Constitutional Law*, Higher Education Press (2006), pp.270.

3 Right to Property was originally incorporated into the Indian Constitution as a fundamental right under Article 19(1)(f) in 1978, via the 44th amendment to the Constitution, its status was reduced to that of a Constitutional right. See, P.K Tripathi, "Right to Property after 44th Amendment-Better Protected than Ever Before", AIR 1980 J 49. Also see, A.K Ganguly, "Right to Property: Its Evolution and Constitutional Development in India", 48 JILI (2006) 489.

law written into the Constitution, it will be far from its civil meaning but provide consolidated legal basis for the guarantee of civil Right to Property. It is an inevitable request of a market economy to acknowledge the Right to Property a fundamental one and to enhance its constitutional protection as well. Of the economic relations governed by the Constitution, the guarantee of the right of individual property shall not be neglected because it is not only one of the fundamental rights, but a general principle established by the Constitution.

§ The Changing Society in China and the Development of Right to Property

Since the establishment of the People's Republic of China on Oct 1, 1949, the country has ratified four constitutions, viz the Constitution 1954, the Constitution 1975, the Constitution 1978 and the Constitution 1982.⁴ The Constitution 1954, also the first Constitution of the People's Republic of China and the first socialist constitution in the history of China, has expressly specified the status of the citizens' Right to Property. The Constitution 1954 provided that "*The state protects the right of citizens to own lawfully-earned incomes, savings, houses and other means of life*"⁵, "*The state shall protect the right of citizens to inherit private property according to law*"⁶, "*Citizens of the People's Republic of China enjoy freedom of residence and freedom to change their residence*"⁷. The Constitution 1975 and Article 9 of the Constitution 1978 largely followed the provisions of the Right to Property established by the Constitution 1954.⁸ Otherwise, compared with the provisions of the Constitution 1954, the Constitution 1982 scores much higher. It extends the scope of the Right to Property to the rights of citizens "*to own lawfully-earned income, savings, houses and other lawful property*" and "*to inherit private property*"⁹ from the rights of "*citizens to own lawfully-earned income, savings, houses and other means of life*" and "*to inherit private property*".¹⁰

4 Some Chinese scholars contend that the constituent power can only be exercised once, thereafter it appears as the power to amend the Constitution, therefore they hold that China has only ratified one Constitution and that the later constitutions are just the revised versions of the Constitution of 1954. Meanwhile some scholars criticize the theory by arguing that the living generation shall not be governed by the dead ones rather than being governed by their own consent. As a logical outcome of this argument, the living generation is entitled to draft and ratify a constitution at their own will. If this is taken into consideration, the argument on how many constitutions China has already ratified is out of question.

5 Article 11 of the Chinese Constitution.

6 Article 12 of the Chinese Constitution.

7 Article 90 (2) of the Chinese Constitution.

8 For details, see Mo Jihong(ed), *Constitutional Law*, Social Sciences Academic Press(2005), p.p.325-326.

9 Article 13 of the 1982 Constitution

10 Article 11 and 12 of the 1954 Constitution. Both *The Basic Law of The Hongkong Special Administrative Region of the People's Republic of China* and *The Basic Law of The Macau Special Administrative Region*

The Constitutions as shown above provide for the protection of the right to own lawful property and to inherit private property rather differently in accordance with the requirements of the changing society in China. However, before the Fourth Amendment to the Constitution 1982 was ratified in the year of 2004, both content and system of those provisions were incomplete, especially respecting and protecting the right to private property lacked social and legal grounds. Problems caused were as follows: (A) lack of consciousness about the protection of private property. (B) objects within the scope of the protection of the Right to Property were undefined, only the means of livelihood such as lawfully earned income, savings and houses being covered while the means of production had been excluded though it had been expected worth its weight in gold¹¹. (C) as for the specific norms system and institution of the protection of the Right to Property, the Constitution 1982 did not clarify the constitutional status of the Right to Property nor the principle and process of compensation for the infringement upon property other than the principle to limit property. (D) comparing public property with private property, we find that in the Constitution, the principles of guarantee were on an unequal basis, more positive policies applied to public property while passive policies to private property and the protection of public property distinctly outweighed that of private property. It gave rise to a series of social issues, such as private owners being unconfident of the security of their property, compelling house removal, unlawful acquisitions of land and default on payment of peasant workers. Seeing from the angle of the Constitution, one of the key factors that account for the conflicts between public interest and private interest in the recent social development of China is the ineffective protection of the right of private property.

With the development of the market-oriented economy, the accumulation of private wealth and the improvement of legal consciousness, the public has paid great attention to property issues and increasingly called for effective protection of the Right to Property. It is widely held that the state should establish an effectual legal system to enhance the protection of the right of private property. In responses to such a practical demand, *Jiang Zemin's Report at the 16th National Congress of the Communist Party of China*

of the People's Republic of China underline the protection of the right of private property. The Art. 6 of the *HKSAR Basic Law* provides that "The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law". And The Art. 6 of the *Macau Basic Law* provides that "The Macau Special Administrative Region shall protect the right of private property in accordance with the laws".

11 Unlike the Chinese Constitution, the Indian Constitution does not enumerate the components of "property" that the Constitution seeks to protect. This is left for the Courts to interpret and determine.

said that “We should strengthen the supervision and administration of the non-public sectors according to law to promote their sound development. We should improve the legal system for protecting private property”.¹² The amendments of the year 2004 to current Constitution have further advanced the protection of the right of private property by clarifying its status in the Constitution. They are of great importance for the realization of the fundamental values of the protection of private property in the whole society, and urge the governments and public agencies to respect the values of the right of private property and to offer sound legal protection for the private property owners.

§ Nature and Content of the Right of Private Property

Nature of the Right of Private Property

The right of private property had been universally taken as an inviolable and absolute natural right not until the ratification of *the Constitution of the Weimar Republic* in the year of 1919. From then on, following the tendency of relativization of rights around the world, the right of private property is relativized gradually, turning to be a combined right with social responsibility. Four doctrines concerned with the nature of the Right to Property are as follows.

Firstly, the Right to Property itself is a liberty, and an inviolable individual right. Secondly, the constitutional Right to Property is of a legal institution in which the individual enjoys the right according to laws, that is to say, it is of an institutional guarantee of the Right of Private Property. Moreover, Right to Property is a defensive right against the arbitrariness of the State as well as an individual right and some kind of a legal institution. Furthermore, the Right to Property is of dual characteristics, referring to a subjectively defensive property and an objectively existing order of law. As a *defensive right*, it is to protect the citizens against infringement by the State and to set the boundaries of public power. While of fundamental nature as an *institutional guarantee*, it is reckoned as an institution or an objective order of law in which citizens are free to exercise the Right to Property. Because of this, provisions of the Right to Property in the Constitution actually play the role of “*the guardian of freedom*”, which guarantees individual free access to economic conditions of any kinds.

As far as the development of the Right to Property and its nature is concerned, the third doctrine and the fourth doctrine sound more reasonable than the other two and share the same academic foundations. Thus, the

12 See *Jiang Zemin's report at 16th Party Congress*, http://news.xinhuanet.com/english/2002-11/18/content_632554.htm.

nature of the Right to Property shall be determined in two aspects: the Right to Property as an individual right and the Right to Property as an institution.

The Scope of the Right to Property

Article 22 of the *Amendment to the Constitution of the People's Republic of China (2004)* provides that: Article 13 of the Constitution, which reads: “*The state protects the right of citizens to own lawfully earned income, savings, houses and other lawful property.*” and “*The state protects the right of citizens to inherit private property according to law.*”, is revised. It now reads as follows: “*Citizens' lawful private property is inviolable.*” “*The State protects in accordance with law the rights of citizens to private property and its inheritance.*” and “*The state may, in the public interest and in accordance with law, expropriate or requisition citizens' private property for its use and shall make compensation therefore*”.¹³ The clause, “*Citizens' lawful private property is inviolable*”, refers to that the state has the duty to protect citizens' right property and to take any effective measures to realize the values of the Right to Property. Based on its constitutional nature, the very amendment expands the scope of the right of private property. The Constitution 1982 guarantees the Right to Property through enumeration and originally limits it to the means of livelihood excluding the means of production. The indetermination of scope directly dampens the enthusiasm of the property owners to create wealth and their own property accumulates all along with insecurity and criticism. In the constitutional sense, any legal interest in property that accrues with to social consensus shall be regarded as part of the property guaranteed by the Constitution. The right to own property in the Constitution 1982 is definitely not comprehensive. It is only an aspect of the Right to Property, so it cannot describe complete content of the Right to Property. In order to cover the means of production and to determine the scope of the Right to Property, the very amendment replaces the expression of “*the right to own property*” with “*the right to private property*” and establishes the principle of the Constitution that “*Citizens' lawful private property is inviolable*”. In accordance with *Amendment 22nd*, both the rights to the means of livelihood and the means of production including the share rights, the right to enter in rural land contract and its operation, and patents are under the guarantee of the Constitution.

The citizens' Right to Property covers a wide range of objects as follows:

A. Lawfully Earned Incomes

The lawfully earned incomes refer to the money or income in kind for the citizens to gain on their own work or by other means within the scope of law, which specifically include salaries and wages, wages in kind, bonus,

¹³ Referred to *Constitutional Law*(«??»), China Law System Press(2005), pp.72.

author's remuneration, retirement pension; labour insurances, domestic sideline production, citizens-owned trees and fruiters, cultural relics, books and reference materials; the means of production for the use of individual laborer in the urban and rural units; production instruments and other means of production for the use of self-employed laborers; other lawfully earned incomes of citizens, such as house rental income, interests on bank deposits, donation and property inherited.

B. Savings

The savings refer to the money or currency that the citizens deposit in banks or credit cooperatives. The state encourages the citizens to deposit their surplus money in the bank or credit cooperative. Citizens may deposit the money on a voluntary basis and draw their money at will. Banks or credit cooperatives shall observe the principles of paying money at interest and keeping secret the depositors' information. No individual or unit shall be allowed to inquire about, freeze or withdraw any individual deposit except with the approval of judicial organs according to law.

C. Houses

The houses fall into the category of the '*means of life*'. Any illegal infringement, seizure, sealing-up or destruction of the citizens' houses wherever in the rural or urban area shall be prohibited. When it is necessary to seize, confiscate or destruct the citizens' houses due to the demand for national construction, the state shall accommodate the house-owners or house-users and compensate for their loss in accordance with relevant regulations.

D. Other Means of Livelihood and Production

In China, the scope of the means of life and the means of production for citizens' use is being widely extended. Any domestic products related to citizens' clothing, food, shelter and transportation that are not forbidden by laws shall be taken as subject of the right of private property and shall be guaranteed by the law of the state. With the economic development and the expansion of the scope of citizens' Right to Property, some rights of new kinds such as right to invest, right to run business, etc., are blooming. Moreover, incomes not from work¹⁴ like securities and dividend emerge in the market economy, which needs to be clarified in nature and legal status. In *the Amendments 1988*, *the Amendments 1993* and *the Amendments 1999*,

14 Art. 6 of the Constitution specifies that: The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people.

The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of 'from each according to his ability, to each according to his work.'

extending citizens' Right to Property has always been an important target of the legislature, which perfects gradually the system of constitutional protection of citizens' Right to Property by various ways and lays a beneficial foundation of further strengthening of the constitutional protection.

The citizens' incomes mean legitimate incomes that are either from work or not from work. Herein the incomes not from work refer to the money earned from dividends, price difference between buying and selling, and lotteries. With the citizens being well off, legitimate incomes not from work account for larger and larger percentage in whole incomes. Some citizens gain from these sources far more than from work. In addition, incomes not from work are lawfully related to the activities of the means of production. If the state tries to guide the investment, it should recognize the legitimacy of investment incomes at first. There are various ways for the citizens to earn incomes in the real life and it is difficult to enumerate them one by one in the Constitution. Based on the nature of the Right to Property, *the amendments 2004* do not adopt the method of enumeration but establish one principle that the citizens' Rights to Lawful Property shall be equally protected. As for the limits of the Right to Property, the constitutional guarantee is confined to legal property excluding illegal property. Herein, whether legal or not is subject to strict lawful judgment, in the hopes of highlighting the legality of the process of wealth accumulation, urging social members to make money through honesty and hard work and building up a glorious tradition of amassing wealth by legal means.

§ **The Doctrine of Public interest and the Limits it sets to the Right to Property**

In the modern society of rule of law, the Right of Private Property plays an important role in promoting individual freedom and guaranteeing other kinds of fundamental rights. The essence of the Right to Property is to achieve the end of freedom. It lays down social and material foundations for a man to live with dignity. Therefore, in the sense of social development, to own private property is a vital prerequisite for harmonious development of the society and for the protection of human dignity.

Naturally, the Right to Property is never absolute just like any other right. Its social characteristics determine its limits. Constitutions around the world universally establish the principle of guaranteeing the Right to Property while setting necessary limits to it. Amendment 22nd of the Constitution of P.R. China provides that "*The state may, in the public interest and in accordance with law, expropriate or requisition citizens' private property for its use and shall make compensation therefore*". The provision helps to strike a fine balance

between state power and private rights, between private property and public property, and to ensure appropriate compensation for the property rights infringed. Expropriation and requisition are both the means to restrict private property for the sake of public interest, but they differ from each other in essences and functions, specifically as follows:

- a. expropriation refers to the change in the ownership of the property while confiscation means the transfer of the right to use the property. Confiscation applies to compulsory use in case of emergency. Once the emergency puts to an end, the confiscated shall be returned to the owner;
- b. the prerequisites and standards differ in the adoption of the expropriation and confiscation provisions. Since expropriation causes much more damages to the citizens than confiscation, the compensation for expropriation is much higher than that for confiscation. Before the Amendment 2004, there has been no definite standard or well-designed procedure for the limits to citizens' Right to Property, which results in various or even low-paid compensation. To seek a rational balance between public interest and individual interest, *Amendment 22nd* has set up the prerequisites and processes of expropriation and confiscation, and defined cautiously the boundaries of public interest. In accordance with the spirit of the Constitution, the subject of rights is entitled to make judgments on the legitimacy of public interest. The Right to Property can only be violated for the sake of public interest, such as the interests of the whole society, essential state interests in the areas of national defense and diplomacy, etc. When expropriation or confiscation is to be carried out, it is necessary to take into full consideration both the values of national policies out of public interest and the values of social justice. Public interest, differing from interests of a group or a social or business organization, should be defined in a cautious and strict way. The phenomena that some public organs infringe on the citizens' Right to Property in the name of public interest during the social development actually safeguard certain business interests as well as unjustified social public interest.

At the same time, it should be noted that any restriction on the Right to Property for the sake of public interest is not to take away the private property without consideration, reasonable payments must be made as compensation. The expropriation or confiscation out of public interest may cause certain losses to the obligee, so it is essential to offer a sound compensation from the angle of the need to protect the right. The compensation provision in *the Amendment 22* will necessarily have significant

influence on the protection of the right of private property, and enable the citizens to take advantage of the right to claim compensation as a remedy.¹⁵

§ Functions of the Guarantee System of the Right to Private Property And Its Future

Functions of the Guarantee System of the Right of Private Property

That the protection of the right of private property is written into the Constitution will produce great effect on the society and enhance the progress of rule of law in China. Influences potential may be as follows:

- (a) the constitutional protection of the right of private property places a strict restriction on the exercising of public power and sets the boundary of its kingdom;
- (b) it requests all public agencies to respect the right of legal private property according through the Constitution and not to act beyond the limits set by law;
- (c) it encourages the people to engage in creative jobs and make more investments so as to produce more social wealth;
- (d) the constitutional guarantee system of the Right to Property will promote the establishment of the remedy system of individual rights.

The Future of Constitutional Guarantee System of the Right of Private Property

Firstly, it is an issue of popular concern whether the right of private property provided by the Constitutional scheme can come true in social life. In this regard the weight shall be attached to the legislature which plays an important part in the future law-making on the Right to Property. The legislation concerned shall severely abide by the Constitutional doctrines and set the standards and limits of the restriction on the Right to Property in accordance with constitutional commission. To lay the constitutional foundation of the protection of the Right to Property, it is necessary to import the theory of administrative presentation, which will meet the demands of the Constitution for its protection of the Right to Property in the sense of formal statutes. The provision of the restriction on the Right to Property shall be stipulated under the package structure, that is, to put the boundary of restriction, the end and the standard of compensation into the same article. Now that the right of private property is stipulated in the system of

15 The Standing Committee of the National People's Congress of the Republic of China has carried out a plan to draft *the National Compensation Law*.

fundamental rights, the legislator shall weigh the values of the Right to Property under the constitutional protection with the order of the Right to Property in conformity with the social justice in an all-round way, and then respond to the requirements of various interest groups rightly. Any law or policy that restricts the Right to Property shall subject to the ends of the constitutional provisions, especially shall not contradict the spirit of the Constitution concerned. Hence the doctrine of proportionality, the principle of equal protection and the principle of legitimate expectation shall be observed.

Secondly, it can not be justified to restrict the Right to Property out of public interest. So it is necessary to define the reasonable margins of public interest according to the doctrine of proportionality,¹⁶ which has basic requirements as follows:

- (a) the goal of the restriction shall be justified, in other words, the goal is confirmed within the framework of the Constitution, herefore justifying the legislative activities.
- (b) the approaches to the restriction shall be justified, that is, to seek a balance between the approaches and the goal.
- (c) even though the goal is justified concerning the expropriation or confiscation of the Right to Property out of public interest, it still has to strictly observe the doctrine of proportionality so as to avoid illegal violations of the Right to Property. D. In addition, the State or the Government shall endeavor to extend the provinces of the Right to Property in hope of making the obligees feel safe of their legitimate property and have the initiative to accumulate more wealth.

Thirdly, it is necessary to clean up or adjust existing laws and regulations, and repeal or revise those that violate or contravene the Constitution in order to lay the unified legal foundation of constitutional guarantee of the Right to Property. In accordance with the Constitutional Laws, the contents and limits of the Right to Property will come into force in two ways:

- (a) the Constitutional Right to Property is enforced directly by laws;
- (b) the abstract and general provision of the Right to Property is concretized through the administrative activities, though the executive branch has no discretion to extend or reduce the scope of the Right to Property. In practice, a great number of arbitrary restriction or deprivation

¹⁶ Referred to Han Da-yuan, On the Constitutionalization of the Right of Private Property, *Legal Sciences*, 2004(4).

of individual Right to Property occurs during the process of so-called “concretization” as above shown. The following cases are beyond the range of reasonable restriction:

- (a) a law involving the Right to Property contradicts the Constitution or an administrative regulation violates the law in its contents;
- (b) the administrative organs implement a law that violates the Constitution or a regulation that contravenes the law;
- (c) though the law is constitutional or the regulation is in accordance with law, the executive activity violates the law. At all events, cases as above shown are the restrictions on the Right to Property, for they violate the fundamental Constitutional spirit concerning the Right to Property. The Constitutional Guarantee of the right of private property establishes some principles to be observed and lays a united legislative basis for the making of the law. If the principles of the Constitution were not concretized by laws, in other words, if relevant statutes did not exist, the doctrine of the protection of the Right to Property is no more than a bushwa. The provisions of the Right to Property of *Amendment 22* are important; however, what is more important is to concretize the Right to Property by statutes and institutions and to enable accessible and effective remedies for the Right to Property infringed.

Fourthly, the constitutional protection of the Right to Private Property relies on a mature constitutional interpretation institution. Whenever it comes to make a judgement on the issues of the Right to Property, it is necessary to put into use the norms of constitutional interpretation in an active and effective way. For example, the concepts of property and the Right to Property, the nature of lawful property, the constitutional meaning of expropriation and confiscation, the connotation of public interest, etc. shall be clarified and constructed during the continuous progress of constitutional practice. It is proved from the constitutional practices worldwide that Constitutional interpretation has been a key approach to perfect the protection of the right of private property.

Fifthly, it is necessary to further concretize the doctrines of “*taxation according to law*” and to control the exercising of the taxation power.

POSITIVE ACTION DECLARED UNCONSTITUTIONAL

*Martin Buzinger**

This contribution is a critical reaction to the recently adopted ruling of the Constitutional Court of the Slovak Republic in which the Constitutional Court concluded that the adoption of positive action measures is in conflict with the rule of law principle and with the principles of equality and non-discrimination. This ruling is considered extremely significant, not only because it denotes principally from the present case law of the Slovak Constitutional Court, but mainly because it departs from the generally recognised principles of International and European Human Rights Law.

In October 2004, the Slovak Government challenged the compliance, of the provision of the *antidiskriminačný zákon* (Anti-discrimination Act)¹ regarding the positive action principle, (Section 8 paragraph 8 of the Anti-discrimination Act)² which had been implemented from the Council Directive 2000/43/CE of 29 June 2000 concerning equal treatment between persons irrespective of racial or ethnic origin, with several provisions of the Slovak Constitution, in the Constitutional Court.

The motion had been initiated by the Minister of Justice, arguing mainly that the challenged provision of positive action constituted a positive discrimination, which is forbidden by the Slovak Constitution.³

The situation was a bit curious, since the same Government which had challenged the constitutionality of the principle of positive action, had, in its resolution of April 2003⁴ and the resolution of November 2003, only a couple of months before it filed the motion with the Constitutional Court, adopted specific measures containing programs of positive actions towards and in favour of the Roma population.

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1 *Zákon č. 365/2004 Z. z. rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon)* [Act no. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, amending and supplementing certain other laws (Hereinafter Anti-discrimination Act)].

2 The mentioned provision of Anti-discrimination Act states: *With a view to ensuring full equality in practice and compliance with the principle of equal treatment, specific positive actions to prevent disadvantages linked to racial or ethnic origin may be adopted.*

3 Article 12 paragraph 2 of the Slovak Constitution states: *“Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds.”*

4 *Uznesenie vlády č. 278/2003 z 23. apríla 2003* [Governmental Resolution no. 278/2003 of 23 April 2003].

On 18th October 2005, the Constitutional Court delivered a final ruling on the merits of the case declaring the incompatibility of Section 8 paragraph 8 of the Anti-discrimination Act with Article 1 paragraph 1 (Rule of Law principle), the first sentence of Article 12 paragraph 1 (principle of equality), and Article 12 paragraph 2 (non-discrimination principle) of the Constitution of the Slovak Republic. The Constitutional Court dismissed the rest of the motion. The decision was taken by the minimal majority of the plenum of the Court. Four judges of the total number of eleven judges who were present at the plenary session of the Constitutional Court presented their dissenting opinions, and one judge presented his concurring opinion, disagreeing only with the reasoning of the ruling. The ruling has been published in the Collections of Laws under no. 539/2005 on 7th December 2005. Since that date, Section 8 paragraph 8 of the Anti-discrimination Act has lost its applicability.

From the reasoning of the decision it is quite clear, that the Constitutional Court declared the incompatibility of the positive (affirmative) action as such, i.e. in its principle, with the Slovak Constitution. The Court has argued, *inter alia*, that “*it is obvious from the Article 12 paragraph 2 of the Slovak Constitution as well as from its standing interpretation of the Court which must be [stand] to, that the Constitution prohibits both positive and negative discrimination for the reasons stated in this provision, i.e. having regard to sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. For all that, adoption of specific compensatory measures, although generally recognized as legislative techniques for the prevention of disadvantages pertinent to racial or ethnic origin, is incompatible with the Article 12 paragraph 2 of the Constitution, and therefore also with the Article 12 paragraph 1 of the Constitution.*”

From the reasoning it seems that the Slovak Constitutional Court also declared the doctrine of material equality, on which the provision of the Anti-discrimination Act implementing the positive action principle is based, unconstitutional as such, because of its inconsistency with the prohibition of positive discrimination contained in Article 12 paragraph 2 of the Slovak Constitution.

This conclusion is rather surprising since the Constitutional Court, in the past, has already several times declared “positive discrimination” to be instrument of material (*de facto*) equality being consistent with the Slovak Constitution. For instance, in its ruling Ref. no. PL. ÚS 10/02 of 11th December 2003 the Constitutional Court said that “*preferential treatment of some group of natural persons for their specific, often disadvantageous attributes, as compared with other natural persons, by adoption of special legal regulations, is not a*

*discrimination of other natural persons but on the contrary, it must be understood as a security of the constitutional principle which is inherent in Article 12 paragraph 2 of the Constitution.*⁵

The principle of positive action is a standard instrument of international human rights law, and is contained in a number of international treaties by which the Slovak Republic is bound. For instance, the International Convention on the Elimination of All Forms of Racial Discrimination (1965) in its Article 1 paragraph 4 provides that “*special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.*”

Similarly, the Framework Convention for the Protection of National Minorities (1995) in its Article 4 paragraph 2 and 3 states that “*the Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.*”

In the view of the European Court of Human Rights, Article 14 of the European Convention on Human Rights and Fundamental Freedoms protects individuals placed in similar situations from discrimination in their enjoyment of their rights under the Convention and its Protocols. However, a difference in the treatment of one of these individuals will only be discriminatory if it “*has no objective and reasonable justification*”, that is, if it does not pursue a “*legitimate aim*” and if there is no “*reasonable relationship of proportionality between the means employed and the aim sought to be realised*”.⁶

5 In this case the Constitutional Court put under judicial review the provisions of Labour Code allowing the students, and only the students, to conclude special agreements on brigade-work with employers. The Court decided that although the challenged provisions constitute “positive discrimination” of students in comparison with other natural persons, the aim of these special agreements is legitimate (these special agreements on student brigade-work were considered by the Constitutional Court as instruments which might enhance the access of students to labour market and thus improve their social-economic situation while studying) and consistent with the principle of equality and principle of non-discrimination.

6 See, among other authorities, *Lithgow and others v. United Kingdom*; *Inze v. Austria*; *Darby v. Sweden*.

Material protection of the principle of equality and the principle of non-discrimination is generally considered as a standard approach also in EU law. The forms of “positive action” contained in Council Directive 2000/43/EC (Article 5) and Council Directive 2000/78/EC (Article 7) are not considered discriminatory, provided they are reasonably and objectively justified by the need to remedy discrimination, and remain proportionate to the discrimination to be addressed, and are temporary, i.e. do not lead to the maintenance of separate rights for different groups.

In the view of the EU Network of Independent Experts on Fundamental Rights, presented in the Thematic Comment no. 3 concerning the protection of minorities in the European Union, “*because of the specific situation of Roma minority in the Union, positive action measures should be adopted in order to ensure their integration in the fields of employment, education and housing. This is the only adequate answer which may be given to the situation of structural discrimination - and, in many cases, segregation - which this minority is currently facing.*”⁷

The ruling of the Slovak Constitutional Court declaring non-compliance of the positive action principle contained in the Anti-discrimination Act with the Slovak Constitution will, in opinion, have far reaching consequences on the further protection of minorities in the Slovak Republic in general, but in particular on the Roma minority. It is obvious, that the widespread *de facto* discrimination suffered by the Roma minority is cannot be reduced or eliminated without a reasonable use of positive action. Therefore, the decision of the Slovak Constitutional Court will, in my opinion, considerably influence the situation of Roma population in the Slovak Republic, and in fact, it might lead to serious aftermath which could impact the whole population, not only the Roma minority.

7 Thematic Comment no. 3: The protection of minorities in the European Union, available at http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm# (Last visited 27th March 2007).

THE INDIAN SUPREME COURT AND CURATIVE ACTIONS

*Muteti Mutisya Mwamisi**

I. Introduction

The decision of the Supreme Court of India in *Rupa Ashok Hurra v. Ashok Hurra and Another*¹ was in more ways than one, a path breaking decision. For one, it got rid of the practice of litigants assailing the Supreme Court's final decisions via Article 32. In the same vein, however, it added a new dimension to its exercise of inherent power. This aspect is brought out by modalities of curative petition that *Rupa Ashok Hurra* so propounded. The propounding of modalities of curative petition went beyond the modest exercise of inherent power of the Court of admitting meritorious petitions under any appropriate procedure but created a new procedure by which such petitions can come before the Supreme Court. The *Rupa Ashok Hurra* decision was an endeavor by the Supreme Court to bring order to a Constitutional issue that could as well have become a hotch potch of highly individualised judicial pronouncements. This could have been so but equally significant is the controversy that the *Rupa Ashok Hurra* decision has bestirred among the litigant public. This article endeavors to bring forth the controversies generated by the *Rupa Ashok Hurra* decision and the impact of this decision on Constitutionalism.

The case commentary is divided into four parts. The first part gives the factual back ground leading to the *Rupa Ashok Hurra* decision. This part provides a justification for propounding the modalities of curative petitions. The second part looks at what distinguishes a curative petition from a 'second review petition', so to speak. As it will be seen, the question whether a curative petition amounts to a 'second review petition' or not, is an open ended question. The third part looks at the *ex debito justitiae*² obligation that the Court expounded in order to propound the modalities of curative petitions. The last part is the conclusion and suggests an alternative that the Court could have adopted in place of curative petitions in dealing with the issues raised in *Rupa Ashok Hurra*.

* Fourth Year, B.A. LL.B. (Hons.), NALSAR University of Law, Hyderabad. I am greatly indebted to Mr. Anil Nauriya, Supreme Court Advocate, who has been my mentor & teacher, with specific reference to this article. I also wish to thank Prof. Amita Dhanda who patiently corrected the article at various stages & T N. Sansi, Additional Registrar, Supreme Court of India, who allowed me to access the Supreme Court registry.

1 (2002) 4 SCC 388

2 *Ex debito justitiae* has been used in Common law doctrine to mean as a matter of right; in accordance with the requirement of justice. In this case commentary it refers to the Court's obligation.

II. A Factual Background

Many questions have been raised, among academics and lawyers, as to whether it was necessary for the Supreme Court to propound the modalities of curative petitions. This is because as the second paragraph in this part will show, it appears that even without curative petition, persons aggrieved by a final Supreme Court decision, resulting in a miscarriage of justice would still be able to approach the Court for assailing a judgment of the Court. In India, the Supreme Court is the 'guardian angel of fundamental rights'; a cause it has furthered with a lot of enthusiasm. This enthusiasm has often been called judicial activism. Perhaps, due to the fact that the matter before the Court in *Rupa Ashok Hurra* had come before it through Article 32 might have prompted the Court to propound the modalities of curative petitions³. In the subsequent paragraphs I seek to provide a glimpse of various Supreme Court pronouncements that culminated in the Court setting forth the modalities of curative petitions.

Prior to *Rupa Ashok Hurra*, the Supreme Court in a number of decisions had held that an order of it, which results in a miscarriage of justice, is amenable for correction. Examples of this sort are to be found in *M.S. Ahlawat*⁴, *Harbans Singh v. State of Uttar Pradesh*⁵ and *Supreme Court Bar Association v. Union of India*⁶. In the above mentioned cases the Court invoked its inherent power under Article 142 to do complete justice⁷. In all these mentioned cases the matter came before the Court via Article 32. These cases had been distinguished in *Rupa Ashoka Hurra* on the ground that no one had joined issue with regard to the maintainability of a writ petition under Article 32.⁸ However, this state of affairs was changed in *A. R. Antulay v. Union of India*⁹ where the Court ruled that a final Supreme Court judgment cannot be assailed via a writ petition¹⁰.

In both *A. R. Antulay* and *Rupa Ashok Hurra*, the matters were referred to larger benches by smaller ones; in the case of *A. R. Antulay*, a Division Bench and a three judge Bench in the case of *Rupa Ashok Hurra*. For *A. R. Antulay* the Constitutional Bench consisted of seven judges whereas for *Rupa Ashok Hurra* it consisted of five judges.

3 Article 32 of the Constitution of India allows persons to approach the Supreme Court directly for the enforcement of their fundamental rights.

4 (2000) 1 SCC 270.

5 (1982) 2 SCC 101.

6 (1998) 4 SCC 409.

7 *Rupa Ashok Hurra V. Ashok Hurra and Anr*, (2002) 4 SCC 388 at P. 416, Para 48.

8 Ibid, P. 402, para 13.

9 See an appendix of *A. R. Antulay V. Union of India* (1984) 3 SCR 482, 48 at P. 764 of *A. R. Antulay V. R. S. Nayak* (1988) 2 SCC 602 judgment.

10 Ibid.

I will now start with the factual back ground leading to *A. R. Antulay* and then proceed to the factual background leading to *Rupa Ashok Hurra* in that order. In *A. R. Antulay* the Court was confronted with the following situation: the Supreme Court in an earlier case had ordered that the appellant therein be tried by a High Court Judge as opposed to a Special Judge as laid down by the Act of 1952.¹¹ This was a clear violation of the statutory provisions of the Criminal Law Amendment Act, 1952. The petitioner first appeared before the High Court judge questioning the Constitutionality of the proceedings before the High Court. However, his objections were rejected by the High Court Judge. The High Court judge ruled that he had been granted powers by the Supreme Court through its earlier order to proceed with the trial of the appellant.

The appellant then sought to challenge this order via writ petition under Article 32, which was dismissed by a two Judge Bench of the Supreme Court who observed that the dismissal would not prejudice the right of the appellant therein referred to as the petitioner to approach the Supreme Court with an appropriate review petition or to file any other application, which he may be entitled in law to file.¹² Subsequently, the petitioner came before the Supreme Court via special Leave Petition under Article 136 to question the High Court's jurisdiction to try his case in violation of Article 14 and 21 and provisions of the 1952 Act.¹³ It then follows that in *A. R. Antulay* an appropriate procedure to assail a final Supreme Court judgment was available to the appellant. This meant that at this point in time there was no need for the Court to propound any new procedures of assailing any of its final judgments that result in a miscarriage of justice. In the next paragraph, I will proceed to look at the how the matter raised in *Rupa Ashok Hurra* came before the Court and move on to show how the fact scenario in *Rupa Ashok Hurra* was completely different to the one in *A. R. Antulay*.

In *Rupa Ashok Hurra* a writ petition under Article 32 had been filed before the three Judge Bench and dismissed since the Court in an earlier judgment, *A. R. Antulay* had held that a final Supreme Court judgment cannot be assailed via writ petitions under Article 32.¹⁴ However, more related writ petitions were again filed before the same three judge Bench. This prompted the three judge Bench to refer these writ petitions to a Constitutional Bench seeking its opinion as to whether an aggrieved person is entitled to any relief against a final judgment/order of the Supreme Court, after dismissal of a

11 *A. R. Antulay V. R. S. Nayak* (1988) 2 SCC 602, Page 641, paras 11 & 12

12 See an appendix of *A. R. Antulay V. Union of India* (1984) 3 SCR 482, 48 at P. 764 of *A. R. Antulay V. R. S. Nayak* (1988) 2 SCC 602 judgment.

13 *A. R. Antulay V. R. S. Nayak* (1988) 2 SCC 602, Page 641, para 12.

14 *Ashok Hurra V. Rupa Bipin Zaveri*, (1997) 4 SCC 226.

review petition, either under Article 32 of the Constitution or otherwise¹⁵

At this point in time it is instructive to note that two possible routes confronted the Constitutional Bench: to uphold the already laid down dictum that a final Supreme Court judgment cannot be assailed via writ petition or overlook this dictum and in the interests of justice admit these writ petitions. The latter view seemed most plausible and the Constitutional Bench embraced it. In India such an action by the Supreme Court is not surprising; after all, the Supreme Court considers itself to be ‘the guardian angel of fundamental rights’¹⁶. Writ petitions under Article 32 only involve fundamental rights issues. In *Rupa Ashok Hurra* these writ petitions were admitted by a Constitutional Bench. In India a Constitutional Bench¹⁷ can overrule a Division Bench. The reason for this is that in India there is hierarchy of Courts and Benches hearing matters before them. Consequently, a larger Bench can overrule a smaller Bench.

However, the Constitutional Bench admitted the above mentioned writ petitions with caution¹⁸. The Constitutional Bench in *Rupa Ashok Hurra* also went ahead to take the same view that a writ petition under Article 32 cannot assail a final Supreme Court judgment¹⁹. Unlike in *A. R. Antulay, in Rupa Ashok Hurra*, there was no appropriate procedure that petitioners could have adopted to come before the Supreme Court in case the Court decided to dismiss their writ petitions. This is what prompted the Court in *Rupa Ashok Hurra* to propound the modalities of a curative petition. Perhaps the modalities of curative petitions did not fully fit the bill as subsequent Sections will try to show. But it is an undisputed fact that an appropriate procedure to fill up the Constitutional lacunae that the writ petitions in *Rupa Ashok Hurra* had pointed out was the need of the hour.

III. Curative Petitions and ‘Second Review Petition’

This part looks at the supposition that a curative petition is not a ‘second review petition’. I try to show here that curative petitions are in effect the same as ‘second review petitions’ filed after dismissal of the first

15 *Rupa Ashok Hurra v. Ashok Hurra and Anr.*, (2002) 4 SCC 388.

16 In India, the Supreme Court stands poised with a responsibility to uphold Constitutionalism in the country, this responsibility has resulted in the Supreme Court to refer to itself as the guardian angel of the Constitution and Fundamental Rights. See *V. C. Mohan v. Union of India* (2002) 3 SCC 451 at P. 453, Para 2.

17 A Constitutional bench refers to a Bench of the Supreme Court consisting of more than three judges looking at a matter that is of Constitutional significance.

18 See *Rupa Ashok Hurra v. Ashok Hurra and Anr.*, (2002) 4 SCC 388 at P. 403, Para 14 where the Court was categorical that a final Supreme Court decision cannot be assailed via Article 32 of the Constitution, the writ petitions filed in *Rupa Ashok Hurra* were the last such petitions to assail a final Supreme Court decision .

19 *Ibid* at P. 417.

review petition. The term 'second review petition' is a hypothetical term used purely illustratively. The above mentioned supposition is necessitated by the huge number of curative petitions that have been filed so far before the Supreme Court. The litigant public seems to have taken curative petitions to amount to the last remedy that is available to a litigant before the Court finally closes its doors to litigation. Since April 2002 when the Supreme Court propounded the modalities of Curative petitions, five hundred and sixty eight curative petitions have been filed before the Supreme Court²⁰. This implies that the litigant public will not stop till they have exhausted all remedies available to the Supreme Court including that of filing of curative petitions. Before *Rupa Ashok Hurra*, review petitions marked the finality of a Supreme Court judgment beyond which no further challenge of the judgment was allowed. This state of affairs, as the article will show, is far from what the Supreme Court intended when it propounded the modalities of curative petitions.

Perhaps this confusion is the result of a misinterpretation of the *Rupa Ashok Hurra* judgment by 'curative petitioners', and the Supreme Court itself. In the next four paragraphs, I will explore this confusion further and try to prove that indeed curative petitions are nothing but 'second review petitions'. At the outset, the modalities of curative petitions in *Rupa Ashok Hurra* involved the invocation of Article 137 of the Constitution by implication. No where in *Rupa Ashok Hurra* is Article 137 explicitly mentioned. The Supreme Court held that under its inherent power under Article 142 of the Constitution; it can review its final order that results in a miscarriage of justice²¹. The power of review is granted by Article 137 to the Supreme Court to review any of its judgments. Such power is not provided anywhere else in the Constitution. The Supreme Court has defined review to mean re-examining or reconsidering a final decision.²² In both curative and review actions, the Supreme Court is only reconsidering its final judgment as such in both the endeavours the activity is the same save for different words being adopted to describe these activities.

The fact that Article 137 is an integral component of the procedure of filing curative petitions is further enhanced by curative petitioners averring in their petitions that such petitions are filed under Article 137, 141 and 142²³. In *Rupa Ashok Hurra*, it was necessary that the Supreme Court wore

20 The Source of this information is the empirical data collected from the Supreme Court registry by the author in the months of November and December, 2006.

21 *Rupa Ashok Hurra Vs. Ashok Hurra and Anr*, (2002) 4 SCC 388 at P. 416, Para 49.

22 *S. Nagaraj V. State of Karnataka* 1993 Supp (4) SCC 595, 619, Para 19.

23 Empirical data collected from the Supreme Court registry and also dismissed Curative petitions reported in Law Reports suggest that a curative petitioner has to aver in the petition that it is filed

the mantle of infallibility due to the fact that its decisions are final and that no higher Court exists to correct an error by the Supreme Court²⁴. The Supreme Court's review and curative actions amount to an acknowledgement by it that sometimes errors or mistakes in judgments do occur resulting in a miscarriage of justice. Such judgments ought to be corrected through a review procedure. This line of thought might have been an incentive for the litigant public to file unwarranted review and curative petitions in the hope that a mistake if found in the impugned judgment. The many number of curative petitions that have been filed and dismissed so far bears testimony to this inference. We find this despite the Supreme Court providing a stringent procedure for filing review petitions and an even more stringent procedure for filing curative petitions. The procedures and grounds for filing review petitions and curative petitions will be dealt with later on.

The power to review does seem to be the answer to Supreme Court's (in)fallibility. However, the power of review can only be exercised once and not twice²⁵. Such a limitation to the number of times the power of review can be exercised marks the first distinction between a curative petition and a 'second review petition'. Once a review petition has been disposed off, a second review petition cannot then lie with the Supreme Court. With such jurisprudence already in place prior to *Rupa Ashok Hurra*, the Supreme Court could not give it the go by and propound modalities of a 'second review petition'²⁶. Legally speaking, curative action by the Supreme Court should not amount to review action. However, as already stated the power to review is inherent in curative actions of the Court.

A Court of law, more so the highest Court of the land cannot, will not and should not be seen to be buckling under pressure of expediency and convenience of the moment so as to lightly transgress into unconstitutional acts. Perhaps this mantra was oblivious to the Court in *Rupa Ashok Hurra* when it coined the term curative action while in essence the term only amounts to a 'second review action'. To put it in simple words as long as the Court is re-considering its earlier final judgment it amounts to review, there are no

under Articles 137, 141 & 142 of the Constitution.

24 *S. Nagaraj v. State of Karnataka* 1993 Supp (4) SCC 595, 619, Para 19.

25 The Supreme Court under Article 145 of the Constitution can from time to time make rules for regulating its practice and procedure. Under this power, the Supreme Court propounded, The Supreme Court Rules, 1966; O-XL Order XL, Rule 5 of the Supreme Court Rules, 1966 provides that where an application for review of any judgment and order has been made and disposed of, no further application for review is maintainable in the same matter. Also Supreme Court in *M.S.L. Patil v. State of Maharashtra*, (1999) 9 SCC 231 held that a second review after the dismissal of the first is considered an abuse of the process of the Court.

26 In *Rupa Ashok Hurra v. Ashok Hurra and Anr*, (2002) 4 SCC 388 at P. 416, para 50, the Court has stated that the modalities of curative petition do not amount to a passport for filing second review petitions.

two ways to the issue. Having said that, one must also be fair to the Supreme Court and try not to dismiss offhand the idea of a marked distinction existing between a curative petition and a 'second review petition'. However, the above observation confounds the litigant public as to what a curative petition actually is.

The above dilemma seems to be further fuelled by the manner in which the Supreme Court has exercised its power of review and, to a lesser extent, its inherent power in the past. What most curative petitioners seem to ask is why the Supreme Court should adopt stringent measures in curative petitions for matters that pertain to review. A scrutiny of the Supreme Court's handling of its power of review is revealing. In *A. R. Antulay*, the Court exercised the power of review without insisting on the formalities of a review petition application.²⁷ Further the writ petitions filed under Article 32 before the Supreme Court in *Rupa Ashok Hurra* were admitted even though the Supreme Court in *A.R. Antulay* had already held that a final Supreme Court judgment couldn't be assailed via a writ petition under Article 32²⁸. Still further, the Court in *Rupa Ashok Hurra* upon admitting the mentioned writ petitions did not insist on the formalities of a curative petition application²⁹. If in the past the Court has been lenient with one procedure of review, it seems to turn around and prescribe the procedure for curative petitions that is almost impossible to be complied with³⁰. From empirical data that I collected from the Supreme Court, not a single curative petition has been successful before the Supreme Court since *Rupa Ashok Hurra*.

Previous paragraphs have tried to show that in effect curative petitions amount to 'second review petitions'. I now proceed look at the other side of the coin : that there is a significant court induced difference between a curative petition and a 'second review petition'. I will also move on to analyse curative petitions in the light of the paradigm of review petitions. This is because review petitions have been provided for in the Constitution unlike curative petitions which are a result of a Supreme Court pronouncement. I will restrict my analysis to the grounds and Constitutional provisions involved in filing both the petitions. In the subsequent paragraphs

27 *A. R. Antulay v. R. S. Nayak* (1988) 2 SCC 670, P. 670, para 79, the Appellant came before the Court under Article 136 to challenge a final Supreme Court judgment.

28 See an appendix of *A. R. Antulay v. Union of India* (1984) 3 SCR 482, 483 (The matter had been disposed of by a divisional Bench) at P. 764 of *A. R. Antulay v. R. S. Nayak* (1988) 2 SCC 602 judgment.

29 In *Rupa Ashok Hurra Vs. Ashok Hurra and Anr*, (2002) 4 SCC 388 P. 417, Para 54, the Court directed the Registry to process the writ petitions even though they didn't contain an averment that the grounds raised in the them for coming before the Court had been raised in the earlier disposed off review petitions. The said averment is a prerequisite for filing a curative petition.

30 From the empirical data gathered from the Supreme Court, so far not a single curative petition has been successful before the Supreme Court.

I will first illustratively look in turns at these petitions in light of the above parameters and then proceed to analyze them. At this point it ought to be noted that Article 137 is the only Constitutional provision that is common in both curative petitions and review petitions.

As the name suggests, curative petitions refer to petitions filed before the Supreme Court that seek to prevent the abuse of the Court process and to cure a gross miscarriage of justice³¹. As already stated earlier curative actions are filed under Article 137, 141 and 142. They are filed after the disposal of a review petition. There is no prescribed period for filing a curative petition.³² A curative petition can only be filed under the following grounds:³³

1. Where there is violation of principles of Natural justice in that the aggrieved party filing a curative petition was not a party to the lis but the judgment adversely affected his interest or if he was a party to the lis, he was not served with notice of the proceedings and the matter proceeded as if he had notice.
2. Where in the proceedings a learned judge failed to disclose his connection with the subject matter or the parties, giving scope for an apprehension of bias and the judgment adversely affects the petitioner.”

In addition to the above grounds, the ‘curative petitioner’ must aver specifically that the grounds mentioned in the curative petition had been taken in the review petition and that such review had been dismissed by circulation.³⁴ Circulation in this context means discussion at a judicial conference and not in Court through oral arguments.³⁵ Also, a curative petition has to include a certificate by a Senior Advocate indicating that the same grounds in the curative petitions had also been taken in the review petition.³⁶ Further, the curative petition has to be circulated to a bench of the three senior most judges and the judges who passed the judgment complained of, if available.³⁷ In the event of the bench holding at any stage that such curative petition is without any merit and is vexatious, it could impose exemplary costs on the petitioner.³⁸

I will now explain what a review petition is. As already mentioned, a review petition is filed under Article 137 of the Constitution. The power to

31 (2002) 4 SCC 388, 416, para 49.

32 The Supreme Court Rules, 1966.

33 *Rupa Ashok Hurra v. Ashok Hurra and Anr*, (2002) 4 SCC 388 at P. 416, Para 51.

34 P. 417, Para 52.

35 *P. N. Eswara Iyer v. Registrar, SC of India* (1980) 4 SCC 680 at P. 687, Para 14.

36 *Rupa Ashok Hurra v. Ashok Hurra and Anr*, (2002) 4 SCC 388 at P. 417, para 52.

37 *Ibid*, Para 53.

38 *Ibid*.

review is not an inherent power³⁹. Inherent power is given to the Supreme Court under Article 142 of the Constitution and it refers to the power of the Court to do complete justice. The power of review must be conferred by law either specifically or by implication⁴⁰. The Supreme Court Rules, 1966 made in exercise of the powers under Article 145 of the Constitution prescribe that in civil cases, review lies on any of the grounds specified in Order 47 Rule 1 of the Code of Civil Procedure, which provides:

- (i) Discovery of new and important matter of evidence.
- (ii) Mistake or error apparent on the face of the record.
- (iii) Any other sufficient reason.⁴¹

In the case of criminal proceedings a review lies on the ground of an 'error apparent on the face of the record'.⁴² 'An error apparent on the face record' has been taken to mean an error which strikes one on merely looking at the record and does not require any long drawn process of reasoning on points where there may, conceivably, be two options.⁴³ However, the Supreme Court has later held that the above restrictive view on criminal review could not have been intended and that it ought to be assumed that the contrary is the case since criminal review matters are more traumatic and touch on issues of life and liberty unlike civil reviews⁴⁴. A review petition lies with the Court if filed within thirty days after the pronouncement of a final Supreme Court judgment⁴⁵. The purpose of review is to ensure that justice is not defeated and that errors leading to miscarriage of justice are remedied.⁴⁶

Having put down the various distinctive features of curative petitions and review petitions I now proceed to draw an analysis between curative petitions and review petitions. Firstly, the manner in which the Supreme Court takes note of both curative petitions and review petitions is almost similar, save for slight differences. In both the cases the petitions are first

39 The Supreme Court in *Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji* AIR 1970 SC 1273, para 4 has held that it is well settled that the power to review is not an inherent power. See also *Lily Thomas v. Union of India* 2000 (6) SCC 224, Para 52 where the Supreme Court has retaliated that review is the creation of a statute.

40 Ibid.

41 The expression 'any other sufficient reason' has been given an expanded meaning and a decree or order passed under misapprehension on true state of circumstances has been held to be sufficient ground to exercise the power of review. See *S. Nagaraj v. State of Karnataka* (1993) Supp. 4 SCC 595.

42 Order XL, Rule 1 of Civil Procedure Code lays down grounds for a review petition but the Supreme Court under its powers in Article 145 has made a distinction between grounds for filing a civil review petition and those for filing a criminal curative petition. See Supreme Court Rules, Order XL.

43 *Meera Bhanja v. Nirmala Kumari Chaudhary* AIR 1995 SC 455 at P. 457.

44 *P. N. Eswara Iyer v. Registrar, Supreme Court of India* (1980) 4 SCC 680 at P. 695, para 34.

45 See Supreme Court Rules, 1966, O-XL relating to review.

46 *Lily Thomas v. Union of India* (2000) 6 SC 224 at P. 252.

circulated to the Supreme Court: for review petitions, circulation is to the judges who passed the impugned judgment whereas in the case of curative petitions, circulation is to the three senior most judges in the Supreme Court and the judges who had passed the impugned judgment if available⁴⁷. Secondly in both the reviews a certificate of a senior counsel is essential. The purpose of the certificate is to aver that very strong reasons exist for the Supreme Court to admit the petition. However, in the case of curative petition the Court can impose exemplary costs for those petitions that are; unwarranted this not being so in the case of review petitions. Thirdly, with regard to curative petitions the grounds laid down in *Rupa Ashok Hurra* are the only grounds that would warrant the admission of a curative petition by the Court⁴⁸. However, with regard to review petitions the Court seems to have taken the grounds for filing review petitions as illustrative not exhaustive. Lastly the grounds for filing a curative petition seem to be based on natural justice principles unlike those of filing review petitions that seem more broad and not necessarily restricted to natural justice. In conclusion I suggest that a very thin line exists between a curative petition and a 'second review petition' and looks like its more of a case of an old wine in a new bottle rather than the Supreme Court breaking down new jurisprudential grounds to propound the modalities of a curative petitions. The Supreme Court has, however sought to lay down different grounds for filing review petitions and curative petitions.

IV. *Ex Debito Justitiae* Obligation

Though, as already mentioned, the Supreme Court in *Rupa Ashok Hurra* chose not to be 'saddled' by a 'discussion' of *A. R. Antulay*, both judgments relied on the same *ex debito justitiae* obligation, albeit formulating it differently. In India a smaller Bench cannot overrule a larger Bench. The *A. R. Antulay* court consisted of a seven Judge Bench whereas the *Rupa Ashok Hurra* Court consisted of a five Judge Bench. This therefore means that the Court in *Rupa Ashok Hurra* could only base its *ex debito justitiae* obligations within the parameters laid down by *A. R. Antulay*. This part finds out if this was so. I will first state the dictum in *A. R. Antulay* and *Rupa Ashok Hurra* and then proceed to my analysis of *Rupa Ashok Hurra*.

47 In India a Supreme Court judgment is pronounced by a Divisional bench, usually three judges hence for curative petitions is circulated to five judges in total, however the number of judges to whom curative petitions have been circulated keeps on fluctuating. A quick perusal of the curative petitions that have come up before the Supreme Court shows that the size of the bench hearing them has been fluctuating between five and four. This fluctuation is as a result of unavailability of one of the judges who passed the impugned judgment otherwise the number of senior judges never changes, its always three.

48 *Ibid*, para 51.

As I have already mentioned before, a bench of seven judges set aside an earlier judgment of the Supreme Court in a collateral proceeding because it was contrary to the provisions of the Criminal Law Amendment Act of 1952⁴⁹. The directions given by the impugned judgment were in violation of principles of natural justice and were without precedent in the background of the Criminal Law Amendment Act of 1952.⁵⁰ These directions deprived the appellant of certain rights of appeal and revision and also his rights under the Constitution.⁵¹ In *A.R. Antulay*, the Court held that it can *ex debito justitiae* remedy directions given *per incuriam* and in violation of certain Constitutional limitations and in derogation of the principles of natural justice.⁵² It was the position of the Court that no man should suffer a wrong due to procedural irregularities.⁵³ To grant justice and to review its earlier judgment the Court invoked its inherent power under Article 142 of the Constitution⁵⁴. The basic premise in the dictum of *A. R. Antulay* is that if facts are ascertained before the court which prove that the impugned judgment was given *per incuriam* or violated natural justice principles or Constitutional provisions, the Court has no discretion than to set aside the impugned judgment. This means that the *ex debito obligation* cannot be derogated from when such facts are disclosed that call for its use.

In *Rupa Ashok Hurra*, the Court was clear that to be entitled to a relief *ex debito justitiae* a petitioner has to fulfill the grounds laid down for filing a curative petition.⁵⁵ This means that a petitioner who seeks to assail a final Supreme Court judgment but is unable to make out a case within the parameters laid down in *Rupa Ashok Hurra* cannot then be heard by the Court. In other words the Court in such a case cannot be 'obliged *ex debito justitiae* since the petitioner has been unable to come before the Supreme Court. This state of affairs is what makes *Rupa Ashok Hurra* dictum appear different from that of *A. R. Antulay*. With regard to curative petitions, the Court can choose to admit or dismiss them depending on whether they fulfill the parameters laid down in *Rupa Ashok Hurra*. In other words the Court can exercise discretionary powers in relation to curative petitions. However when it comes to the *ex debito justitiae* obligation the Court has no discretion as has been laid down in *A. R. Antulay*. If facts ascertained before the Court prove that a miscarriage of justice has taken place in the impugned judgment, the Court would have discretion than to set aside such judgment.

49 *A. R. Antulay v. R. S. Nayak* (1988) 2 SCC 670, P. 673, para 87.

50 *Ibid*, at P.670, para 78.

51 *Ibid*, at P.670, para 78.

52 *Ibid*, at P.670, paras 78, 79 & 80.

53 *Ibid*, at P. 672, para 83.

54 *Ibid*, at P.670, para 79.

55 (2002) 4 SCC 416, para 51.

In *A. R. Antulay*, the Court was not worried about the procedure of ascertaining the said facts whereas in *Rupa Ashok Hurra* we find that procedure is of paramount importance. There is nothing constitutionally wrong with that, but the problem comes to the fore when the Court equates *ex debito justitiae* obligation to the filing of curative petitions as it has done in *Rupa Ashok Hurra*. This in essence amounts to overruling *A. R. Antulay* in so far as *ex debito justitiae* obligation is concerned. The Court in *Rupa Ashok Hurra* introduces a discretionary power to this obligation which is far from the dictum in *A. R. Antulay*. There is a need for the Supreme Court to constitute a large bench to harmonize *Rupa Ashok Hurra* judgment with that of *A. R. Antulay*.

In the next part I will trace the *ex debito justitiae* obligation in the common law and use this as a backdrop for analyzing which of the two dicta *A. R. Antulay* or *Rupa Ashok Hurra* has applied this obligation correctly. However, I must state that this is purely in academic interest since in terms of constitutional validity it is already settled that *A. R. Antulay* dicta having been pronounced by a larger Bench than *Rupa Ashok Hurra* judgment Bench is the binding dicta.

In common law jurisprudence *ex debito justitiae* obligation⁵⁶ is often called “as of right rule” and it entitles defendants to have an irregular, default judgment set aside without considering the merits⁵⁷. The *ex debito justitiae* obligation means no more than this: ‘in accordance with settled practice, the court can exercise its discretion in only one way, namely, by granting the order sought’.⁵⁸ The rule ensures that litigants comply with the relevant procedural rules and that defendants have notice of proceedings and is protected from the injustice that might result if a judgment is unfairly passed against them. The similarity between the *ex debito justitiae* obligation usage in England and India is that the Court has no discretion than to set aside the impugned judgment. Therefore in conclusion it can be said *ex debito justitiae* is an obligation in which the Court does not exercise its discretionary power. This is what the Supreme Court stated in *A. R. Antulay*.

The fact that so far no curative petition has been successful before the Supreme Court suggests two things. First, that so far no curative petition has been able to make out a case within the *Rupa Ashok Hurra* parameters.

56 See *Anlaby v. Praetorius* (1888) 20 QBD 764, mentioned in Camille Cameron “Irregular default judgments: should Hong Kong discard the ‘as of right’ rule?” 30 HKLJ 245 (2000) at www.westlawinternational.com, last visited on March 09, 2006, in Common law is considered as the source of ‘as of right rule’ see.

57 Ibid.

58 Andrew Keay, “Disputing debts relied on by petitioning creditors seeking winding-up orders”, *comp. law.* 2001, 22(2), 40-46.

Secondly, that so far as no other grounds that result in miscarriage of justice that have been alleged in a curative petition have succeeded. The second suggestion is a hypothetical proposition and hasn't been proven so far however, it cannot be wished away because the Court in *Rupa Ashok Hurra* had stated that it was not possible to enumerate all the grounds on which a curative petition may be entertained⁵⁹. Nevertheless, the Court felt it necessary to control the 'floodgates' of litigation which resulted in the limited grounds on which the Court would accept curative petitions. That apart, the Court must ensure that the formalities of filing an application for curative petition should not deny anyone justice. That several curative petitions have proceeded beyond the notice stage⁶⁰ before finally being dismissed strongly suggest that the formalities of filing an application for curative petition may not be a hindrance for approaching the Supreme Court in search of justice. Rather, the difficulties in filing a meritorious claim in a curative petition.

V. Conclusion

Perhaps the propounding of curative petitions by the Court was a judicial fiat. This is so since curative petitions apart from the stringent procedures that have to be fulfilled are nothing but second review petitions. As I have said it is a case of old wine in a new bottle. That the *Rupa Ashok Hurra* dictum is in conflict with a larger Bench's dictum adds weight to the above observation. It cannot be denied that the writ petitions in *Rupa Ashok Hurra* raised fundamental questions, which, disappointingly, as this comment has tried to show, have not been fully answered. I submit that the correct way for the Court to have adopted is through Article 145 of the Constitution. It is equally significant to note that Article 137 of the Constitution grants the Supreme Court the power of review of any of its final decisions.

This power of review as per Article 137 is not restricted to only one time use in relation to a final Supreme Court decision. However, as pointed out, it is through the Supreme Court's pronouncement and in exercise of its power under Article 145 that review power has been used only once in any relevant final Supreme Court decision. Amending Order 40 of the Supreme Court Rules, 1966 would have been the most pragmatic way of dealing with Constitutional questions raised by the Writ petitions in *Rupa Ashok Hurra*. Perhaps one reason for the Court to choose to formulate the procedure

⁵⁹ *Rupa Ashok Hurra v. Ashok Hurra and Anr.*, (2002) 4 SCC 388 p. 416, Para 50.

⁶⁰ After curative petitions have been circulated before the relevant judges, they are then heard in the open court and the parties to the matter are issued notice to appear before the Court. None of the Civil Curative petitiona have ever proceeded beyond the notice stage but as of December 03 2006, 2 criminal curative petitions had proceed beyond the notice stage and were dismissed that proof of surrender as directed by the Court was dismissed beyond the period thar stipulated by the Court. These petitions were *Deo Narrain Mandal v. State of Uttar Pradesh, Curative petition (Cr.L.) No.2 of 2005* and *Raj Deo Rai V. State of Uttar Pradesh, curative petition (Cr.L.) No. 19 of 2005*.

through a judgment was to avoid undertaking the elaborate procedure that could have been involved in amending Order 40 of the mentioned rules and the desire of the Supreme Court to deliver instant justice. That may be so but at the end of the day the Supreme Court sacrificed constitutionalism at the altar. This is one thing that the Apex Court, which is the Court of ultimate resort, cannot afford to be seen doing.

THE RIGHT TO PRIVACY: TRACING THE JUDICIAL APPROACH FOLLOWING THE KHARAK SINGH CASE

Namit Oberoi*

The right to privacy presents itself as an illustration of the interpretative capabilities of the higher judiciary, as well as a right emanating as a consequence of the larger process of widening the ambit of specifically enumerated fundamental rights. Although initially lacking the stamp of judicial approval from the Supreme Court, this right has been afforded legal recognition following a series of judicial rulings, which shall be critically examined in the context of the Supreme Court's ruling in the case of *Kharak Singh v. State of Punjab*¹.

The literal meaning of privacy, as defined in the New Oxford English Dictionary², is the 'absence or avoidance of publicity or display; the state or condition from being withdrawn from the society of others, or from public interest; seclusion.' The Black's Law Dictionary³ refers to privacy as "*the right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned*".⁴ Therefore, the right to privacy, notwithstanding its differing connotations, remains a private right of an individual.

§ Right To Privacy

In a historical sense, privacy is a civil liberty essential to individual freedom and dignity. The right to privacy is the hallmark of a cultured existence, as in the words of Louise Brandeis, J "*the right most valued by civilized men*".⁵ Winfield has referred to the right to privacy as the absence of unauthorized interference with a person's seclusion of himself or his property from the public. This also manifests the legal appreciation of the individual personality.⁶ At the international level, the International Covenant on Civil and Political Rights (of which India is a signatory), and more recently, the European Convention of Human Rights recognizes this right.⁷ However,

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1 AIR 1963 SC 1295.

2 The New Oxford Dictionary, (Vol. 2, 1993).

3 Black's Law Dictionary, (6th Ed., 1990).

4 *Id.* It is further explained as: Term 'right to privacy' is generic term encompassing various rights recognised to be inherent in the concept of ordered liberty...'

5 *Olmstead v United States*, 277 U.S. 438, 478.

6 P. Ishwara Bhat, *Fundamental Rights - A study of their interrelationship* 324, (2004).

7 This appears in Article 8 of the European Convention on Human Rights, as well as Article 17 of the International Covenant on Civil and Political Rights.

the common characteristics underlying this are its being available against the state, as is the case with other human rights.

The Indian Constitution, in comparison, fails to expressly recognize the right to privacy. Some scholars contend that the whole notion of privacy is alien to Indian culture.⁸ In the celebrated case of *ADM Jabalpur v. Shivakant Shukla*⁹, the Supreme Court sought to determine if the right to personal liberty is limited by any limitations other than those expressly contained in the Constitution and statute law. As observed by Khanna J:

*“Article 21 is not the sole repository of the right to personal liberty...no one shall be deprived of his life and personal liberty without the authority of laws follows not merely from common law, it flows equally from statutory law like the penal law in force in India.”*¹⁰

This establishes that the right to privacy need not be expressly guaranteed, but may be implicit because of its inclusion in common law. The Supreme Court in recent years through judicial activism has preferred to “read into” the Constitution a fundamental right to privacy by a creative interpretation of the right to life guaranteed under Article 21. In the case of *M.P. Sharma v. Satish Chandra*¹¹, and thereafter, in the *Kharak Singh* case, judicial pronouncements categorically rejected that there exists any right to privacy. In the case of *Govind v. State of MP*¹², as well as thereafter in *R.Rajagopal v. State of T.N.*¹³ and *PUCL v. UOI*¹⁴, observed that this right emanates from Article 21. On a plain reading of Article 19, it appears that “liberty” as defined is wide enough to indicate “the right to be let alone”. However, the Indian higher judiciary has remained rather ambiguous, to the extent of delivering contradictory rulings.¹⁵

§ Tracing the Origins of the Right to Privacy in India

The struggle to specifically incorporate privacy as a specific fundamental right under the Constitution is substantially attributable, in large measure, to the rather amorphous character of this right. In the case of *M.P. Sharma v.*

8 Legal experts such as Upendra Baxi have expressed doubts about the evolution of privacy as a value in human relations in India. Everyday experiences in the Indian setting, from the manifestation of good neighbourliness through constant surveillance by next-door neighbours, to unabated curiosity at other people’s illness or personal vicissitudes, suggests otherwise, as referred to in Sheetal Asrani-Dann *The right to privacy in the era of Smart Governance* Journal of the Indian Law Institute, (Vol. 47, 2005).

9 AIR 1976 SC 1207.

10 AIR 1976 SC 1207, 1258.

11 AIR 1954 SC 300.

12 AIR 1975 SC 1378.

13 AIR 1995 SC 264.

14 (1997) 1 SCC 301.

15 See generally A.M. Bhattacharjee, Equality, Liberty and Property Under the Constitution of India 104-105 (1997).

*Satish Chandra*¹⁶ wherein the contours of the police's powers of search and surveillance were outlined, it was held that there is no right to privacy under the Constitution. In reaching this conclusion, the Supreme Court preferred to base its interpretation in a rather narrow sense, limiting itself to simply the prescribed statutory regulations. This represented the prevailing judicial approach of simply limiting interpretation, along positivist lines. Therefore, the Court concluded that it lacked the justification to import [privacy] into a totally different fundamental right, by some process of strained construction. Thus the courts adopted a narrow and formalistic approach by pointing to the absence of a specific constitutional provision analogous to the Fourth Amendment of the US constitution, to protect the right of privacy of Indians from unlawful searches.

This ruling has been followed nearly a decade later, in the case of *Kharak Singh v. State of Punjab*¹⁷ wherein the right to privacy was again invoked to challenge police surveillance of an accused person. The contention raised is that the right to privacy may be identified in the "personal liberty" as contained in Article 21. Citing with approval the observations of Field, J in *Munn v Illinois*¹⁸, it referred to the fifth and fourteenth amendment of the American Constitution and other American and English judgments of *Wolf v. Colorado*¹⁹ and *Semayne's Case*.²⁰ In widening the scope of liberty under Article 21, the Court held that "personal liberty" is contained in Article 21 as a "compendious term to include within itself all varieties of rights which go to make up the personal liberty of man other than those dealt with in several clauses of Article 19(1)."²¹ However, notwithstanding this, it concluded that this right to privacy is not in existence under the Constitution, with Ayyangar, J laying down that:

"The right of privacy is not guaranteed under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of fundamental right guaranteed by Part III".²²

As in the *M.P. Sharma case*, the Supreme Court appears to be influenced by the absence of any provision similar to that of a prohibition on unreasonable search and seizure as is available under the Fourth Amendment of the US Constitution. Thus the majority erred in regarding

16 AIR 1954 SC 300.

17 AIR 1963 SC 1295.

18 94 US 113 (1876).

19 (1948) 338 US 25.

20 (1604) 5 Co Rep 91a.

21 AIR 1963 SC 1295,1303.

22 Id.

“prohibition on unreasonable search and seizure” as the only facet of privacy. It remains surprising as to how the Court arrived at the conclusion that secret surveillance is not unconstitutional and violative of personal liberty. It is also not clear how the Court came to the conclusion that secret surveillance was not unconstitutional and did not violate personal liberty, but at the same time quoted in a positive light *Semayne’s case*²³ and opined that “*the house to everyone is to him as his castle and fortress*”.²⁴

Taking a more holistic view of the scheme of protection afforded by Part III, the minority found that all acts of surveillance under the impugned Regulations offended Articles 21 and 19(1)(d), as movement under the shroud of police surveillance cannot be described as free movement within the meaning of the constitution. Thus the minority judgment found the clauses authorizing “surveillance” as unconstitutional as they believed that even though there did not exist an express right to “privacy” in the Constitution, such a right was built into the very fabric of Article 21 and secondly, they were of the opinion that “*the right to move freely*” implied the right to move free from psychological impediments, which obviously cannot be the case if one knows he is under surveillance.²⁵ However, even the minority ruling rejects recognition of the right to privacy, although it concluded that the acts of surveillance are unconstitutional.

At this point, it is pertinent to remember that the rationale on which the majority ruling is based in the *Kharak Singh case* is that the rights contained in Article 19 are not contained in Article 21, which has been rejected following the Supreme Court’s ruling in the celebrated *Maneka Gandhi case*, wherein a Bench of the Supreme Court held, while referring to its earlier ruling in the *Kharak Singh case*:

*“In our view this is not the correct approach. Both are independent fundamental rights, though they are overlapping. The fundamental right to life and personal liberty has many attributes and some of them are found in Article 19.”*²⁶

The majority opinion in the *Kharak Singh case* relied upon the theory of “*carving out*” in Article 21 the residue of the elements of personal liberty excluded in the ambit of Article 19(1). In rejecting this, subsequent rulings of the Supreme Court proceeded to detail upon the different manifestation of personal liberties as contained in both constitutional provisions, because

23 (1604) 5 Co Rep 91a.

24 Nemika Jha, *Legitimacy of the Right to Privacy as a Fundamental Right* AIR 2001 (J) 325, at 329.

25 See generally Sheetal Asrani-Dann, *Supra* Fn. 8.

26 *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, 621.

of which Article 21 could not be treated as a residual provision. This judicial approach resonates the Supreme Court's categorical rejection of the right to strike in the *All India Bank Employees' Association case*²⁷, wherein it held that even upon a liberal interpretation of Article 19(1), it cannot be concluded that trade unions are guaranteed the right to strike. In a similar manner, there is no implied right to privacy, thereby reinforcing the plea that the right to privacy ought to be clearly articulated.

The Supreme Court, a decade later, examined the existence and scope of the fundamental right to privacy. In *Govind v State of MP*²⁸ the Supreme Court, again adjudicating upon the question of the constitutionality of police surveillance, side-stepped the rationale underlying the earlier rulings in *MP Sharma* and *Kharak Singh*. Tracing the origin of the right in the presumed intention of the framers of the Constitution, the court, speaking through Matthew J. said:

*“There can be no doubt that the makers of our Constitution wanted to ensure conditions favorable to the pursuit of happiness. They certainly realized, as Brandeis, J. said in his dissent in *Olmstead v. US*, the significance of man's spiritual nature, of his feelings and his intellect(..). They sought to protect [individual] in their beliefs, thoughts, their emotions and their sensations. Therefore they must be deemed to have conferred upon the individual as against the government a sphere where he should be let alone”.*²⁹

The Supreme Court, while accepting the unifying principle underlying the concept of privacy, noted that the fundamental nature of the right is implicit in the concept of ordered liberty. Substantiated by recent rulings of the US Supreme Court³⁰, the judicial approach remained that there exists a penumbra or zone of privacy in terms of the different guarantees afforded by Part III of the Constitution of India, thereby anchoring the right of privacy in India's constitutional jurisprudence. However, remaining cautious, the Supreme Court also observed that in the absence of any legislative enactment, this right will pass through a “*case-by-case development*”.

The Supreme Court's ruling in the *Govind case* was rendered by a Bench consisting of three judges, although rather contradictory to that as held by a Bench of six judges in the *Kharak Singh case*, hereinbefore referred to. Interestingly, the ruling in the *Govind case* fails to refer to earlier decisions on privacy, because of which it is possible to contend if the law as laid down in this case is valid, as it appears to be contrary to the ruling in the *Kharak Singh case*.

27 AIR 1962 SC 171.

28 AIR 1975 SC 1378.

29 AIR 1975 SC 1378, 1384.

30 *Griswold v. Connecticut*, 381 US 479 (1965), *Roe v. Wade*, 410 US 113 (1973).

§ The Maneka thesis

The jurisprudential edifice of the distinction between a right as *emanating* from a named right and a right as a *facet* of a named right is traced to the opinion expressed by Bhagwati, J, in the *Maneka Gandhi case*.³¹ Distinguishing between named rights and unnamed rights, Bhagwati held that it was *not* enough that a right merely flowed from or *emanated* from a named right, i.e. rights categorically mentioned in the text of the Constitution. Therefore, an unnamed right (rights not mentioned in the text of the Constitution) to be a part of the named right, it must be “*integral to the named right or must partake of the same basic nature or character of the named right.*”³² According to his opinion, each activity which facilitates the exercise of the named fundamental right is not necessarily comprehended in that fundamental right. Since the right to privacy isn’t existing as a named right, in order to become a part of the named right to “*personal liberty*”, this has to be shown as being “*integral to*” personal liberty or “*partaking the same basic character*” as personal liberty.³³ The ruling in the *Govind case*, concluding that the right to privacy is a fundamental right, *flowing* and *emanating* as *derivative* and *penumbral* from the other named rights, cannot be regarded to be good law as it does not satisfy the test of unnamed rights. Although the benefit of Bhagwati, J’s opinion could not be available to Matthew, J in the *Govind case*, the roots of this thesis were already present in the *All India Bank Employees Association case* ³⁴

§ Privacy Cases After Maneka

In *R. Rajagopal v State of Tamil Nadu*,³⁵ the Supreme Court, in the course of examining the right to privacy, concluded that this right is implicit in the right to life and personal liberty as guaranteed under Article 21 of the Constitution. This dispute arose out of the publishing of an autobiography of a convict sentenced to death. This autobiography was written in jail and handed over to his wife for publishing, without the knowledge and approval of the jail authorities. It leveled serious allegations against a number of top officers of the Indian administration, causing the Police to ask the editor to stop its publication. The Supreme Court, referring to the rulings of the US Supreme Court, in *Griswold v. Connecticut*³⁶, *Roe v. Wade*³⁷ and *New York Times Co. v. Sullivan*³⁸ held:

31 (1978) 1 SCC 248.

32 AIR 1978 SC 597, 640.

33 See generally AM Bhattacharya, *Supra* fn. 15.

34 AIR 1962 SC 171.

35 AIR 1993 SC 264.

36 (1956) 381 US 479.

37 (1973) 410 US 113.

38 (1964) 376 US 254.

*“The right to privacy is implicit in the right to life and personal liberty guaranteed to the citizens of this country by Article 21. It is a “right to be let alone”. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education amongst other matters. None can publish anything concerning the above matters without his consent.”*³⁹

However, the two exceptions to this rule were carved out by the court for material based on public records, and information about public official’s conduct “*relevant to the discharge of their duties.*” Thus, this is the first judgment which is an exposition of the current legal position as to the law relating to privacy, expressly laying down that this is implicit in Article 21. According to the majority in *Kharak Singh*, personal liberty even when construed as a “*compendious term*” did not include privacy within it. Therefore, it is unlikely that after *Maneka* when rights under personal liberty are restricted only to those that is “integral to” or “partake the same basic character”, privacy may still be said to a part of it.

The question of right to privacy has been, in more recent times, deliberated upon in the case of *People’s Union for Civil Liberties v Union of India*⁴⁰ in the context of telephone tapping. In this case, the Supreme Court held that right to privacy is a part of the right to life and liberty under Article 21 and it cannot be curtailed except according to procedure established by law. The Court stated that conversations on telephone are often of an intimate nature and constitute an important facet of a person’s private life; therefore its tapping offends Article 21. However, far from continuing with the widening ambit of this right, it clarified that this right could be curtailed by the procedure established by law, so long as this procedure is just, fair and reasonable.

§ Conclusion

On the basis of a dispassionate perusal of the aforementioned judicial rulings, it is evident that there is an implied, unenumerated, but judicially-evolved and recognized right to privacy under the Indian Constitution. Although the rulings of the Supreme Court in the cases of MP Sharma and Kharak Singh, already referred to, denied the existence of any right to privacy, smaller benches in the cases of *Govind*, *Rajagopal* and *PUCI* unmistakably indicate the existence of such a right. The shift in judicial interpretation is most notably observed following the *Maneka Gandhi case*, wherein this right is recognized, subject to legal restrictions satisfying the requirements as laid down in the *Maneka Gandhi case*. However, if the courts were to address

39 AIR 1993 SC 264, 276.

40 (1997) 1 SCC 301.

the issue of right to privacy under Article 21 afresh, there is little doubt that it would conclude that there does exist a right to privacy. Such a statement will not be valid law unless stated by a bench of more than six judges so as to effectively overrule *Kharak Singh*.

On a harmonious interpretation of the legal principles as laid down by the Supreme Court at different points of time, it is sufficient to conclude the existence of right to privacy under Part III of the Constitution. The first principle was stated in *Kharak Singh*, which said that 'personal liberty' used in the Article 21 is 'a *compendious term* to include within itself *all varieties of rights which go to make up the personal liberty of man* other than those dealt with in several clauses of Article 19(1).⁴¹ The second and third principles were laid down in *Maneka*, which stated that any law interfering with 'personal liberty' must be just, fair and reasonable⁴² and that an unnamed right may be regarded as part of a named fundamental right if it partakes of the same basic nature and character of the named right⁴³.

Privacy is also a feature of the dignity of an individual that the preamble to the Constitution assures every individual.⁴⁴ Thus the right is not merely a negative mandate upon the state not to encroach upon the private space of the individual but is also a positive affirmation on the state to create adequate institutions that would enable one to effectively protect his private life.⁴⁵ Thus the right to privacy has a strong constitutional edifice, which could, if clarified by an appropriate Bench of the Supreme Court, settle this judicial controversy at rest.

41 *Kharak Singh v State of UP* AIR 1963 SC 1295, 1303.

42 *Maneka Gandhi v Union of India* AIR 1978 SC 597, 640.

43 *Id.*

44 The Preamble includes the words "We, the people of India, having solemnly resolved ... to secure to all its citizens fraternity assuring the dignity of the individual..."

45 See R. Unger, *Knowledge and Politics* (1975), as referred to in Lawrence H. Tribe, *American Constitutional Law* 1305 (1988).

THE FUNDAMENTAL RIGHT TO PRIVACY: A CASE-BY-CASE DEVELOPMENT *SANS STARE DECISIS**

Sandeep Challa**

The principle of *stare decisis*¹ is of utmost importance especially in relation to a Supreme Court decision, by virtue of Article 141 of the Constitution². The reasoning behind this principle is to ensure consistency and stability in the law declared by the Supreme Court.³ The Apex Court held that: “It is commonly known that most decisions of the courts are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the dispute between them, *but also because in doing so they embody a declaration of law operating as a binding principle in future cases.*”⁴ In addition, in cases of conflict of opinions pronounced by the Supreme Court, the opinion expressed by the larger bench strength prevails.⁵ Therefore, a decision by a Constitution Bench of the Supreme Court can in no circumstance be whittled down by a diametrically contrary interpretation provided by a Division Bench of the same Court. The instant case-comment deals with the fundamental Right to Privacy in the light of the doctrine of *stare decisis*.

The first case⁶ wherein the Indian Supreme Court substantially dealt

* The instant case comment ranges from *District Registrar & Collector, Hyderabad v. Canara Bank*, A.I.R. 2005 S.C. 186 to *M.P. Sharma v. Satish Chandra, District Magistrate*, A.I.R. 1954 S.C. 300; but it primarily revolves around the dictum given in the landmark case of *Kharak Singh v. State of U.P.*, A.I.R. 1963 S.C. 1295, as the present case comment is a *stare decisis* critique.

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1 The doctrine of precedent emanates from the legal maxim *stare decisis et non quieta movere* which literally means “to stand by decisions and not to disturb what is settled.” 4 P. RAMANATHA AIYAR, *ADVANCED LAW LEXICON* 4456 (Y.V. Chandrachud et al. eds., Wadhwa & Co. Nagpur 3rd ed. 2005).

2 Art. 141 of the Const. of India states as follows: “The law declared by the Supreme Court shall be binding on all courts within the territory of India.”

3 21 C.J.S. Courts § 140.

4 *Union of India v. Raghubir Singh*, A.I.R. 1989 S.C. 1933, ¶ 8. (italics supplied)

5 See *State of U.P. v. Ram Chandra Trivedi*, A.I.R. 1976 S.C. 2547; *State of Orissa v. Titaghur Paper Mills*, A.I.R. 1985 S.C. 1293; *Poolpandi v. Supdt., Central Excise*, A.I.R. 1992 S.C. 1795; *CST v. Pine Chemicals Ltd.*, (1995) 1 S.C.C. 58, at ¶ 17; *SBI SC/ST Employees’ Welfare Assn. v. State Bank of India*, (1996) 4 S.C.C. 119; *C.I.T. v. Trilok Nath Mehrotra*, (1998) 2 S.C.C. 289; *N.S. Giri v. Corpn. City of Mangalore*, A.I.R. 1999 S.C. 1958, ¶ 12; *Lily Thomas v. Union of India*, A.I.R. 2000 S.C. 1650, ¶ 56; *Bharat Petroleum Corpn. Ltd. v. Mumbai Shramik Sangha*, (2001) 4 S.C.C. 448; *S.H. Rangappa v. State of Karnataka*, (2002) 1 S.C.C. 538, at ¶ 11; *P. Ramachandra Rao v. State of Karnataka*, (2002) 4 S.C.C. 578, ¶ 28. See also N.K. Jayakumar, *Courts*, in 10 *HALSBURY’S LAWS OF INDIA* 339 (M.N. Venkatachaliah et al. eds., 2001).

6 The first case of the Supreme Court of India where the Fundamental Right to Privacy was referred to, albeit in passing, was in the *M.P. Sharma case*, A.I.R. 1954 S.C. 300 at ¶ 24, wherein an eight-judge bench of the Supreme Court, in relation to Article 20(3) of the Constitution of India and the power of search and seizure, skeptically held as follows: “*When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental Right to Privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction.*” (italics supplied)

with the issue of the Fundamental Right to Privacy with respect to Article 21⁷ of the Constitution of India was in the case of *Kharak Singh v. State of Uttar Pradesh*.⁸

The present case comment attempts to shed light on the interpretation of this case by the Supreme Court of India in *District Registrar & Collector, Hyderabad v. Canara Bank*⁹ and other contemporary decisions¹⁰ of the Supreme Court. Furthermore, a 'case-by-case development' of the Right to Privacy as envisioned by the Apex Court¹¹ mandates a thorough analysis of the judicial process involved in the fundamental Right to Privacy. It is also pertinent to note that the issue of non-compliance with the doctrine of *stare decisis* has not been highlighted despite considerable legal scholarship¹² with respect to the fundamental Right to Privacy. The principal aim of this case comment is to establish firstly, the misinterpretation of the fundamental Right to Privacy as laid down in the case of *Kharak Singh v. State of Uttar Pradesh*¹³ and secondly, the non-adherence to the doctrine of *stare decisis* by the Supreme Court in its subsequent decisions.

The brief facts of *District Registrar & Collector, Hyderabad case*¹⁴ are as follows. The A.P. State Legislature amended Section 73 of the Stamp Act, 1899 which gave inspecting officers not only the power to search premises but also the power to seize deficiently stamped documents.¹⁵ The purpose behind the amendment was to combat stamp duty evasion and also to supplement the stamp revenue of the state.¹⁶ The amendment was challenged before the Andhra Pradesh High Court as the amendment had given unbridled power to the officers with respect to exercising discretion and, consequently the amendment was held to be arbitrary and violative of Article

7 Art. 21 of the Const. of India states as follows: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

8 A.I.R. 1963 S.C. 1295.

9 A.I.R. 2005 S.C. 186.

10 See generally R. Rajagopal v. State of T.N., A.I.R. 1995 S.C. 264; P.U.C.L. v. Union of India, A.I.R. 1997 S.C. 568; Dr. Tokugha Yephthomi v. Apollo Hospital Enterprises Ltd., A.I.R. 1999 S.C. 495; Sharda v. Dharmal, A.I.R. 2003 S.C. 3450.

11 Gobind v. State of M.P., A.I.R. 1975 S.C. 1378, ¶ 28 as per Mathew, J. See also B.D. Agarwala, *The Right to Privacy: A Case-By-Case Development*, (1996) 3 S.C.C. (Jour.) 9.

12 See generally Arvind P. Datar, *Constitution of India* 222 (2001); Durga Das Basu, *Shorter Constitution of India* 263-4 (Y.V. Chandrachud et al. eds., Wadhwa & Co. Law Publishers Nagpur 13th ed. rep. 2006); I D.J. De, *The Constitution of India* 950 (2nd ed. 2005); B.D. Agarwala, *supra* note 11; Madhavi Divan, *The Right to Privacy in the Age of Information and Communications*, (2002) 4 S.C.C. (Jour.) 12; Abhinav Chandrachud, *The Substantive Right to Privacy: Tracing the Doctrinal Shadows of the Indian Constitution*, (2006) 3 S.C.C. (Jour.) 31.

13 A.I.R. 1963 S.C. 1295.

14 A.I.R. 2005 S.C. 186.

15 *Id.*, ¶ 5.

16 *Id.*

14 of the Constitution of India.¹⁷ The decision of the High Court was challenged by the Appellant before the Supreme Court, and the Respondent contended that the impugned provision amounted to a violation of the fundamental Right to Privacy.¹⁸

A two Judge Bench¹⁹ of the Supreme Court upheld the A.P. High Court decision and reiterated *recent* Supreme Court decisions²⁰ and held that the Right to Privacy was implicit in the Constitution of India.²¹ Furthermore, that the impugned amendment was arbitrary and violative of Article 14 of the Constitution, thus it cannot be construed as *procedure established by law* under Article 21 of the Constitution. Therefore the amendment was held unconstitutional as the Right to Privacy had been violated in the absence of procedure established by law.

It is respectfully submitted that the *two Judge Bench* in this decision²² has grossly misinterpreted, the *six-Judge Bench* decision in the *Kharak Singh case*²³ wherein it was categorically held by the majority opinion²⁴ that:

*“As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded, is not an infringement of a fundamental right guaranteed by Part III.”*²⁵

In addition, in the *Kharak Singh case*²⁶, it was conceded by the Respondent that the U.P. Police Regulations was not a law under Article 13(3)(a) of the Constitution of India²⁷, thereby taking away the only defence

17 *Canara Bank v. District Registrar & Collector, Registration & Stamps Dept.*, (1997) 4 A.L.T. 118, ¶ 11.

18 *District Registrar & Collector*, A.I.R. 2005 S.C. 186, ¶ 17.

19 R.C. Lahoti, C.J. & Ashok Bhan, J.

20 See *R. Rajagopal v. State of T.N.*, A.I.R. 1995 S.C. 264; *P.U.C.L. v. Union of India*, A.I.R. 1997 S.C. 568; *Dr. Tokugha Yephthomi v. Apollo Hospital Enterprises Ltd.*, A.I.R. 1999 S.C. 495; *Sharda v. Dharmpal*, A.I.R. 2003 S.C. 3450.

21 *District Registrar & Collector*, A.I.R. 2005 S.C. 186, ¶ 39.

22 *Id.*, wherein it was stated as follows: “*The majority did not go into the question whether these visits violated the ‘Right to Privacy’.* But, Subba Rao, J. while *concurring* that the fundamental Right to Privacy was part of the right to liberty in Art. 21, part of the right to freedom of speech and expression in Art. 19(1)(a), and also of the right to movement in Art. 19(1)(d), held that the Regulations permitting surveillance violated the fundamental right of privacy...*In effect, all the seven learned Judges held that the ‘Right to Privacy’ was part of the right to ‘life’ in Art. 21.*” (italics supplied)

23 A.I.R. 1963 S.C. 1295.

24 The majority consisted of B.P. Sinha, C.J., J.R. Mudholkar, N. Rajgopala Ayyangar & S.J. Imam, JJ. and the minority consisted of K. Subba Rao & J.C. Shah, JJ.

25 *Kharak Singh*, A.I.R. 1963 S.C. 1295 at 1303, ¶ 20.

26 *Id.*

27 Article 13(3)(a) of the Constitution of India states that: “In this article, unless the context otherwise requires,—(a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.”

of the state under Article 21, i.e., *procedure established by law*. Hence, the law laid down by the Supreme Court in the *Kharak Singh case*²⁸ was that there is no Right to Privacy under Article 21 of the Constitution *regardless of the existence of a law infringing the Right to Privacy*; because the U.P. Police Regulations were not considered to be law under Article 13(3)(a) of the Constitution of India. Therefore, regardless of the constitutional validity of the amendment in the *District Registrar & Collector, Hyderabad case*²⁹ the respondent cannot claim a fundamental Right to Privacy. Hence it is humbly submitted that the decision of the Supreme Court is bad in law insofar as it implicitly reads a fundamental right of privacy under the Constitution of India.

The second case which dealt with the Right to Privacy substantially was *Gobind v. State of Madhya Pradesh*³⁰ wherein, it stated that *even assuming that the Right to Privacy existed under Article 21, it was not absolute and it was subject to procedure established by law*. It is also pertinent to note that the obiter of Mathew, J. (notwithstanding his decision) went on to state that these arcane police regulations “were verging perilously near unconstitutionality”³¹.

It is submitted that the controversy pertaining to the existence of Right to Privacy stems from the instant case. The petitioner in the *Gobind case*³² contended that the Right to Privacy was guaranteed under Part III of the Indian Constitution. The Supreme Court through the words of Mathew, J. stated as follows:

*“The Right to Privacy in any event will necessarily have to go thorough a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.”*³³

The Supreme Court in later decisions stretched this *assumption* to the extent of recognising a fundamental Right to Privacy.³⁴ It is submitted that

28 *Kharak Singh*, A.I.R. 1963 S.C. 1295.

29 A.I.R. 2005 S.C. 186.

30 A.I.R. 1975 S.C. 1378.

31 *Id.*, ¶ 33.

32 *Id.*, ¶ 24 wherein the Court inferred that the petitioner was claiming the Right to Privacy implicit in ‘personal liberty’ under Article 21 of the Constitution.

33 *Id.*, ¶ 28.

34 *R. Rajagopal*, A.I.R. 1995 S.C. 264, ¶ 9; *District Registrar & Collector*, A.I.R. 2005 S.C. 186, ¶¶ 37-39. See also *Malak Singh v. State of U.P.*, A.I.R. 1981 S.C. 760. ¶ 6: “But, surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Article 21 of the Constitution”: as per O. Chinappa Reddy, J. See also V.N. SHUKLA, CONSTITUTION OF INDIA, 131 (Mahendra P. Singh ed., Eastern Book Company 10th ed. 2006) (1950).

Mathew, J. only stated that even in a hypothetical situation where a Right to Privacy existed under Article 21, such a right would be qualified and not absolute. Therefore *assuming but not conceding the existence of a fundamental Right to Privacy*, his Lordship made the above observation. Moreover, the *Gobind case*³⁵ was before a three-Judge Bench, and it could not in any manner over-rule the majority opinion of the Supreme Court in the *Kharak Singh case*.³⁶

The Supreme Court after *Gobind case*,³⁷ dealt with the Right to Privacy in the case of *R. Rajagopal v. State of Tamil Nadu*.³⁸ It is submitted that this case before a two-Judge Bench is in derogation to the doctrine of *stare decisis* and it has misinterpreted the case of *Kharak Singh v. State of Uttar Pradesh*.³⁹ This was the first case wherein the Supreme Court held that the fundamental right of privacy is constitutionally guaranteed. The Supreme Court in this case stated that the majority opinion in *Kharak Singh v. State of U.P.*⁴⁰ merely referred to the Right to Privacy; and in effect diluted the observation of the non-existence of the Right to Privacy.⁴¹ Therefore, the result of this case was that the minority opinion of Subba Rao, J. in the case of *Kharak Singh v. State of Uttar Pradesh*⁴² erroneously became the law of the land. It is submitted that the two-Judge Bench decision in the present case cannot over-ride the six-judge bench decision, by virtue of Article 141 of the Constitution which embodies the doctrine of *stare decisis*; thereby the observations of B.P. Jeevan Reddy, J. in the instant case is respectfully submitted to be bad in law.

Moreover, it was also stated that the Right to Privacy has two facets, i.e., general law of privacy which affords a tort action on invasion and the constitutional recognition under Article 21 against governmental invasions. The instant case dealt with invasion of privacy by a private person.⁴³ The Supreme Court in recent times has made Article 21 of the Constitution enforceable against private persons.⁴⁴ However, it is submitted that this view is flawed as these decisions are *per incuriam*; because they consistently do not consider the five-judge bench decision of Supreme Court in the case of *Shrimathi Vidya Verma, through next friend R.V.S. Mani v. Shiv Narain Verma*⁴⁵

35 A.I.R. 1975 S.C. 1378.

36 A.I.R. 1963 S.C. 1295.

37 A.I.R. 1975 S.C. 1378.

38 A.I.R. 1995 S.C. 264.

39 A.I.R. 1963 S.C. 1295.

40 *Id.*

41 *R. Rajagopal*, A.I.R. 1995 S.C. 264, ¶ 14.

42 A.I.R. 1963 S.C. 1295.

43 This is in contradistinction to *Kharak Singh*, A.I.R. 1963 S.C. 1295 and *Gobind*, A.I.R. 1975 S.C. 1378 where governmental invasions were questioned.

44 *Bodhisattwa Gautam v. Subhra Chakraborty*, A.I.R. 1996 S.C. 922, ¶ 6; *Zee Telefilms Ltd. v. Union of India*, A.I.R. 2005 S.C. 2677, ¶ 28.

45 A.I.R. 1956 S.C. 108, ¶ 8 *relied on* P.D. Shamdasani v. Central Bank of India, A.I.R. 1952 S.C. 59. *See also* 2 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA – A CRITICAL COMMENTARY 1160 (4th ed. 1994).

wherein it was stated unequivocally that Article 21 is not enforceable against private persons. Therefore, even if it is *assumed* that the Right to Privacy existed under Article 21, it is not enforceable against private persons. Hence, the only remedy available in cases of invasions of privacy by private persons is a tort action for damages.

It is submitted that with respect to governmental invasions of privacy also the only remedy available is tort law. It is pertinent to note here that the Apex Court has held that Article 21 is the sole repository of the right to life and *personal liberty* against the State.⁴⁶ It can be inferred that the Apex Court has held that 'Right to Privacy' does not come under the ambit of 'right to personal liberty' or any other fundamental right.⁴⁷ Hence, as the Right to Privacy is not implicit under Article 21; the right under common law/tort action will survive even against governmental invasions.

The Supreme Court after the *R. Rajagopal case*⁴⁸ revisited the Right to Privacy in the *PUCCL case*.⁴⁹ In this case, the Supreme Court misconstrued the *Kharak Singh case*⁵⁰ and stated that the majority actually upheld the 'Right to Privacy'.⁵¹ It is submitted that this view is erroneous as it was categorically stated in the *Kharak Singh case*⁵² that the Right to Privacy is not a fundamental right.⁵³ The Supreme Court in this case also stated that under Article 17 of the International Covenant on Civil & Political Rights, 1966⁵⁴ conferred the Right to Privacy. However, the relevance of this international instrument was placed on the erroneous presumption that the Right to Privacy was a fundamental right. Hence, it is submitted that an implementation of Article 51(c)⁵⁵ of the Constitution read with Article 17 of the Covenant cannot create a 'Right to Privacy' which is directly contrary to municipal law.⁵⁶

46 *Additional District Magistrate, Jabalpur v. Shivakant Shukla*, A.I.R. 1976 S.C. 1207, ¶ 135 as per A.N. Ray, C.J. *Cf. Additional District Magistrate, Jabalpur*, A.I.R. 1976 S.C. 1207, ¶ 163 (H.R. Khanna, J., dissenting).

47 *Kharak Singh*, A.I.R. 1963 S.C. 1295, ¶ 21.

48 A.I.R. 1995 S.C. 264.

49 A.I.R. 1997 S.C. 568.

50 A.I.R. 1963 S.C. 1295.

51 *P.U.C.L. v. Union of India*, A.I.R. 1997 S.C. 568, ¶ 16.

52 A.I.R. 1963 S.C. 1295.

53 *Id.* at 1303, ¶ 20.

54 The Republic of India is a signatory to this international instrument and it has been further ratified by the Indian Parliament.

55 Art. 51(c) of the Constitution of India states as follows: "The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and".

56 *See Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461, ¶ 151 as per Sikri, C.J. *Cf. Additional District Magistrate, Jabalpur v. Shivakant Shukla*, A.I.R. 1976 S.C. 1207, ¶ 180 (H.R. Khanna, J., dissenting). In light of Article 141 of the Constitution of India, municipal law here can be interpreted to mean the law laid down in *Kharak Singh*, A.I.R. 1963 S.C. 1295.

In the recent case of *Sharda v. Dharmpal*,⁵⁷ a three-judge bench of the Supreme Court dealt with the Right to Privacy. In the instant case the previous decisions were interpreted accurately by the Supreme Court;⁵⁸ however the Apex Court, incredibly, overlooked the doctrine of *stare decisis* and followed the later decisions.

It is submitted that a ‘case-by-case development’ of the Right to Privacy as envisioned by Mathew, J. was a case-by-case development in accordance with the principle of *stare decisis*.⁵⁹ Moreover, once the Apex Court lays down the law, reconsideration of that law on new grounds is not open to the court unless it refers the matter to a larger bench.⁶⁰ Therefore, for the ‘fundamental Right to Privacy’ to truly become the law of the land either a seven-judge bench of the Supreme Court is to be constituted in favour of establishing the Right to Privacy or the recommendation of Article 21-B⁶¹ of the National Commission to Review the Working of the Constitution⁶² needs to be adopted by the Parliament to bring about a constitutional amendment⁶³.

57 A.I.R. 2003 S.C. 3450.

58 *Id.*, ¶ 55-57.

59 K.K. Mathew, J. was part of a three-judge bench in *John Martin v. State of W.B.*, A.I.R. 1975 S.C. 775, ¶ 3, wherein in the context of *A. K. Gopalan v. State of Madras*, [1950] S.C.R. 88 it was stated that: “*we do not think that these observations made by two out of six learned Judges can be regarded as laying down the law on the point.*” Therefore a logical extension to the *Kharak Singh case*, A.I.R. 1963 S.C. 1295 would render the minority opinion of K. Subba Rao, J. redundant. (italics supplied)

60 *D.K. Yadav v. J.M.A. Industries Ltd.*, (1993) 3 S.C.C. 259. *See also* N.K. Jayakumar, *supra* note, at 342.

61 “Art. 21-B. - (1) Every person has a right to respect his private and family life, his home and his correspondence.

(2) Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions on the exercise of the right conferred in clause (1), in the interests of security of the State, public safety or for the prevention of disorder or crime, or for the protection of health or morals, or for the protection of the rights and freedoms of others.”

62 1, NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION, REPORT 62 (2002).

63 The law laid down by the Supreme Court can be whittled down by a subsequent legislative amendment: *Sakal Deep Sahai Srivastava v. Union of India*, A.I.R. 1974 S.C. 338, 341 at ; *Baliram Waman Hiray v. Justice B. Lentin*, A.I.R. 1988 S.C. 2267.

**UNDERSTANDING CONSTITUTIONAL SECULARISM IN
'FARAWAY PLACES': SOME REMARKS ON GARY
JACOBSON'S *THE WHEEL OF LAW****

*Upendra Baxi***

§ The Promise and the Peril of Comparative Constitutional Studies

As is generally well-known, the tasks of comparison are neither easy nor ever fully done. *What to compare and how and why* remain difficult questions in the larger sphere of comparative law. The rather nascent tradition of doing comparative constitutional studies (COCOS) revives these concerns in some new ways.

COCOS shares with the spheres of comparative law generally, concerns about historical method (the choice of telling stories—doing microhistory or metahistory), ways of periodization, and the unit of comparison (that is whether one focuses on the history of ideas or mentalities, or of political and social action, or further the making of institutional and popular cultures¹.) It also shares more generally the problem of hegemonic intent resulting often in imposition of law, carrying large potential side-effects. Further, the virtue of eternal reflexive vigilance is difficult to cultivate even for the best of comparativists, given the fact they, as also for the lesser comparative beings, remain encased within traditions of sensibility shaped by religion, culture, and language. The moderation of the hegemonic intent in fashioning comparative narratives is never an easy task and the discourse concerning the universal and the particular does not provide any safe harbour for comparativist odyssey.

COCOS confront in addition different orders of difficulty. In the *first* place, the term 'constitution' signifies three different 'things.' I have named this elsewhere I terms of the three 'Cs': C1 standing for the constitutional texts, C2 for both the orders of official (constitutional 'law') and citizen interpretations (constitutional insurgencies); and C3 signifying 'constitutionalism' standing for distinct theories/ideologies, which shape as well as remain shaped by C1 and C2, which also shape these². Even within-

* Gary Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context*, 2003, Oxford University Press, New Delhi.

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1 See, Upendra Baxi, 'The Craft of Disinterested History: *Jury Trials and Plea Bargaining: A True History* by Mike McConville and Chester L. Mirsky' *Kings College Law Journal* 17:1, 155-165 (2006.)

2 See, Upendra Baxi 'Constitutionalism as a Site for State Formative Practices' *Cardozo Law Review* 21, 1183-1210 (2000.)

nation studies of constitutions at work remain besieged by the dialects and dialectics of the three Cs; for the practices of COCOS these present an immensely difficult realm.

Second, COCOS address publics or communication constituencies. The first constituency of course comprises the charmed circle of COCOS specialists. The second public may be designated as the official publics. These remain heterogenous, indeed. Because I find the term 'elected public officials' too restrictive (for example this does not typically include appellate as well as apex Justices) I here suggest that a more helpful distinction is between constitutional *oath taking* public officials and the *oathless* ones, that is others who do not swear affirm the obligation to uphold the constitution, without fear or favour. The latter constitute a vast series of publics: the so-called 'civil servants' or more accurately uncivil masters (because for a large body of Indian people these are neither truly 'civil' nor 'servants'), the varieties of legal professionals, the owners, operators, and independent contractors (public intellectuals writing for the press or regular participants in TV talk-shows) of the print and electronic mass media, social and human rights activist networks, and some self-styled custodians of ongoing traditions of legal education and research, including the inter-disciplinary communities of social and cultural sciences concerned with wider issues of symbolization of law in society. These may be described as the unofficial bodies of deliberative publics via the Rawlsian notion of constitutional 'public reason,' or in Habermasian terms as exploiting the 'discursive community will formation.' One way then of understanding constitutional formations invites sustained grasp of deliberative/reflexive patterns of interaction, or the moral trafficking in ideas between the deliberative official and non-official publics.

All this in turn offers a tangled web through which constitutional normativity stands further socialized. Put another way, constitutional acts, performances, and even interpretive feats constitute new forms of political desire, even utopic imagination, concerning constitutional futures. We ought to pause to note at least four consequences. First, the multiplex process of commoditization via news/views production of constitutional forms of actions via the mass media promoting the folklore of constitutionalisms; second, forms of NGO-ization of constitutions; third, as offering contentious registers of judgements concerning the success or failure of constitutions put to work or sleep as the case may be; and fourth, as providing ambivalent sites of critical judgement concerning liberal and less liberal, even illiberal practices of constitutionalism.

This last, in my considered view, is a distinction of *degree* rather than of *kind* if only because the so-called *liberal* constitutionalism capaciously

accommodates toleration of the intolerable *illiberal* practices. The United States constitutionalism during the Cold War and now under the aegis of the ‘war on terror’ furnishes one example; the routinization of the exceptional state in the Indian instance (for example by the massive constitutionalization of dragnet security legislations under Article 22, which mocks the precious assurances of Article 21 rights to life and liberty.³) In saying this, I do not wish to gainsay some residuary legatees of the Third Reich constitutional ‘paradigms’ of military constitutionalisms in the Global South; rather, I insist from the perspectives of subaltern constitutionalism that the normative distinctions between liberal and illiberal constitutional forms furnish partial and ideologically incomplete narratives⁴. I wish to go so far as to suggest that in a grounded subaltern COCOS perspective all contemporary state formations constitute ‘failed states.’ Any elaboration of this thematic remains the task for another day!

Rarely, do COCOS seek to address counter-publics, specially the militant counter-publics which deploy collective political violence as an act of political communication which interrogate entrenched iniquitous systems of domination legitimated by the constitutionalism/good governance, and the rule of law talk/discourse. Understandably, the COCOS traditions play safe, even as rebels with a cause confront forms of *predatory* constitutionalism. Probably, Professor William Dicey in the late 19th century summated this best when he urged that those who govern should never make the mistake of ‘weighing the butcher’s meat in diamond scales.’ The sufferings of the rightless peoples everywhere remain that meat which ought not to contaminate the finely calibrated scales of constitutional rights jurisprudence!

Third, by now a thriving law and economics type genre, which entails the application of statistical and econometric theoretic models in the tasks of comparing constitutional formats at cross-national levels, makes a pertinent contribution⁵. However, most COCOS studies remain encased in qualitative rather than quantitative comparison. How may each tradition learn from the other is an important question, which I do not pursue in this essay save saying that this divide itself remains rather difficult to bridge if only because the everyday experience of life under constitutionalism is not just a domain of reason but also a realm of politics of passion .

3 See K.G. Kannabiran, *Wages of Impunity* (Hyderabad, Orient Longman, 2003).

4 See concerning the notion of subaltern constitutionalism, Upendra Baxi, ‘The Promise and Peril of Transcendental Jurisprudence: Justice Krishna Iyer’s Combat with the Production of Rightlessness in India’ in C. Raj Kumar and K. Chockalingam (ed.) *Human Rights, Justice, & Constitutional Empowerment* 3-25 (Delhi, Oxford University Press, 2007.)

5 See, Torsten Persson and Guido Tabellini, *The Economic Effects of Constitutions* (2003; Cambridge, The MIT Press); and Darron Acemoglu, ‘Constitutions, Politics, and Economics: A Review Essay on Persson and Tabellini...’ *Journal of Economic Literature* 4: 1025-1048 (2005.)

Fourth, COCOS, perhaps more than other realms of comparative law studies need to maintain claims of ontologically robust constitutional identity even amidst throes of constant transformation. Both permanence and flux need to be simultaneously addressed. The aspect of permanence is often seized by identification of C3 genres, for example summed up by terms such as ‘liberal,’ ‘socialist,’ ‘postcolonial,’ ‘postsocialist,’ ‘supranational,’ ‘revolutionary,’ and ‘transitional’ constitutionalisms. This last category is the puzzling because, truth to say, all constitutions remain *transitional*. They remain always work-in-progress, despite some fantastic claims of their identity. Constitutional development everywhere remains always in a state of crises in terms of respect for the values, norms, and standards of human rights and of responsibility for tasks of re-distributive justice.

In this perspective, I know of *no* actually existing constitution that in this sense is *not* transitional because all nations emerge on the contemporary world historic theatre as *equal strangers* to the tasks of promotion and protection of the internationally enunciated human rights norms and standards⁶. If so, the COCOS enterprise may have prospect of some success when fully informed by a spirit of humility in the task of informed comparative judgement concerning constitutional development as well as failure.

The Wheel of Law makes a noteworthy contribution to the emergent COCOS tradition. Its principal intendment is to foster cross-cultural understanding of constitutions as work-in-progress. This study also brings home the utility and value of thematic cross-cultural comparison; through the prism of constitutional secularism, it traces the complexity of constitutional development and change across India, Israel, and the United States. Further, because ‘constitutionalism in faraway places seems finally to have come of age among all kinds of scholars of public law,’ the claims of American exceptionalism, and I may equally add the comparative European disregard, become problematic. Jacobsohn, additionally, as we note briefly in the next section, redefines the COCOS mission both as a new pedagogy and high theory.

The Wheel of Law revisits secularism as an essentiality contested concept. It traces its some distinctive genealogies, or more precisely the iconography of Indian secularism. It complicates the difficult notion of constitutional politics in a comparative setting. It shows fully the competitive production of the ‘truths’ about constitutional secularism and the ways in which

6 The standard narrative device that distinguishes changes *in* from changes *of* constitutions does not quite help. See Sanford Levinson, ‘How Many Times Has the United States Constitution Been Amended?’ in Sanford Levinson, Ed., *Responding to Imperfection: The Theory and practice of Constitutional Amendment*, 13-36 (1995; Princeton, Princeton University Press); Upendra Baxi, *Courage, Craft, and Contention: The Indian Supreme Court in the mid-Eighties* (1985; Bombay, N.M. Tripathi.)

adjudicatory power prevails over other forms of state power and authority. Further, as I read his work, Jacobsohn rather fully disrupts (to invoke here the Prince of Demark) the 'stale, weary and unprofitable uses' of the American scholarly discourse concerning the 'counter-majoritarian' character of 'judicial review' power and process. As Jacobsohn brings home in this imaginative as well as painstaking exploration, the 'politics' of constitutional interpretation emerges as a *sword* and a *shield*. If in certain historic conjunctures, C2 combats corruption of the first principles that seek to justify the unjustifiable, that is, the practices of constitutional politics which are directed to reproduce human rightlessness and promote inequity, in certain other situations C2 defers to expedient regime oriented negotiation of rights to freedom of conscience and religion⁷.

§ Iconography of Indian Secularism

Constitutions are not mere assemblages of words. They also thrive on symbolic representations: the flag, the anthem and the linkages between 'nature' and 'nation' as provided by laws protecting national birds, animals, rivers, and mountains. Jacobsohn looks at the imageries of constitutional identity as symbolized by various national flags, which provide passional forms of loyalty to the idea of a nation-peoples and serve also as a marker of the 'membership in the national community' (p.9.) Jacobsohn here mediates on the colours and figuration in the Indian national flag; if the colours signify 'the unfinished business of national integration. (p.6), the figuration of the Ashoka wheel convey in more determinate sense ' a message about the conceptualization of secular democracy that is significantly different from the approaches intimated by the American and Israeli flags'(p.7.) He thus strives to offer a distinct message: COCOS ought to attend seriously to constitutional iconography placed in service of 'comparative reflection on the alternative experience of other constitutional systems' (p.8.) Jacobsohn, this context, as also in a comparative focus, suggests that one way to understand and even secure Indian constitutional secularism is to mediate on aspects of constitutional iconography.

However, it is the Ashoka wheel that engages him the most. Upon independence, the search begins for the replacement of Mahatma Gandhi's *charkha* or the spinning wheel which appeared in the flag of the Indian National Congress during the freedom struggle (p.6.) A crucial question thus arises: what led to the search for an alternate icon? Perhaps, the *charkha* was

⁷ The Indian Supreme Court has thus upheld anti-conversion state legislations that criminalize conversion by 'force' and 'fraud.' Proselytizing religious practices that appeal to divine displeasure for refusal to convert would thus amount to 'force,' Appeals to Hell and Heaven would constitute 'fraud' because there is no forensic way to site and prove the existence of these entities!

too humble a symbol to convey this first twentieth century inaugural postcolonial state⁸; perhaps, it did not accord with the Nehruvian vision of Indian economic development; perhaps too it may have been thought that the nation may not be symbolized after all by a party flag.

In any event, the Ashoka wheel as a 'wheel of law' when especially situated in the Sarnath configuration, does not logically carry the interpretation associated with philosopher Radhakrishnan in whose view the law as *dharma* signifies a kind of virtue-ethics, a *dharma* that is 'constantly moving,' reminding that 'there is life in movement' (p.7.) It is however not self-evident that the wheel should represent the law/*dharma*.

On standard and readily available and official and other Internet descriptions⁹, the Sarnath icon consists of 'four lions, standing back to back, mounted on an abacus with a frieze carrying sculptures in high relief of an elephant, a galloping horse, a bull and a lion separated by intervening wheels over a bell-shaped lotus. The wheel appears in relief in the centre of the abacus with a bull on right and a horse on left and the outlines of other wheels on extreme right and left. The bell-shaped lotus has been omitted.' And the fourth lion remains invisible. How may one fully grasp the reduction of all these elements into a representation of the wheel as the wheel of law/*dharma*? May not the wheel equally yield other interpretive readings — for example, the wheel of *dukkha*, the eternal recurrence of suffering, or wheel of God that in Rabindranath Tagore's famous aphorism that grinds exceedingly slowly but it grinds fine! One wonders whether there exists any tradition of subaltern iconography that may offer us different significations of the wheel. The Mahatma's *charkhas*, as well as the potter's wheel, perhaps indicate different ways of some proletarian approaches to understanding the wheel. All this entails re-visitation of constitutional iconography. I remain singularly untrained and incompetent to explore alternate readings.

What interests Jacobsohn, however, is the question: what kind of law/*dharma* that the wheel may signify? Jacobsohn recalls and reiterates the Ashokan conception of *dharma* as a 'concept intended for secular teaching,' 'directed towards amelioration of social injustices embedded in a status quo of religiously based hierarchy' (p.8.) But this does not quite tell us why 'secular teaching' may not merely subvert hierarchy but also reinforce it¹⁰.

8 I need to put the matter thus way because many American students and colleagues insist that theirs was the first world historic postcolonial constitution!

9 For a representation and detailed description of the Ashoka wheel see http://en.wikipedia.org/wiki/Dharma_chakra, http://en.wikipedia.org/wiki/Ashoka_Pillar (last visited 27th March 2007).

10 A monumental example is offered by the Indian constitution itself when it speaks variously of the 'scheduled castes,' thus creating all sorts of new constitutional caste orderings in the pursuit of complex and contradictory affirmative action programmes.

The wheel of law even as it rotates on the axes of indissoluble bounds of the 'spiritual and temporal domains' may in the end help to develop a positive sense of national identity (p.285.) But as concerns the 'underlying premise of ameliorative secularism' that strives to 'reduce inequalities' and to promote 'just social order' (p. 287) the wheel of law may perhaps more aptly be understood as a roulette wheel! Its constant motion rewards more often than not the constitutional *haves* rather than the *have-nots*¹¹. At the same moment, this rotational movement also swings the fortunes of state neutrality obligations. The wheel then shapes an immense multiplicity into a singularity of constitutional secularism, in itself subject to different rhythms of historic time, both the accelerated catastrophic political time and the glacial quotidian time both of competitive party politics and reasoned adjudicative interpretation.

§ Understanding Theory and Practice of Secularism

Two COCOS pertinent messages follow from this important work. First, cross-cultural constitutional comparison entails considerable conceptual innovation and second comparative learning best occurs when the models are constantly set against the realities of political, economic, and social development.

Jacobsohn invites us to fully consider the idea of secular constitution as signifying a 'polity where there exists a genuine commitment to religious freedom that is manifest in the legal and political safeguards put in place to enforce that commitment' (p.28.) While this enables us to distinguish a non-secular from secular constitutionalism, within the latter form neither the 'commitment' nor the 'safeguards' emerge as self-evident and deciphering them requires recourse to indicators of the 'consequential dimension of religiosity (pp.28-29) Further ideal-type construction yields different models of constitutional secularism. Chapter 3 offers three models: the 'visionary' (Israel) 'assimilative' (the United States) and the 'ameliorative' (India.) Jacobsohn distinguishes the Turkish context of 'reformist secularism' (p.107, fn. 131.¹²) Recourse to high political/juristic theory concerning the place and role of autonomous judicial interpretation becomes necessary because secularism entails normative interpretation and even definitional re-articulation. A considerable merit of this work is the re-visitation of John Rawls's germinal notions of 'constitutional essentials' and the doctrine of 'public reason (see, Chapters Seven and Eight.)

11 See for this distinction, Upendra Baxi, 'Violence, Constitutionalism, and Struggle' or How to avoid Being a *Mahahmoorkha* in S.P. Sathe and Sathya Narayan, ed., *Liberty, Equality, and Justice: Struggles for a New Social Order* 9-27 (2003; Lucknow, Eastern Book Co.)

12 Jacobsohn also refers somewhat approvingly to 'positive secularism' (p.151.) All this makes the notion of ameliorative secularism a trifle unwieldy, perhaps?

A COCOS theorist going beyond the Euroamerican shores confronts at least two related hurdles. One is that even eminent Euroamerican political theory producers remain somewhat insular; the frameworks they offer to understand the world rarely address histories of South constitutionalisms. Second, while the South scholarship rightly decries the latent or manifest hegemonic intent or the universalizing effect of Euroamerican theory, it has little demonstrable to offer by way of an alternate and explicit way of theorizing¹³.

Jacobsohn offers some ways out of this *impasse*. He suggests, first, some India-based ways of interrogating the doctrine of constitutional essentials; second, at the same moment, he asks us to consider ways of interactive understanding between high liberal theory and the somewhat hard and parlous experience of the Indian, and Israeli, and American adjudicatory experience in construction of secularism. This is indeed a brilliant feat at once constantly alerting Euroamerican theory producers against their insularity and urging the South decision-makers and scholarship to avoid de-privileging approaches to ‘theory’ as a hegemonic contagion. Both sides have much to learn from each other and this defines the COCOS mission. I may only urge the reader to fully ponder this high order of Jacobsohn achievement¹⁴. Overall, I endorse the observation: ‘If under the rubric of constitutional essentials in India are not to be found principles regulating basic matters of social and economic equality, then much of the history of the Indian constitution will need to be rewritten’ (p.171)

Further, the importance of historical narrative, experience, and imagination may not be gainsaid. Thus both the United States and Israel stand constitute ‘immigrant societies’ but vast differences inform their historic and cultural composition. Terms like ‘multi-ethnic,’ ‘multi-religious,’ ‘multicultural’ that may be used for many societies; these descriptions remain superficially useful but also profoundly deceptive. Thus, while the United States remains admittedly multi-religious, minority religious traditions there never acquire either a ‘formidable presence’ or a ‘substantial minority of American people’ confronting the ‘vast majority’ ‘with a rival constitutive culture’ (p.105.) Jacobsohn goes so far as to say that the American C1, and even C2, would have *otherwise* followed the Indian constitutional provisions.

13 Of course, subaltern, feminist, and postcolonial approaches to constitutionalism exist and some doctrinal commentation on law contains elements of an implicit theory. The question is how far all this may provide a normative/ philosophical perspective on understanding C3? To what extent do these provide a general theory of and about constitutionalism, here understood as a complex relationship between the key ideas of governance, rights, development, and justice?

14 This work does not merely address the re-working of the ‘liberal’ tradition by Rawls; it is replete with many useful asides concerning contributions of Charles Taylor, Will Kyamicka, though Jurgen Habermas remain conspicuous by the lack of reference.

Very few human societies are monocultural. If the pluralities sought to be conveyed by the prefix ‘multi’ is to have any pertinent meaning at all, it lies in an opposition to a ‘universalist political creed’ that separates citizenship (in the words of Michael Walzer) from ‘every sort of particularism’ and justifies a liberal state which remains ‘nationally, ethnically, racially, and religiously neutral’ (p.65.)

The point surely is not that state neutrality in the state–religion nexus is unimportant but that in these three units of comparison it necessarily assumes some staggeringly diverse forms. No ‘comparison’ may ignore some specific cultural sedimentation of state power. The question then is, from a COCOS perspective, how high theory may keep good company with lived social histories. Towards this end of grasping fractured normative histories of the idea of constitutional secularism, Jacobsohn offers a magisterial contribution.

§ The Indian Story

Unlike most narratives of Indian constitutional secularism, Jacobsohn does not detail or distress us with the decisional law concerning the distinction between religious belief and practice, denominational rights, idols and shrines as property, and the ‘dangerous supplement’ (to evoke Derrida) of gender equality in India’s major religious traditions. The three sub-plots of the Indian story that interest Jacobsohn the most are the Uniform Civil Code, the *Bommai* decision, and the emergence of ‘Hindutva’ as a ‘way of life.’ In terms of a recent distinction that I draw, Jacobsohn is more directly concerned with governance oriented secularism (GOS) rather than rights oriented secularism (ROS.¹⁵)

ROS seeks to make the best complete sense of the normative proclamation of the right to freedom of conscience and to religious belief and practice. The elaboration of the ROS dominates much of the Indian Supreme Court’s work for its three decades; it also entails complex interface between rights to religion and other related rights, such as the claims over the near-absolute Article 30 minority rights to establish and administer educational institutions of their own choice, claims to immunity from use of public revenues for renovation of religious shrines or celebrations of historic memory of inaugural figures of religious traditions, contestation over definitions of public order as a ground of regulating associational and movement rights, and claims concerning property rights. ROS signify, overall, claims and contentions about the integrity of rights-structures.

15 See, U. Baxi, ‘Savarkar and the Supreme Court? —Comment on R. Sen, *Legalizing Religion*’ East-West centre, Monograph Series (Washington D.C., in press, March, 2007.)

In contrast, GOS seeks to codify the limits of political practices that craftily appeal to religion as a resource for the acquisition, exercise, and management of political power. GOS no doubt remains related to ROS; but the main remains focussed on the preservation of the integrity of secular governance structures and processes. The GOS formations explicitly remain subject to adjudicatory surveillance. The distinction needs to be developed much further. However, it may be said that the spirit and scope of such surveillance over governance practices [see Chapters Five, Six, and a part Chapter Four (pp.104-121)] provide a principal focus.

I do not, for reasons of space, here examine Jacobsohn's analysis of the Uniform Civil Code debates save to note that this stands here reframed in terms of distributional questions: 'Who gets what, when, and how?' The issue then, in terms familiarised as well as probelmatized so much by Nancy Fraser, concerns scrupulous forms of avoidance of both *misrecognition* and *misdistribution*¹⁶. For Jacobsohn, the principal issue is not the framing of the Code itself but rather how this 'might affect achievement of ameliorative secular aspirations' (p.110.) These aspirations are encased no doubt in "the complicated hierarchies of age, gender and caste" taken by almost everyone at their face value (p.119.)

Matters do of course get further complicated by considerations of 'social comity' (p.105) directed at 'preserving political space for religious identity' (p.108.) The judicial forfeiture of this complexity moves our otherwise reticent author to a sharp criticism of Justice Kuldeep Singh's remarks in *Sarla Mugdal* reiterating the need for a Code; what is lamentable, says Jacobsohn, is not this strong commendation but rather 'a serious misconstruction of Article 44 that bespeaks a broader failure of imagination regarding how one might conceptualize legal uniformity in the Indian context' (p.116.) Far from envisaging either possibility that Article 44 is 'unrealizable' and 'unenforceable,' Jacobsohn suggests a third way that 'does not expend political capital in seeking to divest religion from social relations, but rather deploys it to mandate uniform standards without requiring uniform behaviour' (p. 119.¹⁷) Incidentally, I cannot let go this theme without inviting your attention to some concerns for judicial political correctness variously raised by Soli Sorabjee and Tahir Mohamed (pp.114-115) and Jacobsohn's rather spirited protest against the imposition of the 'veil of silence' (p.110). I like and endorse Jacobsohn's approach to Article 44 as inviting the Supreme

16 Nancy Fraser, 'From Redistribution to Recognition?: Dilemmas of Justice in a Post-socialist Age,' 1 *New Left Review* 212 (1995); and 'Social Justice in the Age of Identity Politics,' in Nancy Fraser and Axel Honneth, *Redistribution or Recognition?: A Political-Philosophical Exchange* 7-109 (2003, London, Verso)

17 Drawing here of course upon the high authority of the lamented Professor S.P. Sathé.

Court to ‘function as an official *constitutional gladfly*’ (p.111, emphasis added.)

If the UCC clearly concerns GOS, so does the *Bommai* decision, which dealt not with any specific constellation of individual or group rights to freedom of conscience or religion but rather with the issue of secularity of governance practices. No doubt the context was catastrophic not just in the sense of the demolition of the Babri Masjid and the carnage that followed but also in the sense that some BJP led state governments and the Party itself proceeded with some abundant and insidious justifications for this. The dismissal of three BJP governments in the state and the imposition of the President’s Rule were upheld by the Supreme Court on the ground of their violation of ‘secularism’ as the essential feature of the basic structure of the Constitution. The issue posed in terms of conflict between ‘democracy’ and ‘secularism’—both essential features—was appropriately handled ‘at least’ by some of the Justices who “were inclined to comprehend democracy and secularism as conceptually intertwined, in effect rejecting a fundamentally process-based definition of ‘the provisions of this Constitution’ ” in Article 356 (pp. 134-135.) Further, Jacobsohn writes approvingly of the *Bommai* linkage of the basic structure doctrine with the working of Article 356 (p.143.)

While I broadly agree with this last observation, even as votary of judicial activism Indian-style, I remain uncomfortable with the manner in which the *Kesavananda* ruling now stands extended. The basic structure doctrine extends *only* to judicial review of constitutional amendments; the *Bommai* Court was clearly bound by this as well as by the minimal deference to the doctrine of precedent which requires judicial deference by smaller Benches to a Full Court decision. Article 356 is a *constitutional*, not by any means a *constituent*, power. I believe that the eminent Justices had ample authoritative legal materials before them to have arrived at much the same result, without claiming the high authority of that doctrine; since *Bommai* even a more fantastic recourse to the doctrine converts it into a canon of constitutional construction and even statutory interpretation! I essay a fuller review of these trends elsewhere¹⁸ .

Perhaps, more to the point is Jacobsohn’s elaborate analysis of judicial understanding of the *Bommai* brand equity ‘secularism’ (pp. 145-160.) This should be compulsory reading for all COCOS community because at stake remain ‘the long-term consequences of the unchallenged ethnoreligious nationalism on the prospects of social reform and reconstruction’ (p.134.)¹⁹

18 See Upendra Baxi, ‘The Routinization of the Basic Structure Doctrine With and Since *Bommai*,’ being a paper presented to S.P. Sathe first death Anniversary, ILS Law College, Pune, March 8-11, 2007.

19 In this sense, *Bommai* invites comparison with the 2003 European Court of Human Rights decision in *Refah Partis (The Welfare Party) and other v. Turkey*.

The so-called *Hindutva* judgment manifests yet another domain of GOS. No doubt, there was involved the question of the individual claim to freedom of speech and expression in electoral political campaigns in the face of a statutory prohibition of appeals to religion, which stand described as 'corrupt practice.' The brilliance of Jacobsohn's contribution lies in meditations on 'corruption.' This political evil has many faces. Quoting Dobel, Jacobsohn reminds us that 'systematic corruption' serves a source of 'certain patterns of inequality' (p. 163, fn. 3.) Evoking the difficult notion of Dworkin that struggles to speak to us of 'law as integrity' Jacobsohn also suggests that 'corruption, in short, represents the loss of integrity' (p. 166, fn. 9.) Echoing Montesquieu, he says that corruption violates the 'constitutive commitments that establish a polity's constitutional identity' (p.165.)

All this, put together, ought to guide a COCOS type understanding of systemic political corruption. More specifically, it helps elevate the more mundane electoral law judicial interpretation to some lofty heights. The *Prabhoo* decision is significant precisely because it scales these heights by establishing some normative linkages between democracy and secularism' (see the quote from the decision at p. 167.) In the Court-bashing that followed a decision misread and miscalled as the *Hindutva* decision this dimension stands near completely ignored and surely scrupulous Indian constitutionalists ought to revisit this in fullness.

GOS again becomes pertinent in *Prabhoo*. I invite you to cheerfully study Jacobsohn's exegesis (especially, pp.163-202). This brings to a full view the difficulties of constitutional justicing in less ontologically robust constitutionalisms than characterised by the American First Amendment. I have yet to be convinced about the indictment of judicial 'conflation between Hinduism and Hindutva' (pp. 203-209) for the very same reasons that lead Jacobsohn to cite my *Indian Express* article on the decision in the context of my other related writings (pp. 233-234.) I continue to think that too much is made of Brother Verma's references to *Hindutva* as 'way of life.' It was neither a kiss of life to the *Hindutva* forces nor a kiss of death for Indian constitutional secularism; rather, the issue concerned invocation of differently constituted Utopias during the campaign speech-making; how may Justices and legislators prohibit freedom of speech and expression as forms of constitutionally dreaded Dystopia²⁰? The issue remains: how may appeals to constitutional secularism remain subject to the constitutional discipline of the rights to freedom of speech and expression, association and movement? Put another way, when as a matter of principle may Justices draw bright lines between the utopic and the dystopic?

²⁰ Raising this question is certainly not to ally myself with the highly partisan interrogations of Arun Shourie, profusely, and fortunately dismissively, cited by Jacobsohn on this count.

There is of course no question that the political right everywhere appropriates the 'liberal' discourse to its own distinctive 'undemocratic' ends. One may say that the doctrine of basic structure remains crucial as setting standards for judging the issue of appropriation and *The Wheel of Law*, overall, provides a devastatingly accurate understanding of how this actually happens in the Indian case. In this, it remains a safe companion in decoding the crises of Indian constitutional secularism in some comparative settings. It, overall, constitutes a remarkable COCOS genre.

I must conclude by a small reference to some remarkable pedagogic turns and twists in this text. Readers are constantly asked to switch scenarios (see especially pp.125-30.) They are afforded no safe harbour for understanding 'secularism' in comparative contexts (Chapter Seven.) Most startling remains the device of 'chronological manipulation' (p. 259) which furnishes in the Indian context a most exciting tool for 'teaching' constitutional secularism by raising the question: what if the sequences of judicial enunciation in these three GOS cases here (including for this purpose the Ayodhya decisions) studied were to be contingently re-ordered?

The *Wheel of Law* is indeed a *rare* COCOS treatise. In the Indian context, it signifies the need for transition from genocidal politics to a regime of relatively non-violent transformative state formative practices. In this, it is a call for *résistance* to the *Modi-fication* of Indian constitution and constitutional secularism imaginers²¹. Surely, this study remains especially crucial for the nascent COCOS subaltern Indian constitutional scholarship.

21 The reference here is to Narendra Modi Gujarat 2002 catastrophic political management. See Upendra Baxi, 'The Gujarat Catastrophe: Notes on Reading Politics as Democidal Rape Culture,' in Kalpana Kannabiran (ed.) *The Violence of Normal Times: Essays on Women's Lived Realities*. 332-384 (New Delhi: Women Unlimited in association with Kali for Women)

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