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NALSAR UNIVERSITY OF LAW

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Prof. (Dr.) Veer Singh
Vice-Chancellor

Vice Chancellor's Message

It gives me great pleasure to present the fourth volume of the Indian Journal of Constitutional Law, a publication conceived by the Constitutional Law Society, NALSAR, and published by it in collaboration with the M.K. Nambyar SAARCLAW Chair in Comparative Constitutional Studies. The Constitutional Law Society is an initiative of the students of NALSAR, with the goal of promoting interest in the field of Constitutional Law through varied activities which include lectures by eminent scholars, discussions and competitions. The Journal was conceived in 2006 with the aim of making a lasting contribution to Constitutional Law Scholarship and remedying the lack of authoritative academic writing on the same.

The Journal is the first of its kind in India, the only Journal devoted wholly to the study and analysis of Indian and Comparative Constitutional issues. Its previous editions have been a resounding success: trendsetters, both in terms of their significance to the field of study as well as the direction they provide for future initiatives. The Journal, now in its fourth year of publication, strives to emulate as well as further the heights attained by the inaugural issue released in 2007, which was furthered by the second and third volumes in 2008 and 2009.

I have no doubt that the fourth volume of the Journal, which includes contributions from scholars across the globe, covering a wide range of issues, will live up to the high standards set by the previous volumes and will prove invaluable to academics and practitioners alike. I wish the Journal and the Board of Editors 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 sincere gratitude to Mr. K.K. Venugopal, Senior Advocate, Supreme Court of India, the M.K. Nambyar SAARCLAW Charitable Trust and Professor Upendra Baxi, Chair-Professor, M.K. Nambyar SAARCLAW Chair in Comparative Constitutional Studies for wholeheartedly supporting this student initiative.

Prof. (Dr.) Veer Singh
VICE-CHANCELLOR

Editorial

The Indian Constitution never ceases to surprise. Given that its remarkable length was sought to provide for extensive certainty as to its framers' intentions, the challenges it has posed to legal and political structures in the country year after year, for over sixty years has given constitutional scholars much to grapple with. Scholarship in Indian Constitutional Law has had the opportunity, on occasion, to be informed by jurisprudence from other jurisdictions. This system is so enormous that it is not surprising to encounter constitutional questions that come up for interpretation for the first time since its adoption. In attempting to understand the dynamics of many of these issues, this Edition of *The Indian Journal of Constitutional Law* will present a microcosm of a broad spectrum of challenges faced by the Indian legal and political set-up under this Constitution.

Since the release of the first edition of the Journal in 2007, it has grown substantially and acquired a reputation befitting the only Comparative Constitutional law journal in the subcontinent. Over the past few years, we have had the privilege of being associated with some of the most eminent scholars in these fields of jurisprudence and practice, forged through the tireless efforts of our Editorial team and the guidance of our mentors on the Advisory Board. This association is reflected through the writings of various scholars from various parts of the world, who have contributed remarkably to scholarship in Constitutional law through this Journal. This Edition of the Journal follows suit by presenting a very arrestive line-up of scholarship on a wide array of issues.

The Editorial, in the first part, seeks to provide a capsule of the raging debates surrounding developments in constitutional law and a synopsis of the important decisions of the Courts in India, which significantly impacted such development. In the second part, we will provide a glimpse of the contributions to this Edition of the Journal and in the concluding part, the Editorial team would like to express its sincere gratitude and appreciation for the support we have received from several quarters in releasing this Journal.

Significant Developments in Constitutional Law 2009-10

The year 2010 has been a spectator to some of the most interesting issues in constitutional law in the country. It becomes necessary to examine these, particularly keeping in mind the way in which they informed the contours of our constitutional setup.

The sphere of reservations and affirmative action is a constitutional field that has invited much debate and discourse during the formation of constitution and since, attracting much deliberation over both the legitimacy and the quantum of reservations. This debate began right at the beginning of 2010 with the Apex Court's ruling in *Rakesh Kumar v. Union of India*.[1] The target of reservation however, was not distributive justice through provisions for opportunities in education and employment but State action aimed at proportional political representation to members of Scheduled Tribes in areas formerly listed in the Fifth Schedule. The State interest served in providing for better opportunities in employment and higher education finds a compelling counter argument in favour of meritocracy. Reservations in favour of proportional political representation however serve a State interest very unlike those provided for under Articles 15(4) and 16(4) of the Constitution. While an affirmative action measure under these provisions of the Constitution is directed at upliftment of hitherto underprivileged sections of the society, reservation directed at political representation serves a State interest of inclusiveness. This distinction assumes an attractive significance when held against the backdrop of the classification of certain areas of the society into 'Scheduled Areas' and listed in the Fifth Schedule. These areas are so categorised owing to their relative isolation from the society resulting in a very unique culture and heritage that the Constitution makers sought to preserve. The ruling comes in response to a challenge to The Panchayats (Extension to the Scheduled Areas) Act, 1996. So while initially these areas were protected under the aegis of the Fifth Schedule, under the 1996 Act they were sought to be included in the political set-up and be made responsible for their own developmental needs through the *Panchayati Raj*. The constitutional vires of this Act was challenged as against two constitutional norms, first that the upper ceiling of 80% reservation in such areas for the tribal population was against the established upper limit of 50%; and secondly that the provision of reservation of the posts of Chairman and Vice-Chairman of the *Panchayat* in favour of tribals was void as being excessive and unreasonable. In an interesting twist to the reservation debate, the three judge bench presided by the then Chief Justice K.G. Balakrishnan drew an interesting distinction between the bases of State action under Articles 15(4) and 16(4) and the provision for political representation under Article 243M of the Constitution. While the former was directed at 'adequate' or 'proportional' representation of backward classes in the society, the latter was an instance of what the Court called 'compensatory discrimination'.

1 2010 (1) SCALE 281: (2010) 4 SCC 50.

The threshold of compensatory discrimination was much larger since the State interest served was much more important against the right of citizens to vote, which was merely a legal right. Accordingly, it wouldn't be limited by the constitutional norm of fifty percent as the upper limit , laid down by the 1993 Apex Court ruling in *Indira Sawhney v. Union of India*[2]. It is tempting to reflect on this ceiling of 50% and its bearing on the doctrine of substantive equality in the domain of rights jurisprudence. We have often come across characterisations of the approach of Articles 15 and 16 to this jurisprudence as being an *asymmetric anti-discrimination principle*. Essentially, notwithstanding that the normative approach to equality has been rather straightforward with guarantees of equality and equal protection, the approach of these two provisions permits affirmative action by the State. The resultant issue then is not regarding the validity of reservations *per se* but more about how the quantum of these reservations must be calibrated so as to forward the essence of equality in Article 14 of the Constitution. In July, a three judge bench of the Apex Court, again, found opportunity to subscribe to the view that the fifty percent limit could be circumvented as long as such State action was based on quantifiable data and was seen to forward the spirit of substantive equality. Here the Court was called upon to pronounce on the validity of two State legislations in Tamil Nadu[3] and Karnataka[4] permitting reservations in higher education and appointments in favour of backward classes to the extent of sixty nine percent and seventy three percent respectively.

In May 2010, the Supreme Court dealt with the *vires* of Companies (Second Amendment) Act, 2002, the challenge therein being to the constitution of the National Company Law Tribunal ('NCLT') under Article 323B of the Constitution. This challenge to the Act invited the Court to engage in an interesting discourse on the subject of separation of powers and the issues surrounding the over-burdened judiciary. While the Court upheld the validity of the Act for most parts, subjecting provisions dealing with the constitution of the tribunal to unconstitutionality under the doctrine of eclipse, certain points merit a discussion on whether the Court adopted the proper course in dealing with this challenge. To begin with, the competence of the parliament was sourced in a defective reading of Article 323B. It held that Article 323B which provided for the constitution of tribunals

2 (1992) Supp. (3) SCC 217.

3 The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and Appointment or Posts in Services under the State) Act, 1993.

4 Karnataka Scheduled Castes and Scheduled Tribes and Other Backward Classes (Reservation of Seats in Educational Institutions and Appointments or Posts in the Service under the State) Act, 1994.

was an inclusive and not exhaustive list and therefore the Parliament had a power to make laws for the constitution of the NCLT notwithstanding the fact that this provision of the Constitution does not specifically enumerate such a matter. However, while upholding the competence of the Parliament, the Court struck down certain provisions dealing with the constitution of the members of this tribunal for want of procedural propriety. Questioning the impact of short tenures, lack of judicial insight and provisions permitting administrative officers to function as members on lien, the Court laid an emphasis on procedural due process that has thus far rarely found such an application in Constitutional jurisprudence in India. The case is also significant for its explicit rejection of the basic structure doctrine as applied to ordinary law. Core fundamental values of the rule of law, independence of the judiciary and separation of powers were however identified as being part of the "essence of equality" as contained in the Constitution.

A much awaited ruling as regards the protection of Article 20(3) of the Constitution with respect to Narco Tests, brain mapping and polygraph tests was found in *Selvi v. State of Karnataka*[5]. This area of law was fraught with ambiguities with various high courts taking widely conflicting viewpoints on the validity of these tests when conducted against the consent of the accused. The Apex Court had reserved its ruling on the matter for over two years. While the results of these tests are *per se* inadmissible, the issue here was if the *Nandni Satpathy*[6] ruling, that extended the protection against self incrimination to beyond the trial stage to the investigation stages could be applied to such tests. Two lines of argument were taken before the Court. The first was that the incriminatory nature of such tests would not be known until the test is actually conducted on the accused and therefore it renders the protection inoperable. In making the applicability of the protection contingent on the result of the tests, this argument virtually strips the doctrine of self incrimination of all its potency. The second argument in this regard considers the State interests in protecting crime against the competing interests of the citizens' right and seeks to justify conducting such tests by tilting the balance in favour of law and order. The Apex Court in *Selvi* negated both these arguments and affirmed the protection to the accused as against any of these tests under the constitutional protections of Articles 20(3) and 21 of the Constitution.

The case, also highlighted India's International obligations in lieu of the UN Convention Against Other Cruel, Inhuman Punishment and

5 2010 (4) SCALE 690.
6 (1978) 2 SCC 424.

Degrading Treatment. Thus it also serves as necessary background to another significant development in the arena of legislation making - the Prevention Against Torture Bill. The Bill, which seeks to ratify the UN Convention was introduced in the Lok Sabha on April 26, 2010, and passed by on May 6. It came under significant criticism owing to the fact that the definition of 'torture' it provided was not in complete conformity with the Convention and consequently diluted the protection offered by the Act.

In *State of West Bengal v. Committee for Protection of Democratic Rights*[7], a five judge Bench of the Apex Court reaffirmed its position as the ultimate guardian of people's rights by asserting its powers of judicial review. This case debated on whether the Court can direct the Central Bureau of Investigation (CBI) to investigate a matter within a State's jurisdiction against the State's consent, answering in favour of such exercise of judicial review. Surprisingly, this judgment did not attract the kind of attention from the academia that it deserves. While there are many interesting facets to this ruling we shall briefly cull out the most significant of them. To begin with, the Court based the constitutional debate surrounding this question in the context of federalism. The scope of Article 21 of the Constitution was expanded first to take into its fold not only the rights of the accused but also the rights of the victim. Therefore, in a matter where there exist victims of incidents with, according to the court, *national and international ramifications*, it was upto the Court in the face of inaction or inefficiency of the Executive to grant relief to the victims. The Court's intervention by a direction to the CBI against the State government's consent however, not only strikes at the federal structure, but also against the theory of separation of powers. First, the Court justifies this intrusion into the federalism principle by reading Entry 2A of List I of the Seventh Schedule to include the CBI. This Entry is about the deployment of the armed forces of the Union in a State to quell disruptions of public order. It is unclear as to what has been the basis of such a reading since the CBI is neither an *armed force* under this Entry nor is there any particular disruption of public order. Additionally, the Court brings in Entry 80 of List I to State that the Union may extend the powers of a State police to another State without the consent of that other State. It was argued that the CBI statute (Delhi Police Establishment Act, 1946) categorically bars this agency from ousting the jurisdiction of the investigative agencies of a State without the State's consent. Accordingly, the justification of the Court, both legally and constitutionally seems defective. The Court then turns to its umbrella powers under Article 142 to grant complete justice to victims in

7 2010 (2) ALLMR (SC) 941.

such a matter, which could be juxtaposed against its own ruling in the 1998 *Bar Association Case*[8] on the powers under Article 142 as being merely procedural and not substantive, and in any case that its exercise must not directly contravene a Constitutional or statutory provision.

This ruling is strikingly similar to *Vineeth Narain v. Union of India*[9] in 1997 where the Court accorded to itself the power to direct a CBI investigation in certain matters in the interests of the rights of the *Indian Polity* under Article 14. Much has been said about these two rulings revealing the ease with which the Court has accorded to itself the power to appropriate functions essentially performed by the Executive under the garb of rights protection.

The context of separation of powers was a subject of much debate once again in *Bhim Singh v. Union of India*[10] where the constitutional vires of the MPLAD Scheme was challenged. The MPLADS was challenged earlier in 1999 by Jammu and Kashmir National Panthers Party Chief Bhim Singh and an NGO, Common Cause, alleging that in the absence of any guidelines, the funds allocated under the scheme were misused by MPs. In 2005 then, the Scheme was in the midst of a controversy when a sting operation conducted by the media revealed that many members of parliament were accepting bribes for awarding contracts under the Scheme. Specifically speaking, this controversy has distinct political and legal issues surrounding it. On the political plane it has been alleged that it gives the Members of Parliament an unfair advantage in gathering valuable public opinion in their favour. With such vast funds at their disposal, the Members of Parliament wield not just the powers of a legislator, but also those of the executive transforming them into a single authority capable of exercising governmental functions and lacking sufficient political accountability.

The Supreme Court put its weight behind the Scheme by allowing it under a combined reading of Article 114(3) read with Articles 266(3) and 282 of the Constitution. Accordingly, it defended the Scheme claiming that Article 282 has to be given its widest amplitude so that the public purpose enshrined therein can effectively be achieved both by the Union and the States to advance Directive Principles of State Policy. On the other hand, the challenge to the scheme was twofold. It was suggested that the MPLADS scheme confuses the model of separation of powers followed in India by permitting the performance of essential executive functions such as

8 AIR 1998 SC 1895: (1998) 4 SCC 409.
9 AIR 1996 SC 3386: (1996) 2 SCC 199.
10 (2010) 5 SCC 538.

administering of funds and their specific resource allocation by a legislator. For this specific reason, even the Second Administrative Reforms Commission advised that MPLADS be abolished.

It was argued, that the Scheme also challenged the *Panchayat Raj* system introduced by the 73rd and 74th Amendments to the Constitution. As early as 2002, the National Commission to Review the Working of the Constitution (NCRWC) pointed out that all activities performed by legislators under the Scheme were on the State List in the Seventh Schedule, thereby compromising the distribution of powers between the Union, the States and the local government. Specifically, functions such as those of providing basic civic services are constitutionally the function of the local governments and by creating incentives for MPs to perform the same, these Amendments to the Constitution were undermined. The question here is not as to who is better suited to perform these roles but as to whose domain their performance essentially falls in, this being a constitutional function as opposed to a political one. Even as a political issue, the MP represents about 10-15 lakh people while the local governments represent about three thousand on an average, the latter therefore, being the best institutions to perform such functions. Ironically, the local governments are usually starved for funds in this regard while the MPs are assured funds of up to Rs.2 Crore.

The doctrine of pleasure in India is arguably the most debatable area of the Constitution given the structures of quasi-federalism that co-exist with a republican form of government at the Centre and the State. These notions are highly debatable given the dichotomy in the nature of powers vested in President and the Governor based on the extent of discretion given to him in their exercise. If the President were to then remove a Governor from his position on the aid and advice of the Council of Ministers based on material that is not only purely political, but also lacking in fundamental constitutional considerations of procedural and substantive due process, this structure of federalism would undoubtedly have to be inquired into by the Court. When called in to do so in *B.P.Singhal v. Union of India*,[11] a five judge bench of the Apex Court very appropriately took up three major issues. The Court first sought to sketch out the nature of the doctrine of pleasure of the President in our Constitutional scheme and from that context examined valuable issues regarding the nature of the Governor's position and the justiciability of the decisions taken by the President with regard to his appointment and removal.

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11 (2010) 6 SCC 33.

The President's prerogative under this doctrine was said to have three broad variations based on the extent of restrictions placed upon it. Accordingly it was suggested that under the umbrella provision of Article 74, the President's powers were suitably curtailed such that he acts within the framework of the Constitution. Given however that the Governor's appointment falls under the category of an unrestricted application of the doctrine, the Court engaged in a discussion as to why exercise of discretion as regards this office was nonetheless subject to fundamental constitutional limitations. The office of the Governor was to be treated as a high constitutional office since he is vested with important functions and duties and with regard to his position as the head of the legislature of the State. The Union argued that the method of appointment of the governor, given that it is made under the aid of the Council of Ministers, would have a bearing on the reasons for his removal. If then the Central Executive loses faith in the Governor for instance owing to, his political ideologies which were not in sync with those of the Union Executive, this situation should be a valid ground for his removal. If on the other hand the Governor is in fact treated as the executive head of the State government, then such a power of removal of the Governor based on the whims of the Union Cabinet would seriously compromise our federal structure. Further, if the Constitution specifically regards the application of the doctrine of pleasure to the appointment of Governors in an unrestricted manner, then the scope of judicial review of such exercise ought to be severely curtailed. The Court addresses this issue in a classic *Marbury-Madison* manner. It begins with an exposition of core constitutional principles of the rule of law, and of fairness and non-arbitrariness in exercise of any power conferred by the Constitution. If this power too is permeated by such principles, then any action taken against the Governor resulting in his removal before completion of his tenure would have to be barred by the substantive and procedural essentials of Article 14. Accordingly, the powers of judicial review could not be curtailed. On the other hand, it was also held that while a decision to remove a Governor had to be based on sufficient material, such reasons need not be disclosed; the power of the Court to look into such reasons however could not be questioned. In this ruling then, the Court not only struck down the reasons given by the Union for removal of the Governor, but also granted a significant leeway to the Union Executive in removal of a person from this office without having to provide any reasons, both while upholding its own power of judicial review of such action.

In 2005, Mr. Anantrao Joshi introduced a proposal in the upper house of the Parliament to amend the Representation of Peoples Act, 1951 so as to delete parts of the statute that require all political parties to pledge their adherence to socialist principles. In support of his proposal, he forwarded eight core arguments that created a tumult in the Rajya Sabha and subsequently the resolution was negatived with the majority voting against it. Two critical aspects that ran through the arguments forwarded were, the right of a political party to voice dissent against a political ideology that was not only intentionally omitted in the original text of the Constitution but also does not reflect the true spirit of political parties seeking recognition from the Election Commission. This is obvious from the fact that India does not adhere to socialism in its true sense as also the fact that a strict adherence to socialism by all parties would deny the country the possibility of change. The requirement of the statute then, did nothing but promote hypocrisy in our political sphere. Very recently in 2010, a petition was filed before the Apex Court seeking omission of the word 'socialism' from the Preamble.[12] The Supreme Court dismissed this petition claiming that no political party has opposed its retention and therefore the petitioners lacked the requisite *locus* to file this petition. The Bench also refrained from commenting on the merits of the petition stating that it would reconsider it if any political party challenged its retention, and when the Election Commission takes a decision on the refusal of a political party to subscribe to it formally. This reference to a need for a formal challenge to this aspect of the Preamble by political parties is misleading in a sense that while the Representation of Peoples Act, 1951 is directed at political parties, the Preamble is not, and therefore making such a challenge would typically be open to the entire polity.

Pending Legislations and Constitutional Amendments

The Constitution (One Hundred and Eighth Amendment) Bill, 2008 seeks to reserve one-third of all seats in the Lok Sabha and the State legislative assemblies for women. The allocation of reserved seats shall be determined by such authority as prescribed by Parliament, and will be by rotation granted to different constituencies in the State or Union Territory. One third of the total number of seats reserved for Scheduled Castes and Scheduled Tribes shall be reserved for women of those groups. The Bill attempts to place a time limit for such reservation, stating that it shall cease to exist 15 years after the commencement of this Amendment Bill. It was passed on May 9, 2010 by the Rajya Sabha. This Amendment Bill ushers in a new contour to the debate in equality jurisprudence, with considerable political overtones.

12 *Good Governance India v. Union of India,* Civil Writ Petition 679 of 2007.

Earlier in 2010, a constitutional bench of the Apex Court in *K. Krishna Murthy v. Union of India*[13], while dealing with the constitutional amendment that granted 33% reservation for the posts of chairperson in local self-governments, defended its constitutional validity stating,

"It cannot be denied that the reservation of chairperson posts in favour of candidates belonging to the Scheduled Castes, Scheduled Tribes and women does restrict the rights of political participation of persons from the unreserved categories to a certain extent. *However, we feel that the test of reasonable classification is met in view of the legitimate governmental objective of safeguarding the interests of weaker sections by ensuring their adequate representation as well as empowerment in local self-government institutions*. The position has been eloquently explained..., wherein it has been stated that the asymmetries of power require that the chairperson should belong to the disadvantaged community so that the agenda of such panchayats is not hijacked for majoritarian reasons".

Though yet to be passed by the Lok Sabha, we are keen on witnessing the prospective course and form of this debate, and its likely impact on discourse in constitutional scholarship.

The Right to Education has a rich constitutional history, unlike most other socio-economic rights. Its transition can be traced to its first embodiment within the Directive Principle of State Policy (under Article 45), followed by its status of a Fundamental Duty (under Article 51), and subsequently being read within the ambit of the right to life by the Apex Court and now, finally, by way of a constitutional amendment as a fundamental right. The Supreme Court read the right to education into Article 21 in *Mohini Jain v. Union of India*[14]. It was, however, limited to the age of 14 years in *JP Unnikrishnan v. State of Andhra Pradesh*[15] where it was also held that the right to education under Article 21 drew its content from Article 45 of the Constitution.

The Constitution (Eighty-sixth) Amendment Act, 2002, introduced Article 21-A, which mandates that the State shall provide free and compulsory education to children between the ages of 6 and 14.[16] The reason for the incorporation of Article 21-A into Part III of the Constitution is to make explicit what is implicit in Article 21.[17]

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13 (2010) 7 SCC 202,

14 (1992) 3 SCC 666.

15 (1993) 1 SCC 645.

16 Constitution Eighty-sixth Amendment Act, 2002, *Statement of Object and Reasons, available at* indiacode.nic.in/coiweb/fullact1.asp?tfnm=86.

17 Report of the 165th Law Commission of India, 81(1997).

It was felt that direction in the form of legislation was necessary in order to detail the exact manner of achieving this ambitious goal. One such attempt is the Right to Education Bill which was to be used as a model Bill leaving it to the discretion of the States to adopt it. The Right of Children to Free and Compulsory Education Act or to Education Act (RTE) was passed on 4 August 2009 and came into force on 1 April 2010.

In December 2010, the Law Minister Veerappa Moily formally introduced the much debated Judicial Standards and Accountability Bill in the Lok Sabha. This Bill was set to repeal and substitute the Judges (Inquiry) Act 1968 thereby effectively governing the law relating to the conduct of and procedure for proceeding against judges on complaints of misbehaviour or incapacity. Apart from the standards of judicial conduct laid down by the Bill, it is significant in two respects. The Bill firstly requires that all judges declare all their assets, along with their spouses' and dependants' assets within thirty days of assuming office, and subsequently file an annual report of the same that would be displayed on the website of the Court where the judge sits. Secondly, the Bill amended the existing complaint procedure for proceeding against a judge for alleged misconduct. Two authorities would be set-up, with a complaint initially being made to the National Judicial Oversight Committee consisting of a retired Chief Justice of India, a judge of the Supreme Court, a Chief Justice of a High Court, the Attorney General and an appointee of the President. Complaints there from would be referred to the Scrutiny Panel that would be constituted in every High Court and the Supreme Court consisting of a former Chief Justice and two sitting judges of that Court. The Scrutiny Committee would then investigate the merit in the allegations made and report to the Oversight Committee with a recommendation to investigate the matter. If the inquiry committee finds that the charges against the judge are proved, the judge would be requested to resign voluntarily, failing which the Oversight Committee would proceed to remove the judge. In such a case the President would refer the matter to the Parliament for impeachment.

While the Bill has attracted much criticism from various quarters, it is suspected that it will meet little resistance in its passage through the Parliament.

Comparative Law Developments

Closer home, India's neighbours saw various significant Constitutional developments in the last year. The election of Asma Jahangir as the President of the Supreme Court Bar Association (Pakistan) was a shot in the arm for

human rights activists. The recent debate about the Blasphemy Law in Pakistan, however, took a tragic turn as Salman Taseer, the governor of Punjab, was shot for his virulent opposition to it.

The 18th Amendment to the Pakistani Constitution was a significant attempt to strengthen democracy in the country. From a Presidential Republic, Pakistan's polity was altered to a Parliamentary form of government, significantly increasing the powers of the Prime Minister *vis-à-vis* the President. Furthermore, provincial autonomy was also significantly enhanced by this amendment with the abolition of the Concurrent List resulting in broadening provincial autonomy and reduced control of the central government over many subjects. This comes in the backdrop of an unprecedented situation wherein the judges of the Supreme Court, in the wake of rumours that the President was planning to dismiss the Chief Justice, unanimously agreed that this would tantamount to treason. In any event, the Prime Minister refuted any such suggestions, averting a Constitutional crisis.

In Bangladesh, the main constitutional controversy pertained to the restoration of the word *"Secularity"* in the Bangladeshi Constitution. In a 2005 judgment, the Bangladesh High Court had struck down the Fifth Amendment to the Constitution, which had deleted the words *"secularity"* and *"socialism"* from the Bangladeshi Constitution's "Fundamental Principles of State Polity". The Supreme Court upheld the verdict of the High Court[18] in 2010 ruling that both *'secularism'* and *'socialism'* were an essential part of the Bangladeshi nation-building process. Taking this step, it argued, was bringing the Constitution in consonance with its original aims under the Mujibur Rahman government of 1972-75. In doing so, the Supreme Court has taken a strong stand against fundamentalism - with the active support of the Awami League government in power.

Meanwhile, in Nepal, work on the draft of a new Constitution, its fourth, continues, even as it is currently being governed by an Interim Constitution. There have been multiple abortive attempts to elect a new Leader of the House, largely because of a 'neutrality provision' in the Interim Constitution, which allows members to abstain from voting for any leader. A group of lawyers have petitioned the Supreme Court to seek a change in this law. The status of this petition remains in limbo. Simultaneously, in Bhutan, attempts to separate 'religion' and 'State' saw expression in a ban on all clergy, whether Buddhist or Hindu, participating in elections. This

18 Moon Cinema v. Islamic Republic of Bangladesh.

implies that the Indian (and Bangladeshi) understanding of secularism contrasts with the Bhutanese experience, perhaps a wise choice for a small, deeply religious nation that has so far been able to maintain a balance between Constitutional progress and tradition.

The 18th amendment to the Sri Lankan Constitution has met with great controversy since its enactment in September 2010. The Amendment removed the two-term limit for Presidential terms, analogous to the 22nd Amendment to the Constitution of the United States, and reduced the powers of the Election Commission, ensuring that it could no longer interfere with political parties that sought to use State funds for contesting elections. Furthermore, the Electoral Commission may place limits on private media during elections. This change is coupled with the introduction of a Parliamentary Council to look into the functioning of major public service commissions, which may make *recommendations* for these appointments. In doing so, it amends the 17th Amendment, which had recommended the creation of a Constitutional Council. In amending the Constitution to this extent, the Government has exposed itself to charges of absolutism and of converting Sri Lanka into a dictatorship. The haste with which the amendment has been made has also been problematic for Sri Lanka's civil society, which has argued that the lack of consultation violates basic norms of Constitution-making, and demonstrates a growing shift towards authoritarianism. Some have gone so far as to claim that this amendment poses "an assault on Constitutional values". Only time will tell whether the much-feared subversion of democracy will take place or not.

The Contributions

The contributions in this Edition of the Journal present an interesting blend of scholarship in Constitutional theory and practice. Our endeavour was to ensure that no important developments on the national scheme goes uncovered, given that the year 2010 was witness to a rather ruthless spectrum of constitutional developments.

Tania Groppi's *The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?* resonates excellently with the Journal's mandate of increasing the discourse in comparative constitutional law by offering an explanation of the law and practice of the Italian Constitution. Groppi tackles the question of judicial review in Italy, a feature introduced in the 1948 Constitution and undertaken by means of a designated Constitutional Court, distinct from the ordinary courts, to adjudge on questions such as the constitutionality of laws, the jurisdictional conflicts

between the various organs of state, crimes committed by the President of the Italian Republic etc. The peculiarities of Italy's Constitutional Courts – features such as the fact that constitutional challenges can only arise from 'certification orders' issued by ordinary judges or by national or regional governments, or that rejections of constitutional challenges are binding only between the parties to the suit whereas their corresponding acceptances are binding *erga omnes* – necessitate a unique approach to judicial review. Groppi traces the evolution and structure of Italy's complex legal system, highlighting expertly, the ideology underlying the adoption of certain peculiarities, and delineating the way the Constitutional Court has devised different types of judgments. Two of these types, 'corrective' and 'interpretive' decisions, allow for a division of labour between the Court and ordinary courts. Other categories of decisions, such as the 'additive' and the 'admonitory', affect the relationship the Court holds with Italy's legislature. Groppi finally summarizes the work of the Constitutional Court since the 1950s through its stages of promotion of reforms, mediation of social and political conflicts (in the 1970s and 1980s) and subsequently the elimination of case backlog. A reader familiar with Indian Constitutional law would immediately be struck by the similarities with the reform eras of Privy Purses, the tumultuous social and political battle of the ADM Jabalpur era and later the growth of the PIL movement. Constitutions and courts, it would appear, follow similar patterns across continents, jurisdictions and even systems of government. Groppi concludes her piece with an analysis of a crisis of legitimacy facing the Constitutional Court as it ruminates its own identity as supreme guarantor of the Constitution against the economic and social costs of its decisions. The consequences of this have largely been the devolution of the Court's job to other actors, throwing into question the future of centralized constitutional review in Italy.

Rishad Chowdhury, in his essay, provides a roadmap for the judicial interpretation of the recently inserted fundamental right to education in the Indian constitution. He notes the limited jurisprudence on the subject, and argues that on account of the positive nature of the right, and magnitude of failure of all branches of government in the past with respect to universal education in India, the insertion of this right presents a fundamentally distinct challenge for the Indian Supreme Court- one that should be approached in a principled, circumspect and workable manner.

Pathik Gandhi, in his comment on the applicability of the Basic Structure Doctrine to ordinary laws, contends, with some assistance from Kelsenian thought on the hierarchy of legal norms, that ordinary laws and

constitutional amendments derive their validity from the Constitution, and that the basic structure doctrine therefore ought to apply to ordinary laws in a like manner. He also examines the applicability of the basic structure doctrine to laws contained in Schedule IX of the Indian Constitution and argues that the Supreme Court has unduly extended the applicability of the doctrine to such laws in the *I.R. Coelho case*, and has therefore violated the plain and simple language of Article 31B of the Constitution.

The piece titled "The Flying Shoe" by Gopal Sankarnaraynan focuses on a contempt of court case that led to the *Leila David v. State of Maharashtra*[19] decision, with the important finding that statutory requirements may be ignored where a Court is exercising its power as a court of record. The paper explores the constitutional scheme in tandem with the statutory limitations on the existence of superior courts as courts of record, going on to examine the nature of contempt in the face of the Court and the altered approach of the Courts in trying the same.

The reading down of Section 377 of the Indian Penal Code and consequent decriminalization of same sex consensual relationships was a milestone in Indian Constitutional jurisprudence. The article by Arvind Narain traces the evolution of judicial empathy from the *Nowshirwan* case to the *Naz Foundation* judgment. It focuses on how the judiciary's usage of the term 'constitutional morality', brings about a paradigm shift in the way homosexual expression is viewed by law. Homosexual expression now finds meaning and protection of the freedoms guaranteed by the Indian Constitution itself, instead of merely being 'tolerated' by the majority.

Alok Prasanna and Zohaib Hossain were part of the team of advocates who appeared in and assisted Mr. Mohan Parasaran, Additional Solicitor General of India in his arguments before the Supreme Court of India in *Reliance Industries Limited v. Reliance Natural Resources Limited*.[20] Their article "The new jurisprudence of scarce natural resources: An analysis of the Supreme Court's judgment in *Reliance Industries Limited v. Reliance Natural Resources Limited"* discusses the jurisprudence of scarce natural resources, in the context of the *RIL v. RNRL* judgment. While applauding the Supreme Court for its judgment, particularly its analysis of the Constitutional scheme for the regulation of natural resources in great detail, the article argues that the judgment is the first of its kind for enunciating principles to guide such regulation of natural resources. These principles offer valuable guidance in

19 (2009) 4 SCC 578.
20 (2010(7 SCC 1.

framing regulatory policies for protection of natural resources, not only for the Courts but also for the Government.

Malavika Prasad's piece on the Apex Court's ruling in *Subhash Chandra v. Delhi Subordinate Selection Board*[21] argues against the judiciary's lack of methodological rigour in the borrowing of cross constitutional ideas. While examining the Court's exercise of judicial review, she builds a case for contextualism in cross constitutional jurisprudence as advocated by Mark Tushnet, and argues that in failing to do so the Courts have indulged in what is known as 'bricolage'.

Raadhika Gupta critiques the Apex Court's ruling in *State of West Bengal v. The Committee for Protection of Democratic Rights*,[22] addressing the validity of a High Court order directing investigation into an offence committed within a State's jurisdiction and against the consent of the State government. While agreeing with the ruling in principle, she builds an extensive case arguing that the reasoning of the Court in support of such a ruling was defective. She also engages in a contextual analysis of the Court's application of the Basic Structure Doctrine and the Federal Scheme of the Indian Constitution, eventually suggesting an alternative approach based on identifiable rights of the victims and the scope of the High Court's writ jurisdiction under Article 226 of the Constitution.

Prof. Amita Dhanda, one of the most prominent scholars in the field of disability studies, and professor at NALSAR has reviewed Nobel laureate Amartya Sen's "Idea of Justice" for the Journal. This critical review focuses on the treatment of persons with disabilities in the book, and in particular, points out Prof. Sen's non-application of his idea of justice in the development of justice rights for persons with disabilities.

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22 (2010) 2 SCALE 467.

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The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?

*Tania Groppi**

Introduction

The Constitutional Court was introduced for the first time in Italy in the 1948 Constitution, enacted by the Constituent Assembly after the fall of the Fascist regime and the end ofthe World War II. The Constitution establishes a 'constitutional democracy',[1] that is, aform of government in which the sovereignty belongs to the people, but which has torespect a 'rigid' constitution, entrenched by a difficult amendment process. The previous Italian Constitution, the '*Statuto Albertino*' 1848, was a flexible Constitution, such as mostof the European Constitutions of the 19th century; thus the problem of judicial review of legislation was never raised in the Kingdom of Italy, in which the doctrine of supremacyof Parliament was largely accepted both by state institutions (including the judiciary) andby scholars.[2]

The framers of the Italian Constitution, having opted for a 'rigid' constitution, decided tointroduce a system of constitutional review that was ranked among the various 'guarantees of the Constitution' (articles 134-139).[3] They rejected the few proposals oriented towards the introduction of a decentralized system, American-style, and, in accordance with the dominant constitutional trends in post-war Europe (particularly as expressed by HansKelsen), they designed a system of centralized review, with the creation of an 'adhoc' organ of constitutional justice separate from the judiciary.[4]

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1. Among Italian scholars, the concept of 'Constitutional Democracy' has been developed mainly by Zagrebelsky, G (1992) *Il diritto mite,* Einaudi.
2. See Watkin, TG (1997) *The Italian Legal Tradition,* Ashgate Publishing.
3. The important link between a democratic state governed by law, a rigid constitution, and constitutional review, in the Italian experience, was pointed out in Rolla, G and Groppi, T 'Between Politics and the Law: The Development of Constitutional Review in Italy' in Sadurski, W (ed) (2002) *Constitutional Justice, East and West,* Kluwer Law International.
4. The debates in the Italian Constituent Assembly are summarized in Pizzorusso, A; Vigoriti, V and Certoma, CL (1983) 'The Constitutional Review of Legislation in Italy' *Tem. L.Q.* 56 at 503.

The experience of more than 50 years of judicial review in Italy (the Court was only actually established, as will be underlined in the following pages, in 1956) has seen an evolution towards a much more decentralized system, as the article will try to point out, a system in which the ordinary judges also play an important role in constitutional review.

This article is composed of four parts. Part I provides some basic features of constitutional review in Italy, dealing with the composition and competences of the Constitutional Court. In this part the limitation of competences and the importance of certified questions as the main gateway to invoke the Court's jurisdiction will be pointed out. Part II illustrates the evolution of the Italian model of judicial review towards a concrete model, by emphasizing the creativity of the Constitutional Court and the relations with the judiciary and the legislature. Part III explores the performance of the Constitutional Court in the development and protection of constitutional values, by focusing on four main stages of the experience of the court. Finally, Part IV provides some final remarks on the present role of the Court and some considerations on its possible future evolution.

BASIC FEATURES OF CONSTITUTIONAL REVIEW IN ITALY

Composition and competences of the Constitutional Court

The Constitutional Court's composition reflects the effort to balance the need for legal expertise, the characteristic of a judicial body, against the acknowledgment of the inescapably political nature of constitutional review:[5] fifteen judges, chosen from among legal experts (magistrates from the higher courts, law professors, and lawyers with more than 20 years of experience), one-third of whom are named by the President of the Republic, one-third by Parliament in joint session and one-third by the upper echelons of the judiciary.[6]

One of the main features of proceedings in the Italian Court, the prohibition of dissenting (or concurring) opinions by judges (and the related principles of secrecy of deliberation and collegiality) has also been linked by scholars to the same necessity of finding a balance between politics and the

5. This balance has been pointed out by Zagrebelsky, G (1988) *Giustizia costituzionale,* Il Mulino, that remains the most complete study on the Italian Constitutional Court. It is interesting to notice the early study on the US Supreme Court Justice Samuel Alito: Alito, SA (1972) *An Introduction to the Italian Constitutional Court* (unpublished undergraduate Woodrow Wilson School Scholar Project prepared for Professor Walter F. Murphy, on file with Mudd Library, Princeton University), available at: http://www.princeton.edu/~mudd/ news/Alito_thesis.pdf.

6. This tripartite model has been used later in other countries: see for example Chile, Columbia, Dominican Republic, Ecuador, Guatemala, Indonesia, Korea, Mongolia, Paragua.

law. According to them, the principle of collegiality is a way of protecting the Court from the pressures and interferences of politics, giving to the judges the opportunity to express their opinion freely, without having to justify their position outside the Court.[7] On the other hand, the prohibition on disclosing the individual opinions of the judges has been criticized because it may result in opaque, non-transparent motivation. Over the years some attempts to introduce dissenting opinions have been made by the Court itself, but all failed due to lack of consensus.

The powers of the Constitutional Court, defined in Article 134 of the Constitution, are typical of constitutional tribunals.

The Court has the power:

a) to adjudicate on the constitutionality of laws issued by the national and regional governments;

b) to resolve jurisdictional conflicts between organs of the state, between the state and the regions, and between regions;

c) to adjudicate crimes committed by the President of the Republic (high treason and attempting to overthrow the Constitution).

Article 2 of Constitutional Law n.1 of 1953 added a further power beyond those listed in the Constitution:

d) to adjudicate on the admissibility of requests for referenda to repeal laws, which may be promoted by 500,000 voters, or five regional councils, pursuant to article 75 of the Constitution.

Limitations on the competences of the Constitutional Court and the importance of indirect review

Compared to other models of constitutional adjudication, especially the most recently established,[8] these competences seem notable for being so apparently limited and minimalist.[9]

7. This is the point of view of Zagrebelsky, G (2005) *Principi e voti,* Einaudi.
8. See for example the competences of the Constitutional Courts in Central and Eastern Europe countries: see in this special issue the essay of Lach and Sadursky. See also Favoreau, L 'Constitutional Review in Europe' in Henkin, L and Rosenthal, AJ (eds) (1990) *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* Columbia University Press at 52-53.
9. For a general overview of the competences of the Constitutional Court see Cerri, A (2001) *Corso di giustizia costituzionale,* Giuffrè; Ruggeri, A and Spadaro, A (2004) *Lineamenti di giustizia costituzionale* Giappichelli; Malfatti, E; Panizza, S and Romboli, R (2003) *Giustizia costituzionale,* Giappichelli. Among the publications in English see Baldassarre, A (1996) 'Structure and Organization of the Constitutional Court of Italy' *St. Louis U. L.J.* 40 at 649; Pizzorusso, A (1988) 'Constitutional Review and Legislation in Italy', in Landfried, C (eds) (1988) *Constitutional Review and Legislation: an International Comparison*, Nomos Verlagsgesellschaft at 111; Dengler, DS (2001) 'The Italian Constitutional Court: Safeguard of the Constitution' *Dick. J. Int'l L.* 19 at 363.

On the one hand, the Italian Constitutional Court does not have some competences which are present in other systems of constitutional law, and which could be labeled as political: for example, in many systems Constitutional Courts have powers relating to electoral issues, supervision of political parties and ascertaining the incapacity of the President of the Republic.

On the other hand, with regard to the Court's main competence of reviewing the constitutionality of laws, several limitations arise from articles 134-137 of the Constitution, Constitutional Law n. 1 of 1948 and Law n. 87 of 1953. These limitations concern the means of triggering constitutional review, the object of review and the types and effects of the Court's decisions.

First of all, access to constitutional review is rather circumscribed: the Italian system offers only *a posteriori*, indirect review, which arises mainly out of a separate judicial proceeding. The keys that open the door to constitutional review are primarily in the hands of ordinary judges, who therefore perform the important function of screening the questions that the Court will be called upon to answer. The constitutional proceeding begins with a 'certification order' whereby the judge suspends all proceedings and submits the question to the Constitutional Court. In that order, the judge must indicate the relevance and plausibility of the question, the law challenged, and the constitutional provision that it allegedly violates.

There is also an avenue of direct review, according to Article 127 of the Constitution, but it is rather circumscribed. The national government and the regional government may challenge, respectively, a regional or a national statute within 60 days of its publication. In this way, direct review is only a tool for the guarantee of the constitutional separation of powers as between national and regional governments. Neither private citizens nor parliamentary groups nor local (sub-regional) governments can directly invoke the Court's jurisdiction.

Secondly, the 'object' of constitutional review is represented exclusively by laws. Delegated or administrative legislation is not reviewed by Constitutional Court, but by ordinary Courts.

Furthermore, the Court may not wander from the '*thema decidendum*' (that is, the object and parameter of review) identified in the application to the Court. As stated in Article 27 of Law n. 87 of 1953, 'The Constitutional Court, when it accepts an application or petition involving a question of constitutionality of a law or act having force of law, shall declare, within the limit of the challenge, which of the legislative provisions are illegitimate.' In

other words, constitutional review is limited to the question presented and must be carried out 'within the limit of the challenge.' Article 27 itself carves out an exception to this general principle: the Court may also declare 'which are the other legislative provisions whose illegitimacy arises as a consequence of the decision adopted'. At issue here is 'consequential unconstitutionality.'

Thirdly, there is a limited range of decisions that resolve the process of constitutional review. Aside from decisions that are interlocutory or reject a question on procedural grounds, decisions either *accept* or *reject* constitutional challenges, known respectively as *sentenze di accoglimento* and *sentenze di rigetto*. The consequences of these two sorts of decisions, including their temporal effects, are rather straightforwardly defined by law. Decisions that *reject* a constitutional challenge do not declare a law constitutional. They merely reject the challenge in the form in which it was raised. These judgments are not universally binding, that is, they are not effective *erga omnes*. Thus, the same question can be raised again, on the same or different grounds; only the judge who has certified the question cannot raise it again in the same lawsuit. For this reason, such judgments are said to be effective only as between the parties, that is, *inter partes*. On the other hand, judgments that *accept* a constitutional challenge are universally binding and are retroactive (*ex tunc*), in the sense that the constitutional rule cannot be applied from the day after the judgment has been published. This retroactivity is limited by what are called '*rapporti esauriti*,' which might be translated as 'concluded relationships' or '*res iudicata*'. For reasons of convenience and legal certainty, judgments do not affect situations that were already resolved by final judgments, claims that are barred by statutes of limitation, or the like. Yet there is an exception to this rule where a final criminal conviction has been entered pursuant to the law now declared unconstitutional: the law provides that such a conviction and any related punishment should cease.

Moving from a simple list of the Court's powers to statistics about its activities, the limited nature of its powers becomes even clearer. The vast majority of the Court's activity is dedicated to constitutional review of laws, overshadowing its other powers, in particular with regard to jurisdictional disputes between the State and the Regions.

Within this category of constitutional review, particular importance is assumed by 'incidental' review or certified questions, which has absorbed most of the Court's energy during its more than fifty years, and which therefore deserves the bulk of our attention.[10]

10. Data about the work of the Court may be found in Celotto, A (2004) *La Corte costituzionale,* Il Mulino; Romboli, R (eds) (1990, 1993, 1996, 1999, 2002, 2005) *Aggiornamenti in tema di processo*

EVOLUTION OF THE ITAL IAN MODEL OF JUDICIAL REVIEW

A centralized and concrete model of constitutional review

An analysis of the powers granted by the Constitution and a glance at the procedures used are indispensable for understanding the mechanics of the Italian Constitutional Court, yet they are not sufficient for comprehending the role it plays in the legal system. To this end, one must consider other aspects, taking account of history and considering the provisions governing constitutional review in the light of the dynamism of its jurisprudence.

It is hard to understand the current system simply by looking at the statute books. Theory traditionally distinguishes between the American model of judicial review of legislation, which is diffuse, concrete, and binding as between the parties, and the Austrian model (*Verfassungsgerichtbarkeit*) which is centralized, abstract, and binding universally.[11] Judged against this backdrop, the Austrian model clearly had the greatest influence on the framers of the Italian Constitution.

Undoubtedly, the implementation of the Italian system has not maintained the purity of Kelsen's Austrian model, having introduced some features that approach the American model of judicial review.[12]

As an initial matter, the centralization of review has been mitigated by endowing ordinary judges with two important powers: first, as we already stated, the decision whether or not to raise a constitutional question; second, the constitutional review of secondary legislation. This peculiarity has a significant impact on how we classify the Italian system, since it indicates that it is not an absolutely centralized model of constitutional review, but rather a model with some features of diffuse review.

Furthermore, the requirements that the question be relevant and explained by the certifying judge have introduced into the process features similar to those contained in systems of 'concrete review',[13] although the Court will review the constitutionality of the statute, but it will not decide

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costituzionale, Giappichelli and on the annual report of the President of the Court, published on the website of the Court: www.cortecostituzionale.it.

11. See Cappelletti, M (1971) *Judicial Review in the Contemporary World,* Bobbs- Merrill; in this special issue see Gamper, A and Palermo, F, *Austria*.
12. See Pizzorusso, A (1990) 'Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies' *Am. J. Comp. L.* 38 at 373; Pasquino, P (1998) 'Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy' *Ratio Juris* 11 at 38.
13. Concrete review in the meaning given by Cappelletti, M (1971) *Judicial Review in the Contemporary World,* Bobbs-Merrill.

the case: the decision is up to the ordinary judge, that has to wait (as the ordinary trial is suspended) the decision on the constitutionality of the statute, before the proceedings.

The nature of the Italian system is highlighted by the Court's practice which, in some phases, has helped to increase the degree of concreteness of its judgments. In this regard, one can emphasize the following developments:

a) The drastic reduction of time taken to decide a case and the consequent elimination of pending questions, that occurred in the early 1990s, means that a constitutional decision increasingly has concrete effects for the parties in the case at bar;[14]

b) The Constitutional Court has increasingly employed its evidence-gathering powers before deciding questions.[15] As a result, it can better understand the practical aspects of the question that gave rise to the constitutional challenge, the effects that would flow from the Court's judgment, and the impact of a judgment on the legal system;

c) An interpretative continuum has arisen, in two respects, between the Constitutional Court and ordinary courts (in particular, the Court of Cassation and the supreme administrative court, called the 'Council of State'). On the one hand, the legal principles and interpretations of the Constitution provided by the Constitutional Court acquire force for all legal actors, especially courts that must directly apply the Constitution or review rules that are subordinate to statutes. On the other hand, when resolving constitutional questions, the Constitutional Court tends to address the legal provision in question not in the abstract, but as it has been concretely applied. The Court tends to rule on the 'living law', or the rule as it has been interpreted in case law. In this way, there seems to have been a tacit division of labour between the Constitutional Court and ordinary courts, so that each endorses and approves the other's interpretation within its own sphere. This tendency may be broken by the excessive speed of the Court in deciding cases: the object of the proceeding may very well be a statute for which the 'living law' has yet to be consolidated.[16]

14. On this new phase of constitutional justice in Italy see the essays published in Romboli, R (eds) (1990) *La giustizia costituzionale a una svolta,* Giappichelli.
15. As I tried to show in my book: Groppi, T (1997) *I poteri istruttori della Corte costituzionale nel giudizio sulle leggi,* Giuffrè.
16. See Pugiotto, A (1994) *Sindacato di costituzionalità e "diritto vivente"*, Cedam.

According to these developments, one can undoubtedly affirm that the Italian system still remains a centralized system, but with an increasing presence of elements of a diffuse system.

Procedure and Practice of the Constitutional Court, 'Interpretative' and 'Manipulative' Judgments and Relations with Courts and the Legislature

The powers of the Italian Constitutional Court and the process of constitutional review were regulated in the years immediately after the entry in force of the Constitution and have not changed much since then.[17] It should be noted, however, that unlike the procedure and practice of the ordinary courts, which are regulated in detail in the civil and criminal procedure codes those of the Constitutional Court are more flexible. The reason for this flexibility is due to the fact that, unlike the ordinary courts, the Constitutional Court has a much greater discretionality in interpreting its procedure and practice thus allowing it to modify the latter in order to achieve a desired goal or to more fully implement constitutional values.

This 'discretion' enjoyed by the Constitutional Court has divided scholars: some authors claim that the Constitutional Court's activity should be subjected to detailed rules of procedure that are spelled out with precision, while others believe that a certain measure of discretion is unavoidable, given the nature of judicial review. This disagreement mirrors the larger debate between those who emphasize the judicial nature of constitutional review and those who instead focus on its necessarily political nature.[18]

This flexibility is reflected most prominently in the way the Constitutional Court has devised different types of judgment which, as we shall see, have significantly influenced the development of Italy's legal system.[19] One should note that the Constitution[20] and subsequent constitutional and statute laws governing the Constitutional Court only provide for judgments that accept or reject a constitutional challenge, however, the Constitutional Court has since developed a rich variety of judgments, which again as we shall see, are based on the necessity to respond to specific

17. See Const. Law 1/1948, Law 1/1953 and Law 87/1953.
18. This debate has been summarized in the essays published in Romboli, R (ed) (1990) *La giustizia costituzionale a una svolta,* Giappichelli.
19. On this judicial creativity see Pinardi, R (1993) *La Corte, i giudici ed il legislatore. Il problema degli effetti temporali delle sentenze di incostituzionalità,* Giuffré; Pinardi, R (2007) *L'horror vacui nel giudizio sulle leggi. Prassi e tecniche decisionali utilizzate dalla Corte costituzionale allo scopo di ovviare all'inerzia del legislatore,* Giuffré and exemples cited by Pinardi. In English see Vigoriti, V (1972) 'Admonitory Functions of Constitutional Courts – Italy: The Constitutional Court' *Am. J. Comp. L.* 20 at 404.
20. See Art. 136 It. Const.

practical needs rather than drawing on abstract theory.

In particular, the various types of judgments arise from the necessity, recognized by the Constitutional Court, to consider the impact its decisions have on the legal system and on other branches of government, in particular Parliament and the judiciary.

This result was made technically possible by the theoretical distinction between '*disposizione*' and '*norma*,' or legal 'texts' and 'norms'.[21] A 'text' represents a linguistic expression that manifests the will of the body that creates a particular legal act. A 'norm,' on the other hand, is the result of a process of interpreting a text. By use of hermeneutic techniques, one can derive multiple norms from a single text or a single norm from multiple texts. This distinction between text and norm is particularly important in that it permits the separation of the norm from the literal meaning of the text, in a way cutting the umbilical cord that link them at the moment the text is approved. This distinction allows the system to evolve, facilitating the interpreter's creative activity and helping to reduce the 'destructive' activity of the Court, with its consequent gaps in the legal system, giving it the ability to operate with more surgical precision.

Relationship with the courts

The need to establish a relationship with the courts, which are charged with interpreting statutory law, has led the Constitutional Court to issue two kinds of decisions, 'corrective' decisions and 'interpretative' decisions (which can come when the Court either strikes down or upholds a law). These two kinds of decision have allowed a division of labour between the ordinary courts and the Constitutional Court and have mitigated conflicts that arose during the Court's early years.[22]

a) With its so-called '*corrective*' decisions, the Constitutional Court avoids the merits of the constitutional question and simply states that the statutory interpretation of the certifying judge is incorrect, in that he failed to consider either the teaching of other courts, a consolidated interpretation of the law in question, of the plain meaning of the text or, increasingly, of a possible interpretation that would conform to the Constitution.

21. This distinction was introduced by Crisafulli, V (1956) 'Questioni in tema di interpretazione della Corte Costituzionale nei confronti con l'interpretazione giudiziaria' *Giurisprudenza costituzionale* at 929 et seq.
22. See Merryman, JH and Vigoriti, V (1967) 'When Courts Collide: Constitution and Cassation In Italy' *Am. J. Comp. Law* 15 at 665.

b) With '*interpretative*' decisions, the Constitutional Court distinguishes between the text and the norm (see above) and either indicates to the certifying judge an alternative interpretation (norm) that is in pursuance of the Constitution thus rejecting the constitutional challenge (i.e. a *sentenza interpretativa di rigetto*) or it judges the interpretation given by the certifying judge to be contrary to the Constitution and strikes down that specific norm, but not the text itself (i.e. a *sentenza interpretativa di accoglimento*).

More specifically, in the case of a *sentenza interpretativa di rigetto* the Constitutional Court offers the ordinary courts an interpretation that would render the statute consistent with the Constitution, thereby saving it from unconstitutionality. With such an interpretative judgment the Constitutional Court declares the challenge 'unfounded' insofar as the law can be attributed a meaning consistent with the Constitution, which is different from the one given to it by the certifying judge or the petitioner. Among the possible meanings of the text, the Court chooses the one that is compatible with the Constitution, putting aside those which could conflict with the Constitution.

Such an interpretation offered by the Court is not, however, universally binding because these judgments reject the challenge and therefore they only have an *inter partes*.[23] It is effective only insofar as its opinion is persuasive or its authority as constitutional arbiter is convincing. A legal duty is created only in relation to the judge who raised the question, who cannot follow the interpretation he initially submitted to the Court.

c) Due to this fact ordinary judges have generally tended to ignore the Constitutional Court's interpretation, thereby persisting in an interpretation of the provision that is not in pursuance of the Constitution, thus demonstrating some of the underlying tensions between the Constitutional Court and the judiciary. Over time the

23. The reason for this, as pointed out by an eminent constitutionalist and former President of the Italian Court Livio Paladin, is that Art. 136 of the Italian Constitution only deals with the generally binding effect of judgments that *accept* the challenge, but it is tacit with regard to the binding effects of judgments that *reject* a challenge. This 'silence' has been interpreted by the ordinary courts and by most legal scholars as signifying that the latter only have an *inter partes* effect. It is worth pointing out, in the context of this Special Issue that this constitutes an important difference with respect to two other countries with a constitutional justice system similar to Italy i.e. Germany and Spain. In these two countries *both* judgments that *accept* and judgments that *reject* the challenge are binding *erga omnes*, see Paladin, L (1988) 'La tutela delle libertà fondamentali offerta dalle Corti costituzionali europee: spunti comparatistici' in Carlassare, L (ed.) (1988) *Le Garanzie costituzionali dei diritti fondamentali,* Cedam, 11-25.

Constitutional Court has thus increasingly delivered interpretative judgments that *accept* a challenge. In such judgments, the Court acknowledges the fact that the ordinary judges are interpreting the provision in an unconstitutional manner (even though other interpretations in pursuance with the Constitution would be possible) and it thus declares that specific interpretation unconstitutional. Because this is a judgment that *accepts* the constitutional challenge it is binding *erga omnes* therefore the provision can no longer be interpreted in that way, however all other interpretations remain valid, therefore the Constitutional Court does not strike down the text itself, but only one of the norms it gives rise.

Relationship with the legislature

While '*interpretative*' judgments seem designed to address the relationship between the Court and ordinary courts, other sorts of decisions have instead affected the relationship between the Court and the legislature.[24]

a) An especially delicate issue has been the use of '*additive*' judgments, whereby the Court declares a statute unconstitutional not for what it provides but for what it fails to provide. In this way, the Court manages to insert new rules into the legal system which cannot be found in the statutory text. This kind of decision runs contrary to Kelsen's model of constitutional review, according to which a constitutional court ought be a '*negative legislator*'. With these judgments, the Constitutional Court transforms itself into a creator of legal rules, thereby playing a role that in the Italian system belongs principally to Parliament. Yet in many cases, the mere nullification of an unconstitutional law would not solve the problem posed by the constitutional question, and the addition of a missing rule is the only way to remedy the violated constitutional value and, therefore, offers the only way for constitutional law to perform its task.

   A first effort to limit the interpretative scope of such judgments is the principle that they are appropriate only where it is said, to use a poetical metaphor, as the Court did, that the judgment inserts only '*rime obbligate*', or 'obligatory verses', into a statute. That is, the norm proposed by the Court is regarded by it as logically necessary and implicit in the normative context, thereby eliminating any appearance of discretionary choice.

24. Details and examples may be found in the books of Pinardi, quoted above at note 18.

b) A second effort to eliminate the interference with the parliamentary domain implied by these judgments has led, in recent years, to the development of a slightly different type of judgment, which is described as adding only 'principles' rather than 'norms' (see above). These are known as '*additive di principio*'. In these decisions, the Court does not insert new rules into the legal system, but only principles, rather like framework legislation, that the legislature must give effect to with statutes that are universally effective, indicating a deadline within which the legislature must act. In this way, the Constitutional Court strives to strike a balance between safeguarding the Constitution and preserving the discretionary powers of the legislator. In fact, as with additive judgments, the Court declares the statute unconstitutional, but in this case it leaves it up to Parliament to actually decide how to amend the provisions rather than itself providing a detailed set of rules. The problem is that these judgments pose problems with regard to their effectiveness vis-à-vis ordinary judges. In most cases judges have deemed it essential for Parliament to legislate on the basis of the guiding principles indicated by the Constitutional Court; however, on the other hand, in some cases they have considered the Court's decision to be directly applicable to the case at bar (i.e. they treat it like a standard additive judgment).[25]

c) Another type of decision deriving from the necessity of caution in relation to the legislature is the so-called 'admonitory' decision or '*doppia pronuncia'* – what one might call 'repeat' or 'follow-up' judgments. The Court has adopted this approach when it has faced highly politicized questions. In these cases, it has preferred to bide its time and hint at its decision that the challenged norm is unconstitutional, without explicitly declaring it so. The Constitutional Court has introduced a logical distinction between its judgment and its opinion: the former announces that the constitutional question is 'inadmissible'; the latter, however, clearly indicates that the

25. See, tra le altre, the decisions n. 185/1998, n. 26/1999, n. 32/1999, n. 61/1999; n. 179/1999, n. 270/1999, n. 526/2000. As examples, the decision n. 26/1999 may be quoted. In that case, the Court declared unconstitutional that part of the law on the organisation of the prison system which failed to provide immunity for the prison administration from actions for damages by prisoners when their rights have been infringed. The Court expressly declared 'that the statute is unconstitutional due its defect in not providing jurisdictional guarantees, but the rules of judicial review of legislation do not allow for the introduction of the legislation needed to remedy such a defect. Thus, in order to carry out the principles of the constitution, the Court's only option is to declare the unconstitutionality of the omission, and, at the same time, call for Parliament to exercise its legislative function to remedy the defect'.

constitutional doubts are well-founded. Structurally, '*doppie pronuncie*' imply that in the first instance the Court will reject the certified challenge, asking the legislature to act. If Parliament does not act and the question is raised again, the Court will respond with a judgment that accepts the constitutional challenge, declaring the law unconstitutional.

d) A further point is that the highly political nature of some issues, combined with the need to balance the defence of social rights against the state's financial exigencies, has obliged the Constitutional Court to moderate the effects of its decisions that strike down laws as unconstitutional. In this way, the Court tries both to assure that the Government and Parliament have the time needed to fill the gap created by its nullification of a law, and to strike a balance between the constitutional rights central to the social welfare state and the limits to economic resources.

This problem is not unique to the Italian legal system. Comparative study offers several solutions. The Austrian Constitutional Court can postpone the effects of a judgment nullifying a law for up to one year, thereby letting parliament regulate the area and avoid legal gaps.[26] The German Federal Constitutional Court can also declare laws simply 'incompatible' (*Unvereinbarkeit*), without declaring them nullified, or can declare that a law is 'still' constitutional. In that case, the law is declared only temporarily constitutional. The Court retains its power to declare the law unconstitutional if the legislature does not modify the law to conform with its judgment.[27]

In Italy, by contrast, the implications of the timing of a judgment that accepts a constitutional challenge are more rigidly established.[28] The Constitutional Court has tried, through its case law, to spread over time the effects of its decisions in two ways. First of all, it has imposed limits on the retroactive effects of its decisions accepting constitutional challenges (in order, for example, to protect certain trial proceedings) through what have been labeled judgments of 'supervening unconstitutionality'. In these cases, the norm is not nullified *ab initio*, but only from the moment it is held to be invalid. The simplest example is when a new constitutional norm takes effect, but one could also imagine a change in the economic or financial environment, in social attitudes, or in a more general change in conditions

26. See the article on Austria in this issue.
27. See the article on Germany in this issue.
28. In fact, Art. 30.3 of Law 87/1953 clearly states that 'norms that have been declared unconstitutional cannot be applied the day following the publication of the decision'.

that leaves a norm incompatible with the Constitution.

Finally, the Court can postpone the effects of a declaration of unconstitutiona-lity (for example, where judgments lead to expenses for the public treasury), leaving the legislature a fixed amount of time to act before the statute is nullified. These are decisions of 'deferred unconstitutionality', where the Court itself, based on the balancing of various constitutional values, pinpoints the date on which the law is nullified. Such decisions pose serious problems of compatibility with the Italian system of constitutional review, in that they do not affect the case in question, thereby detracting from the concrete nature of review that characterizes the system.

THE MAIN STAGES OF DEVELOPMENT OF ITALIAN CONSTITUTIONAL REVIEW IN THE LAST FIFTY YEARS

To evaluate the role played by the Constitutional Court in the Italian constitutional system, its relationship with other branches of government and with parliamentary democracy, one can delineate (at the risk of oversimplification) several stages in its development.[29]

Promotion of reforms

The first period (from the 1950s, when the Court was established, to the early 1970s)[30] could be described as 'implementation of the Constitution' or 'promotion of reforms'. This period was characterized by the central role played by the Constitutional Court in the modernization and democratization of the Italian legal system, as well as in the affirmation of the values contained in the new republican Constitution. In this process of systemic reform, the Court acted as a stand-in for Parliament, which was slow and timid in modifying statutes inherited from earlier times. In this phase, the Constitutional Court took on what might be described as a 'didactic' function, in that it breathed life into the Constitution's principles and brought them to the

29. We will follow the periods proposed by Cheli, E (1996) *Il giudice delle leggi,* Il Mulino. For an overview of the experience of the Court, see Volcansek, ML (2000) *Constitutional Politics in Italy: the Constitutional Court,* MacMillan. The decisions of the Court are available on its website, already quoted supra at note 8, and on the website www.giurcost.org, where it is possible to search for subject or words.

30. The Constitutional Court was not established until 1956, with a delay of eight years. The difficulty of establishing the Court was due to the resistances of the government, which tried to avoid the countermajoritarian limitation always determined by constitutional justice. During this period of time, according to the VII transitional provision of the Constitution, judicial review had to be carried out the ordinary courts, following the decentralized system. The lack of the 'constitutional sensibility' of the ordinary judges explains the small number of cases in which a statute was set aside because unconstitutional. See Adams, JC and Barile, P (1953) The 'Implementation of the Italian Constitution' *Am. Pol. Sc. Rev.* 61 at 66 *et sequitur*; Dietze, G (1958) 'America and Europe – Decline and Emergence of Judicial Review' *Va. L. Rev.* 44 at 1258.

attention of society, as well as a catalyzing function, as it renewed the legal system by eliminating norms contrary to the Constitution.

The Constitutional Court found itself constantly filling in for Parliament, which pursued statutory reform slowly and hesitatingly, and found itself in conflict with the highest levels of the judiciary, in particular with the Court of Cassation and the Council of State, according to whom programmatic constitutional norms did not provide grounds for judicially reviewing legislation. Beginning with its first judgment (n. 1 of 1956), which constitutes a landmark decision in Italian constitutional law, the Court affirmed the binding nature of all constitutional norms (thereby overriding the classic distinction between preceptive and programmatic norms), specifying their binding character not only in relation to the government, but also private parties, and reiterated its power to review laws that predated the Constitution.[31] In this way, thanks also to the stimulus provided by progressive elements of the judiciary, which raised numerous constitutional challenges to laws enacted before the Constitution concerning liberty as well as social and economic rights, the Constitutional Court was able to purge the legal system of numerous unconstitutional norms dating back to the 19th century as well as to the fascist era (1922-1943). Worthy of note are the Court's actions to protect personal liberty (such as its judgments in connection with the public security law of 1931 and the old system of unlimited pretrial detention, judgment n. 11 of 1956); freedom of expression (which was purged of the worst lingering traces of fascism such as the multiple permits to be obtained from the police, judgment n. 9 of 1965 and n. 49 of 1971); freedom of assembly (the Court declared unconstitutional a law that required prior notice for assemblies in public places, judgment n. 27 of 1958); and gender equality (the Court declared unconstitutional, in judgment n. 33 of 1960, a 1919 law that excluded women from a vast array of public positions).

In this initial phase, the Constitutional Court was considered, both by legal scholars and public opinion, the principal (if not the only) interpreter and defender of the Constitution and of the values it embodied. It is this stage that explains how the Constitutional Court garnered its authority and prestige within the Italian legal system and laid the foundations of its legitimacy.

31. On the first decision see Adams, JC and Barile, P (1957-1958) 'The Italian Constitutional Court in Its First Two Years of Activity', *Buff. L. Rev.* 7 at 250. Cf. also here the article by Harding and Leyland in this issue, which adverts to a similar critical decision in Indonesia. On the first years see Evans, M (1968) 'The Italian Constitutional Court' *Int'l & Comp. L. Q.* 17 at 602; Farrelly, DG (1957) 'The Italian Constitutional Court' *Italian Quarterly* 1 at 50; Farrelly, DG and Chan SH (1957) 'Italy's Constitutional Court: Procedural Aspects' *Am. J. Comp. L.* 6 at 314; Treves, G (1958) 'Judicial Review of Legislation in Italy' *Journal of Public Law* 7 at 345.

Mediation of social and political conflicts

The second stage ran from the mid-1970s to the mid-1980s and has been described as that of 'mediation of social and political conflicts'. This was a period in which, after the 'cleansing' of pre-constitutional legislation, the object of constitutional review was no longer pre-constitutional legislation, but recent laws that had been drafted and approved by the republican Parliament. For this reason, the Court took on a more politicized role characterized by balancing techniques, essentially in the search for equilibrium and mediation among the various interests and values involved in constitutional questions.

The Court slowly changed the nature of its judgments. No longer was it simply a question of applying the traditional syllogism that compared an inferior norm to a superior one. Instead, it became a matter of considering all the constitutional values at stake, of weighing them and establishing not which would prevail, but what was the best balance possible among them. In sum, one can say that at this stage the Constitutional Court evaluated the choices of the legislature to determine whether it had adequately taken into account all the values and constitutional principles that might affect a certain issue. This operation was made technically possible by an evolving interpretation of the principle of equality. From article 3 of the Constitution, according to which all are equal before the law, can be drawn a duty of reasonableness imposed on the legislature, so that it not only must regulate different situations differently, but must also refrain from using arbitrary criteria. In order for a norm not to be unconstitutional, one must avoid contradictions between the goals of a law and the concrete normative rules, between the objective pursued and the legal tools used to achieve it. In sum, one must avoid irrational contradictions between the goals of the law and the content of its text.[32] In these years, the Court acted in numerous areas that characterize a secularizing society. It is enough to mention its judgments regarding divorce; abortion (see judgment n. 27 of 1975, which sought to strike a difficult balance between protecting the fetus and safeguarding the mother's health); church-state relations; family rights; the right to strike (the Court declared political strikes unconstitutional, judgment n. 290 of 1980); and numerous issues connected with the right to work and social welfare. In this way, the Court struck down what it termed 'unjustified discrimination' in the salaries of public employees (judgment n. 10 of 1973); upheld the 'Workers' Statute' (judgment n. 54 of 1974); and issued innumerable additive

32. An earlier example of this technique is judgment n. 46 of 1959.

judgments that increased state spending that aimed at equalizing (upward) welfare and wages (judgments n. 141 of 1967 and n. 103 of 1989). Emblematic of this stage are also the many decisions concerning radio and television, decisions in which the Court found itself hounding and scolding the legislature in the name of freedom of expression, yet without ever succeeding in completely guiding its choices into conformity with the Constitution (see, among the many decisions, judgment n. 202 of 1976, which definitively opened the doors to local radio and television broadcasting).

The elimination of the case backlog

Paradoxically, the Constitutional Court's tremendous success during the first stages of its activity turned out to be one of the principal factors that rendered the system of constitutional review ineffective. The massive quantity of questions raised made it rather difficult to issue decisions at an acceptable pace. The increase in the number of questions gave rise to a significant backlog and a prolongation of the process. This spiral threatened not only to swamp the Constitutional Court, but also to impair its institutional functioning. The time factor, the length of the proceeding, is crucial for the impact of constitutional decisions on the legal system. Fortunately, the members of the Court, aware of these risks, dealt with this problem through a series of reforms of the Court's procedural rules.[33] These reforms gave rise to a third stage known as 'operational efficiency' that ran from the mid-1980s to the mid-1990s. The main goal of this new phase was to reduce the time taken for a constitutional decision and the number of pending cases, through declarations of inadmissibility in summary orders (*ordinanze*) of a large number of cases that were obviously inadmissible or trivial, as well as through the selection of cases on which the Court could focus its attention. To this end, the Constitutional Court adopted numerous procedural innovations (organization of work, streamlining of debate, deciding cases by summary order, and so on) that helped to reach these goals. At the beginning of the 1990s, the number of pending cases was significantly lower and the length of constitutional review cases had been reduced to nine months.

In order to reach this result some sacrifices had to be made, as pointed out by scholars who during these years focused their attention on constitutional procedure. For example, the number of decisions increased, but often at the expense of more summary opinions. The method for organizing work reduced the collegiality of decision-making and the

33. See La Greca, G (1997) 'Current Situation and Planned Reforms in the Light of Italian Experience' *The Supreme Court and the Constitutional Court: Third Meeting of Presidents of Supreme Courts of Central and Eastern European Countries,* Council of Europe at 9.

importance of the parties' arguments, simultaneously increasing the procedural discretion of the Constitutional Court. In sum, operational efficiency does not always equate to effective decision-making. Insufficiently explained opinions are less persuasive and carry the risk of reducing consensus, both among scholars and the public and, as a consequence, of reducing the Court's legitimacy. Various procedural ideas have been advanced to promote more carefully reasoned opinions, in particular the introduction of dissenting opinions.[34] Likewise, some have proposed allowing interested parties to participate in constitutional proceedings even though they are not involved in the lawsuit giving rise to the constitutional question, in order to offer the Court more viewpoints in evaluating constitutional claims.[35] Yet none of these attempts has so far produced any change in constitutional procedure.

The Court during the 'transition years'

Once the case backlog had been eliminated, the Italian system of constitutional review entered a new stage, whose features are still unclear.

First, the brief time that passes between the raising and determination of a question means that the object of the Court's review is ever more frequently neither a law of the fascist period nor a law passed by a previous legislature, but a law that has just been adopted: that is, one supported by a current political majority. This rapidity has important consequences for the relationship between the Constitutional Court and Parliament as well as the judiciary. As for the former, the Court is inevitably drawn into current political conflicts. When politically and socially important issues are at stake, connected with recently approved laws that are often the result of delicate compromises and long debates, it is unavoidable that the Court's decisions are politically influenced and that its legal judgments are viewed both by the public and scholars as decisions of mere political convenience.[36] The difficulties in these cases are obvious. In order to preserve the authority of their decisions, the Court's opinions take on special importance, particularly in their ability to persuade on the rhetorical rather than the logical level. As regards relations with the ordinary courts, the Court's rapid turnaround and the fact that it confronts 'new' laws means that the Court is forced to rule on the constitutionality of laws that have not yet received a consolidated judicial

34. Panizza, S (1998) *L'introduzione dell'opinione dissenziente nel sistema di giustizia costituzionale*, Giappichelli.
35. D'Amico, G (1991) *Parti e processo nella giustizia costituzionale,* Giappichelli.
36. See Rolla, G and Groppi, T 'Between Politics and the Law: The Development of Constitutional Review in Italy' in Sadurski, W (eds) (2002) *Constitutional Justice, East and West,* Kluwer Law International.

interpretation, the so-called 'living law'. The Court is therefore called upon to perform the task of interpreting the law subject to review, a task that belongs to the judiciary rather than the Constitutional Court. This raises afresh the problem of relations with the judiciary that the use of the 'living law' was thought to have overcome.

Second, the Constitutional Court finds itself interpreting constitutional texts that embody principles of the welfare state, that is, that recognize social rights, in an environment marked by the financial crisis of the state and by economic austerity policies. The Court is trapped between Scylla and Charybdis: between the danger of abdicating its role of supreme guarantor of the Constitution and the social rights it protects, and the danger of provoking serious economic repercussions with its decision. The Court's concern for the financial consequences of its decisions is readily perceptible from a survey of its activity. Indeed, it frequently issues evidence-gathering orders to acquire information about the costs of possible judgments striking down laws. Furthermore, a look at the Court's case law shows its tendency to significantly reduce, compared to the earlier stages, the number of decisions based on the principle of equality and designed to equalize unequal situations upward. On the contrary, on some occasions the Court has chosen the opposite path; faced with challenges raised in the name of equality, it has decided to equalize the situations downward, raising before itself *sua sponte* the question of the con stitutionality of the baseline offered by the certifying judge (the *tertium comparationis*). This was the situation with regard to the personal income tax on pensions of parliamentary deputies. The favourable treatment they received was invoked as the baseline for all citizens in a case involving the income of employees. The Court did not hesitate to question *sua sponte* the favorable treatment accorded to these pensions, and declared them unconstitutional (n. 289 of 1994).

In the hope of balancing these two goals – on the one hand to fulfil its role of constitutional guardian, in particular of social rights, and on the other hand not to directly create state budgetary burdens without adequate financial support – the Constitutional Court has from the mid-1990s developed the innovative decisional techniques mentioned earlier, in particular judgments that 'add principles' rather than norms. These decisions are aimed at recognizing rights, but leaving it to the legislature to choose the means for implementing them and the funds to meet their costs. Illustrative of this tendency is judgment n. 243 of 1993. In that decision, the Court declared unconstitutional norms that excluded a cost-ofliving adjustment from the calculation of severance pay benefits, but held that its decision could not

take the form of the mere nullification of a law, or of an additive judgment. Rather, it fell to the legislature to choose the appropriate means 'in view of the selection of economic political choices needed to provide the necessary financial resources'.

Third, the constitutional reform of the State-regions relationship in 2001 created an unexpected increase in the number of direct complaints. The consequence was an increase in the number of decisions enacted in this kind of review from 2% in 2002 to 24.41% in 2006. For some years (between 2003 and 2006), most of the activity of the Court was devoted – independently of the will of the Court itself, but simply as a consequence of the number of state-regions disputes – to the solution of problems of division of competences between different levels of government, more than to the guarantee of fundamental rights.[37]

Finally, the current stage of constitutional jurisprudence is occurring in an unstable political and institutional context characterized, since 1992, by the weakening of the established balance of political power, with the collapse of the old party system, the change in the electoral system, the birth of alliances and alignments that have not yet sufficiently consolidated their positions, and the emergence, after 40 years of a consociational political system, of a majority system based on the alternation in government of two main coalitions.

These elements have resulted in an increase in the political role played by the Court. There has been an increase, both quantitative and qualitative, in the competences of the Constitutional Court with strong political ramifications, such as those related to conflicts over the attribution of powers among the branches of government and the admissibility of referenda to repeal laws. As a result, there has been a tendency to emphasize the Constitutional Court's role as an arbiter in political and constitutional conflict, a role from which the Court has not sought to extract itself. In this vein, it is worth noting its judgment concerning votes of no-confidence in individual ministers (which the Court found constitutional, even in the absence of express constitutional provisions, on the ground that they are inherent in the form of parliamentary government: judgment n. 7 of 1996); the cases regarding decree-laws (the Court went so far as to declare the unconstitutionality of reissuing them, in judgment n. 360 of 1996, because they violate legal certainty and would change the structure of government; see also n. 171 of 2007); the

37. See Del Duca, LF and Del Duca, P (2006) 'An Italian Federalism? The State, Its Institutions and National Culture as Rule of Law Guarantor' *Am. J. Comp. L.* 54 at 799.

case law governing the immunity of parliamentary deputies for statements made in the performance of their official functions (in this regard, after many years of uncertainty, the Court annulled a parliamentary vote of immunity deemed to have been adopted in the absence of any functional nexus between the declaration of the deputy and his parliamentary activity: judgment n. 289 of 1998); the case related to the power of mercy of the President of Republic and his relationship with the Minister of Justice (judgment 200 of 2006, in which the Court ruled that this is a typical presidential power and that the Minister cannot influence the decision); and the case regarding the immunity of the higher power of the state (judgment n. 24 of 2004, in which the Court ruled the unconstitutionality of the statute that determined a complete immunity).

Conclusion

More than 50 years of constitutional review in Italy have brought about a consolidation of the position of the Constitutional Court. It is an important institutional actor, well accepted by public opinion and respected by the political system.[38]

In the last few years, however, something has changed. The traditional sources of legitimacy of the Court (the Constitution itself and the dialogue with public opinion) seem weaker than in the past, having been dried up by the loss of legitimacy of the Constitution itself, testified by the need, more and more widely acknowledged, of reform,[39] and the apathy of the public.

In order to preserve its legitimacy and to defend itself against an increasingly aggressive political power, the attitude of Court has been very cautious: so far the Court has decided not make a direct link with public opinion. Instead, it preferred to 'disappear' from the headlines, devolving a large part of its job to other actors.[40]

We can point out two main paths that have been followed by the Court towards this new, low-profile role.

First of all, the Court tries to decentralize its work maximally, involving ordinary judges more deeply in constitutional review than the European model of judicial review normally provides for, in order to share with them

38. As it is testified by the fact that only in very few cases does Parliament reenact a law already set aside by the Court.
39. An important constitutional reform, aimed at amending more than 50 articles of the Constitution, was passed by Parliament in 2006, but rejected by the people in a national referendum.
40. On this attitude see Nardini, WJ (1999-2000) 'Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court' *Seton Hall L. Rev.* 30 at 1.

the task of safeguarding the Constitution. Before referring a question to the Constitutional Court, an ordinary judge is expected to look for an interpretation of the statute that will preserve its constitutional validity. Although ordinary judges cannot disregard statutes on constitutional grounds, they can interpret them. But it is obviously difficult to identify the conditions that a reading of a statute must satisfy to qualify as 'interpretation'. The European model is thus based on an unstable distinction between the power to interpret (for ordinary judges) and the power to set aside (for the Constitutional Court): in Italy the distinction is changing, in favor of the judiciary, by request of the Constitutional Court itself.

Secondly, the Court looks increasingly to supranational jurisdictions. The shift of Italian case-law in this regard in 2007 and 2008 was extremely significant. In judgments n. 347 and 348 of 2007 the Court established that the ECHR and the interpretation given to it by the European Court of Human Rights are 'intermediate law' (*norme interposte*) which falls between mere statute and the Constitution, and can be used as a parameter in reviewing the constitutionality of a national statute. In judgments n. 102 and 103 of 2008 the Court defined itself for the first time as a 'court or tribunal of a Member State' for the purposes of Article 234 (formerly Article 177) of the EC Treaty, in order to apply to the European Court of Justice and ask for a preliminary ruling on the interpretation of European Community law.[41] It should be remembered that in its previous case law, particularly in the ordinance n. 536/ 1995, the Italian Constitutional Court had always excluded that possibility in broad terms.

Both tendencies imply a transfer of power from the Constitutional Court to other bodies: ordinary judges on one hand, supranational judges on the other hand. The Court chooses to devolve many of its powers, to become 'the last resort' in defending the Constitution against extraordinary attacks.

Thus, as a consequence of this evolution, the question today in Italy concerns the very future of the centralized constitutional review.

On the one hand, the search for legitimacy might determine its impoverish-ment and even its disappearance. In that case, the price to be paid in the name of legitimacy would be too high. In addition, there are no guarantees that the legitimacy of the ordinary judiciary or of the supranational

41. On the previous jurisprudence of the Court in relation to the EC law, see Cartabia, M (1990) 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community' *Mich. J. Int'l L* 12 at 173.

courts is better established than that of the Constitutional Court. The Constitutional Court, with its visibility, its history, its roots and its powerful resources is still more suitable than any other court in order to face the 'democratic objection'. On the other hand, we might witness not at a disappearance but a transformation, from a centralized system of judicial review towards a 'multilevel system', in which ordinary courts and supranational courts also contribute to the guarantee of the national Constitution, but under the direction and the control of the Constitutional Court. In that case, the Constitutional Court would play a new role: not the sole guarantor of the Constitution, but a kind of signalman ('*manovratore di scambi*') in a system with many actors.

This new trend has just begun. We will see in the next years where this evolution will bring the Italian Constitutional Court.

"The Road Less Travelled": Article 21A and the Fundamental Right to Primary Education in India+

*Rishad Chowdhury**

Introduction

In this essay, I endeavour to articulate an account of how the Supreme Court of India ought to interpret and enforce Article 21A[1] of the Constitution - the fundamental right to a free and compulsory education for children - in the coming years. Article 21A has only recently been brought into force,[2] and there is consequently minimal judicial guidance about the ambit of the fundamental right enshrined therein.[3] Given that this therefore represents

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1 Article 21A, Constitution of India, amended by The Constitution (Eighty-Sixth Amendment) Act, 2002 (brought into force on April 1, 2010), "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

2 *Id. See* Section 1, Constitution (Eighty-Sixth Amendment) Act, 2002,
"(1) This Act may be called the Constitution (Eighty-sixth Amendment) Act, 2002.
(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint."
The updated version of the various constitutional provisions having a bearing on education in India is available on the website of the Ministry for Human Resource Development, at http://www.education.nic.in/constitutional.asp#Fundamental (last visited on Dec. 25, 2010).
The fundamental right was brought into force with effect from April 1, 2010. While the legislation intended to operationalize the fundamental right – The Right of Children to Free and Compulsory Education Act, 2009 [Hereinafter Right to Education Act, 2009] - was enacted by Parliament in 2009, this statute itself was brought into force only with effect from this date, i.e. April 1, 2010. The text of the Act is available at http://www.education.nic.in/Elementary/free%20and%20compulsory.pdf (last visited on Dec. 28, 2010).
See generally , From today, every child has a right to education, The Times of India, Apr. 1, 2010, http://timesofindia.indiatimes.com/india/From-today-every-child-has-a-right-to-education/articleshow/5749632.cms (last visited on Dec. 26, 2010); Education is now a fundamental right, Ndtv, Apr. 1, 2010,http://www.ndtv.com/news/india/education-is-now-a-fundamental-right-of-every-child-18878.php (last visited on Dec. 26, 2010).

3 Even prior to the date on which Article 21A came into force - theoretically - as part of the text of the Constitution, there was some limited judicial *dicta* concerning the interpretation of the language of the provision. For an analysis of this interesting if slightly anomalous state of affairs, *see infra* Part III.A.

largely unchartered waters, and bearing in mind the difficulty of attempting to sketch its contours in the abstract, I draw on certain theoretical accounts of socio-economic rights. This scholarship captures the unique characteristics of these rights in the context of judicial enforcement, and highlights the dilemmas at play. It helps define more clearly the choices the Supreme Court will surely be confronted with, and lays the foundation for the analysis to follow. The hope is that these perspectives can shed some light on how the Indian Courts might enforce Article 21A in a principled yet workable manner; and, equally, that the choices and experiences of the Indian Constitution may enable us to revisit our basic assumptions about the justiciability of such rights.

It is impossible to conceptualize the significance of the right to education in India without some understanding of the historical roots of the deprivation of the right, and the constitutional response thereto. When India gained independence from the British in 1947, the drafters of the Constitution confronted the reality of a deeply poverty-stricken and overwhelmingly illiterate populace.

Article 45 of the Constitution, a Directive Principle of State Policy, as originally enacted, required the State to endeavour to provide free and compulsory education to all children within ten years.[4] Directive Principles of State Policy are not "*enforceable by any Court*", but the Constitution mandates that "*the principles therein laid down are nevertheless fundamental in the governance of the country*" and that "*it shall be the duty of the State to apply these principles in making laws.*"[5] Furthermore, Article 45 was the only Directive Principle which had a built-in time frame for achievement, another indication of the great significance accorded to it by the framers of the Constitution.[6]

There can be little disagreement about the fact that the project of achieving universal access to education, in the first few decades after independence, was an abysmal failure. As late as 2001, the overall literacy

4 Article 45, Constitution of India (prior to the constitutional amendment brought into force on April 1, 2010), "The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

5 Article 37, Constitution of India, "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

6 *See* Vijayashri Sripati & Arun K. Thiruvengedam, *Constitutional amendment making the right to education a Fundamental Right*, Int'l J. Const. L. 150 (2004), available at http://icon.oxfordjournals.org/cgi/reprint/2/1/148 (last visited on Dec. 25, 2010) [Hereinafter *Making the Right Fundamental*].

rate stood at a modest 65 percent.[7] Specific to primary education, as late as the time period 2003-04 to 2004-05, over 10 percent of children enrolled in Grades I to V dropped out without completing primary education.[8] The year 2001 was the first time that census figures showed the number of illiterate Indians to have declined in absolute terms, to 304 million from 329 million in 1991.[9]

It should not be surprising that – as with any other democracy – the very magnitude of the failure led to some degree of introspection and self-correction within the democratic branches of Government.[10] Central Government expenditure on education has been increasing gradually, although slowly and irregularly. Expenditure on education exceeded 1 percent of the Gross Domestic Product [GDP] for the first time in 1955-56, and stayed between 1 and 2 percent until 1979.[11] A hugely significant development in 1976 was the constitutional amendment giving the Central Government concurrent legislative competence to act in the realm of education.[12] The Government has set a self-imposed target of expenditure on education to the tune of 6 percent of the GDP, although this has not yet been attained.[13]

Clearly, there has been significant progress towards the achievement of universal primary education in the last few years. This is often attributed to the national umbrella programme designed to achieve universal primary education - the *Sarva Shiksha Abhiyan* [National Campaign for Education for All] – introduced in 2000.[14] Government statistics show that the total number of out-of-school children has reduced from 42 million at the beginning of the Tenth Five Year Plan to 13 million in 2005.[15] Funds allocated for primary education increased by 56 percent from Rs. 57.5 billion in 2003-04 to Rs.

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7 Millennium Development Goals India Country Report 2007 , Chapter II, available at http://mospi.nic.in/rept%20_%20pubn/ftest.asp?rept_id=ssd04_2007&type=NSSO (last visited on Dec. 25, 2010). It is necessary to complete a free registration on the website of the Ministry of Statistics & Programme Implementation, Government of India to gain access to this web link. [*Hereinafter Millennium Report*].

8 *Id.*

9 *Id.*

10 I elaborate on this conception – of all branches of Government making good faith, although inherently imperfect, make efforts to comply with the constitutional mandate - in Part III of the essay, and treat it as an underlying premise for the argument that follows.

11 *Making the Right Fundamental* at 151.

12 Constitution (Forty-Second Amendment) Act, 1976, available at http://indiacode.nic.in/coiweb/amend/amend42.htm (last visited on Dec. 25, 2010).

13 *See Millennium Report*.

14 *Id*.

15 *Id.*

89.8 billion in 2004-05, and a further 36 percent to 122.4 billion in 2005-06.[16] A concrete step which has been taken towards resource-mobilization is a 2 percent cess on all major central taxes, the revenue from which is specifically reserved for primary education.[17]

Alongside this slow building of momentum in terms of budgetary allocations and programme implementation, it was also resolved to amend the Constitution to incorporate the right to education as a fundamental right. Ultimately, the enactment of the Constitution (Eighty-sixth Amendment) Act, 2002 led to the insertion of Article 21A, a justiciable fundamental right, in these terms: "*The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.*" At the same time, the constitutional amendment also altered Article 45 of the Constitution to state: "*The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.*"

The amendment attracted a significant amount of criticism for this aspect, namely, the exclusion of early childhood care and education (for children younger than six years) from the ambit of the justiciable right.[18] It is important to appreciate that this was clearly no oversight on the part of Parliament.[19] The amendment of Article 45 demonstrates that the intent of Parliament was to shift the goalposts with respect to justiciability, in that the right to primary education becomes an absolute right, while the State still retains flexibility in relation to the mandate of providing early childhood care and education.

It is critical to bear in mind that the financial commitment on the part of the State which would be required to universalize primary education, while substantial, no longer appears to be entirely unrealistic. In the run-up to the insertion of Article 21A, for example, a Government-appointed expert committee initially estimated that an amount of 0.78 percent of the GDP

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16 *Id*.

17 *Id*.

18 Article 45 of the Constitution of India, as originally enacted, provided that it is the obligation of the State to "endeavour to provide" within 10 years "for free and compulsory education for all children until they complete the age of fourteen years". This obligation, it is pointed out, is significantly broader in that it includes within its ambit all children below the age of fourteen years, and therefore presumably encompasses an obligation to provide age-appropriate education to children below the age of six too. *See* Report of the National Commission to review the working of the Constitution, Paragraph 3.20, available at http://lawmin.nic.in/ncrwc/finalreport/v1ch3.htm (last visited on Dec. 25, 2010). *See also Making the Right Fundamental* at 155.

19 For an analysis of the criticism that the exclusion of early childhood education attracted, within Parliament as well as from civil society generally, *See Making the Right Fundamental* at 155.

would be required annually to universalize primary education.[20] At the time the constitutional amendment was tabled, however, the Government revised the estimated annual expenditure to 0.44 percent of the GDP. In the context of the gradually increasing budgetary allocations for education, and the government's self-imposed commitment of raising expenditure to 6 percent of the GDP, this financial requirement seems achievable.

In the backdrop of these historical developments, the long delay that ensued in bringing into force the fundamental right is particularly troubling. It also poses substantial questions of democratic accountability and constitutional law.[21] It seems legitimate to inquire whether the delay of seven years does not defeat the intent of the democratic representatives of the people in enacting the Amendment? If the Courts have any scope to address the Executive's failure to notify the Amendment, even if that failure stretches to an unreasonable length of time? As intriguing as these questions are, they are not the focus of the present essay.[22]

I now turn to the structure of the present essay. In Part II, I describe certain theoretical accounts of socio-economic rights as constitutional rights, focusing on Tushnet's analysis of "strong" and "weak" versions of these rights and corresponding remedies. In Part II, I attempt to present a bird's-eye view of Indian fundamental rights jurisprudence, and contend – in the realm of education as well as more generally – that the Supreme Court has tended towards broad, normative enunciations of positive rights without adequate regard to the feasibility of enforcing tangible remedies for their realization. The right to education – recognized as a implicit fundamental right in *Mohini Jain*[23] and *Unni Krishnan*[24] – is a good example of this trend. I also draw on

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20 *See* Anil Sadgopal, Education for too few, FRONTLINE, November 22-December 05, 2003, available at http://www.hinduonnet.com/fline/fl2024/stories/20031205002809700.htm (last visited on Dec. 25, 2010).

21 It also has relevance, as will be explored in later sections of this essay, for our understanding of the judiciary's role in the implementation of this particular fundamental right.

22 This question has, however, been addressed by the Indian Supreme Court in a landmark Constitution Bench decision in *A.K. Roy v. Union of India*, AIR 1982 SC 710, where a central issue was whether the Supreme Court could issue a writ of Mandamus directing the Central Government to bring into force Section 3 of the Constitution (Forty-Fourth Amendment) Act, 1978. A majority of three Justices held that the Supreme Court could not issue such a direction, but two justices dissented strongly. In view of the divided nature of the judgment, the passage of time since that case was decided, the significantly greater delay which has ensued in the present case, and the crucial nature of the right in question here; it is not implausible to conjecture that the Supreme Court might have reconsidered this aspect of *A.K. Roy*, had the Central Government delayed much further in bringing the Amendment into force.

23 Mohini Jain v. State of Karnataka, AIR 1992 SC 1858 [Hereinafter *Mohini Jain*].

24 Unni Krishnan J.P. v. State of Andhra Pradesh, AIR 1993 SC 2178 [Hereinafter *Unni Krishnan*].

the *Godavarman* case[25] to argue that strong, rigid enunciations of rights raise democratic and institutional-competency concerns without necessarily achieving the instrumental goals desired by the Court.

In Part IV, I extend the logic of the previous discussion to contend that Article 21A presents the Supreme Court with a unique opportunity to aid the achievement of the constitutional mandate of primary education, without raising significant democratic or competency concerns. I argue that successfully rising to this challenge would require the Supreme Court to enforce Article 21A in a robust, yet pragmatic, manner. In Tushnet's terminology,[26] the right would be defined in an intermediate manner, and relatively strong, coercive remedies would be enforced when necessary. I conclude Part III by developing a normative account of why such a construction of Article 21A would be satisfactory from a constitutional perspective, as also conducive to the speedy attainment of the constitutional goal. In the Conclusion, I summarize my vision of the Supreme Court's role in enforcing Article 21A of the Constitution.

A final caveat before I proceed to the substantive argument; and this concerns an important limitation of the paper. I do not at all attempt to analyse the implementing statute – the Right to Education Act, 2009, either to evaluate its merit or to predict how Courts might interpret and enforce specific aspects of it.[27] A critic might assert that such an approach skirts the most vital issues, the difficult details of how the right is proposed to be actualized in practice. Such criticism would not be entirely devoid of merit. Nonetheless, the objective of the present essay is, in the same breath, more sweeping and (yet) more modest than of one which would narrowly scrutinize the implementing legislation. My aim is to articulate overarching principles determining the approach that the Supreme Court ought to adopt, while supervising the implementation of the fundamental right. These broad principles can then be utilized to critically evaluate, interpret and enforce the present legislation, or any legislative or executive measures that might be employed in the future. The scope of the present essay does not permit this latter exercise, which I leave for another time.

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25 T.N. Godavarman v. Union of India, Writ Petition (Civil) No. 202 of 1995.

26 For Tushnet's framework of analysis, *see infra* Part II.

27 Among the issues that I do not address in this essay is that of the constitutional challenge raised with respect to the amendment inserting Article 21A in the Constitution, as also to the implementing legislation. These constitutional claims have been referred to a Constitution Bench of the Supreme Court. *See* Ashish Singh, Petitions challenge constitutional validity of RTE Act, EDUCATION MASTER, Sept. 8, 2010, available at http://www.educationmaster.org/news/petitions-challenge-constitutional-validity-rte-act.html (last visited on Dec. 28, 2010).

A Theoretical Conception of Socio-Economic Constitutional Rights

The difficult questions pertaining to the judicial role in enforcing positive (social and economic) constitutional rights – in contrast to the historically more dominant category of civil and political liberties – have engendered a substantial body of scholarship. The scope of this essay does not permit a comprehensive review of this literature, and I do not claim to have undertaken the same here. Rather, I focus on a particular framework of analysis, developed by Tushnet, which encompasses many of the dilemmas at play, and thus appears to be a promising tool of analysis for my present purpose.

Tushnet's analysis of positive socio-economic rights proceeds in terms of a conceptual bifurcation of constitutional rights and remedies.[28] He argues that both the underlying constitutional right in question, as well as the remedy afforded by Courts (should a constitutional violation be established), can be classified into "strong" and "weak" categories.[29] Weak socio-economic rights are those types which, while embedded in the Constitution and justiciable, nonetheless do not (or do not necessarily) afford tangible protection to an individual plaintiff deprived of the right.[30] He classifies the right to housing in South Africa, in light of the judgment of the Constitutional Court in *Grootboom*[31], as a weak substantive right to housing.[32] On the other hand, the

Even though I have not analysed the constitutional challenges here, I must observe, *prima facie*, that the convergence of views of the three branches of government (which I have described in this essay), and the extraordinarily limited circumstances in which the Indian Supreme Court is prepared to strike down constitutional amendments, leads me to be greatly sceptical – both in a narrowly doctrinal and more realistic sense - of the overarching challenge posed to Article 21A itself. (The very topic of this essay is, of course, premised on the assumption that Article 21A will remain a part of the Constitution in the foreseeable future.) The challenge to the legislation may pose more difficult legal questions, and I refrain from commenting on the same.

28 Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 Tex. L. Rev. 1895 [Hereinafter *Social Welfare Rights*].

29 *Id.*

30 *Id.* at 1902-1906.

31 The Government of the Republic of South Africa v. Irene Grootboom, (CCT11/00) [2000] ZACC 19, available at http://www.saflii.org/za/cases/ZACC/2000/19.html (last visited on Dec. 26, 2010). In Paragraph 33 of the opinion of Yakoob J., he observes as follows: "*The determination of a minimum core in the context of "the right to have access to adequate housing" presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people. As will appear from the discussion below, the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable.*"

right to health in the South African context, at least in the context of the facts of the *Treatment Action Campaign* case[33], was construed to be a strong right.[34]

Further, assuming a constitutional violation to have been established, the range of remedies that might be adopted by Courts could be classified as "weak" or "strong" too.[35] A strong remedy would be one that provided a redressal of the constitutional violation immediately, while a weak remedy would be one where the Court acknowledged explicitly or implicitly that a complete redressal of the violation would take time, and allowed for such flexibility in the relief decreed.[36] Tushnet gives the example of *Brown II*[37], where the Court ordered desegregation of schools "*with all deliberate speed*", as an illustration of the possible co-existence of strong rights and weak remedies.[38] He points out that weak remedies might be ineffective but, for that very reason, are unlikely to generate significant political opposition.[39] Strong remedies might alter governmental behaviour more substantially but are likely to be intensely controversial.[40]

In Paragraph 41, he proceeds to observe: "*The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.*"

32 *Social Welfare Rights* at 1903-1906.

33 *See* Minister of Health v. Treatment Action Campaign, 2002 (5) SA 721, available at http://www.saflii.org/za/cases/ZACC/2002/15.html (last visited on Dec. 26, 2010). In this case, the Constitutional Court interpreted the right to health enshrined in the South African Constitution as requiring "*the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their new born children to have access to health services to combat mother-to-child transmission of HIV.*" The Court further declared that "*[t]he programme to be realised progressively within available resources must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment available to them for such purposes.*" The Court further granted mandatory injunctive relief along these lines. *See* Para 135.

34 *Social Welfare Rights* at 1906-1908.

35 *Id.* at 1909-1912.

36 *Id.*

37 Brown v. Board of Education, 349 U.S. 294, 301 (1955).

38 Social Welfare Rights at 1910.

39 *Id.* at 1912.

40 *Id.*

Dixon takes Tushnet's analysis forward, and outlines a theory regarding when Courts should compromise on the strength of the underlying right, and when they should instead dilute the strength (or degree of coerciveness) of the remedy.[41] She argues that where such rights are left unfulfilled on account of legislative inertia, often an inescapable by-product of majoritarian politics, then the intervention of Courts with relatively strong remedies is called for.[42] However, there is good reason for Courts to be cautious about defining the scope of positive socio-economic rights in broad and rigid terms, since they are institutionally ill-equipped to do so with any great degree of accuracy.[43]

In the next section of the essay, I examine Indian constitutional jurisprudence relating to fundamental rights generally and the right to education in particular. I will then proceed to critically review the Supreme Court's approach in light of the theoretical framework outlined above.

The Indian Orthodoxy – Fundamental Rights, Education and Beyond

i. Fundamental Rights, Education and the Indian Supreme Court - A Brief Overview

It is beyond the scope of this essay to present a comprehensive review of fundamental rights jurisprudence in India. The brief overview below - of constitutional remedies for the breach of fundamental rights - is intended merely to contextualize the discussion that follows, and help explain why Article 21A presents a fundamentally distinct challenge for constitutional jurisprudence in India.

In the event of violation of any of the fundamental rights enshrined in Part III of the Constitution, Article 32 guarantees the right to directly approach the Supreme Court for redressal.[44] It is important to bear in mind the

41 Rosalind Dixon, *Creating Dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited*, 5 Int'l J. Const. L. 391 [Hereinafter *Dialogue about Socioeconomic Rights*].

42 *Id.* at 411-415.

43 *Id.* at 410-411.

44 Article 32, Constitution of India,

"(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

extremely broad, indeed sweeping, nature of the powers of the Supreme Court to enforce the fundamental rights enshrined in Part III of the Constitution, wherein the Court has expressly been granted the power to issue all appropriate directions, orders or writs to enforce these fundamental rights.[45] Article 32 was described by Dr. B.R. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly, as the "*very soul*" of the Constitution.[46]

Further, High Courts are also empowered to enforce fundamental rights in the exercise of original jurisdiction under Article 226 of the Constitution.[47] Appeals against judgments of High Courts in exercise of their powers under Article 226 lie to the Supreme Court, if it chooses to invoke its discretionary jurisdiction under Article 136 of the Constitution, and grant "*special leave to appeal*". The Supreme Court has concluded that the power of judicial review vested in the High Courts under Article 226 and in the Supreme Court under Article 32, is "*an integral and essential feature of the Constitution*", and part of its unamendable basic structure.[48]

It is this structure of constitutional remedies that we must keep in mind as we turn to an overview of the Supreme Court's record with respect to the enforcement of Part III of the Constitution.

In the Indian context, the black-letter jurisprudence surrounding Article 32 would raise serious questions about "strong" rights that nonetheless yield insubstantial remedies. It would appear at first glance that the assumption about a necessary connection between substantive rights and substantive remedies, which Tushnet considers to be flawed, is probably central to Indian constitutional jurisprudence.[49] Nevertheless, a closer analysis of Indian

45 *Id* .

46 Constituent Assembly Debates, Vol. VII, 953 *in* L. Chandra Kumar v. Union of India, AIR 1997 SC 1125, Paragraph 73, "*If I was asked to name any particular Article in this Constitution as the most important - an Article without which this Constitution would be a nullity–I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance.*"

47 Article 226, Constitution of India,

"(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose...

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32."

48 L. Chandra Kumar v. Union of India, AIR 1997 SC 1125.

49 The views of prominent constitutional scholar H.M. Seervai probably exemplify this assumption. Seervai was a vehement critic of what he regarded as the blurring of lines between judicially

fundamental rights jurisprudence reveals a more nuanced reality. A number of rights that have been judicially-interpreted to be implicit in other fundamental rights have remained grossly under-enforced.[50] There could potentially be some debate in particular instances about whether the under-enforcement was on account of a "weak" right being enunciated, or weak remedies being employed in aid of the right in question. As Tushnet acknowledges, the distinction does tend to blur.[51]

However, in the realm of education, the right - first detailed in *Mohini Jain* and substantially reiterated in *Unni Krishnan* - was formulated in fairly robust terms.[52] One interpretation is that the Supreme Court had implicitly adopted the Irish model of declaring a constitutional violation, but abstaining from adopting a proactive stance to compel compliance.[53] Irrespective of whether the Supreme Court purposefully refrained from adopting strong remedies, or had initially intended to strengthen the remedy with the passage of time, it is undeniable that the practical import of the judgments was to leave the right – now recognized, at least theoretically, as a fundamental right - significantly under-enforced.

Since I have argued that the enactment of Article 21A mandates a much more robust involvement of the Supreme Court than was the case

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enforceable negative rights, which limited the power of the State, and Directive Principles which did not so limit the State's power, and could not be the source of remedies under Article 32 of the Constitution. *See* H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY, 1934 (1996). "*The question which must be answered when we are dealing with the governance of our country is: what happens if the duty imposed by the Constitution is ignored, violated or neglected? In respect of fundamental rights...the answer is simple. Failure to discharge the duty involves the invalidity of the law or executive action at the instance of the aggrieved party. But in respect of directive principles the answer is that the failure to discharge the duty involves no consequence: it may expose the defaulting government to public and political criticism; it may have some effect when fresh elections are held. But to tell people, for whose benefit the directive principles were formulated, that if governments do not discharge the duty of implementing the directive principles they violate the Constitution, must appear to the people, deprived of the benefit which the implementation of the directives were to confer on them, as a cruel mockery...*".

50 *See, for example*, Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495.

51 *See Social Welfare Rights* at 1909.

52 *Mohini Jain* and *Unni Krishnan* both formulated the right to education in extremely broad terms, but did little to address the problem of enforcement. My view is that the Court's approach was unsatisfactory at many levels. First, because it is difficult to plausibly locate a right to education in Article 21 and past precedent. Second, because even if it were a plausible interpretation, the cases at hand, which concerned higher education, were singularly ill-suited to considering (and holding in favour of) a right to primary education. For a view similar to my own, *see* S.P. Sathe, *Supreme Court on Right to Education*, ECONOMIC AND POLITICAL WEEKLY, Aug. 29, 1992, available at http://www.jstor.org/stable/4398806 (last visited on Dec. 25, 2010). *But see* D. Nagasaila & V. Suresh, *Can Right to Education be a Fundamental Right*, ECONOMIC AND POLITICAL WEEKLY, Nov. 07, 1992, available at http://www.jstor.org/stable/4399101 (last visited on Dec. 25, 2010).

53 *See, for example*, T.D. v. Minister for Education, [2001] 4 I.R. 545.

with *Mohini Jain* or *Unni Krishnan*, I require possible analogies in prior Indian constitutional jurisprudence (for examples of the vigorous enforcement of positive fundamental rights). The model I intend to critically review is the *Godavarman* case.[54]

ii. The Godavarman Model – Lessons for the enforcement of Article 21A

In the *Godavarman* case, popularly known as the 'Forest Bench', a writ petition was filed under Article 32 in 1995 seeking certain directions from the Supreme Court with respect to environmental conservation, specifically to protect a part of the Nilgiri forest from illegal timber felling.[55] What is unique about the *Godavarman* case is that the Supreme Court has retained jurisdiction over the matter for over fifteen years, appointed a number of eminent counsel to assist it as *amici*, and continued to issue a series of substantive and far-reaching directions on diverse issues relating to forest conservation.[56]

In the last few years, the Central Government has raised increasingly pointed attacks on the legal basis for the Court's retention of jurisdiction, and its overt intervention in the sphere of forest conservation.[57] While a number of environmental activists and conservationists continue to employ *Godavarman* as a forum for advancing their claims, it is interesting to note that a number of others have raised concerns about the long-term impact of the Court's prolonged intervention.[58] Critics assert that the Court cannot – "*constitutionally or practically*" – manage India's forests, and that it should

54 A useful online resource on the *Godavarman* case is http://www.forestcaseindia.org//f2 (last visited on Dec. 25, 2010).

55 *Id.* On 12th December 1996, the Supreme Court issued the first of many landmark rulings in *Godavarman*, which held that all forests within the dictionary meaning of the term, irrespective of their technical status under the Forest Conservation Act, were legally protected forests.

56 *Id.*

57 *See, for example,* Dewan C. Vohra, FCA committee under government lens, THE FINANCIAL EXPRESS, Aug. 1, 2007, available at http://www.financialexpress.com/news/fca-committee-under-government-lens/208069/ (last visited on Dec. 25, 2010); Sonu Jain, Centre withdraws forest plea, THE INDIAN EXPRESS, Sept. 21, 2007, available at http://www.indianexpress.com/news/centre-withdraws-forest-plea/219592/ (last visited on Dec. 25, 2010).
The present author happened to be present in Court on one of these occasions, although he cannot recall the exact date. One of the Senior Counsel representing the State – Dr. Rajeev Dhavan - made an impassioned argument to the effect that the Court ought to convene a hearing simply for re-considering the jurisdictional question of whether the Court at all had the authority to issue such a wide-ranging series of directions on all aspects of forest conservation. One of the assertions he made was that the Supreme Court was invoking an understanding of its own jurisdiction, the scope and breadth of which was unknown to any constitutional court anywhere in the world.

58 *See* Armin Rosencranz & Sharadchandra Lele, *Supreme Court and India's Forests*, ECONOMIC AND POLITICAL WEEKLY 11, Feb. 2, 2008, available at http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/2525/11683.pdf (last visited on Dec. 25, 2010), "*The Godavarman case offers strong evidence to*

stop at directing the State to fulfil its constitutional duty by developing appropriate programs.[59]

Viewing *Godavarman* in terms of Tushnet's rights-remedies framework helps explain a lot. While *Godavarman* was – and is – certainly a case which can (at least often) be classified as strong on the remedies dimension – that is not what is truly controversial about it. In fact, it is the broad and inflexible delineation of the right to environmental protection that appears to have offended the Government most. Even assuming that environmental rights are implicit in the right to life, it is certainly not obvious that it has necessarily to be understood as a strong individually enforceable right.[60] It is likely that effective, time-bound relief with respect to a weaker right might not create 'separation of power' concerns to the same degree.[61] Significantly, none of this touches the core concerns that motivated criticism of the *Godavarman* proceedings. In this analysis, therefore, *Godavarman* adopted a strong rights-strong remedies approach, and it is the judicial definition of the right that has attracted the most criticism. Perhaps ironically, this arguable judicial overreach has lead to calls for the dissolution of the Forest Bench in its entirety,[62] a timely reminder to the Indian Courts that when a political backlash occurs, it is not necessarily a proportionate or carefully-calibrated one.

Godavarman is a complicated topic deserving of more attention than I can give within the scope of the present essay. Nonetheless, I believe it does hold useful lessons for how the Supreme Court ought to approach the right

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suggest that judicial overreach not only hurts the process of governance by undermining the role of the executive, but also the content of governance by producing flawed judgments, i.e., interpretations of the law that are both unsound and impracticable. This happens for several reasons, including inadequate application of mind in the hurry to produce "landmark" judgments, and the impossibility of a central court knowing the complexities of conditions and laws across such a diverse nation."

59 *Id.* ,"The Supreme Court has played an important role in increasing awareness about the sorry state of forest governance in the country. But it cannot – constitutionally or practically – manage India's forests...The court should move towards closing down the Godavarman case and, if necessary, invoke the constitutional duty of the state (under section 48A) to prepare comprehensive legislation for a more decentralised, locally sensitive and sustainable use-oriented forest governance system."

60 Put differently, it is possible to conceive of a fairly robust environmental right implicit in the right to life, without concluding that the Court is required to adjudicate (say) every claim relating to illegal timber logging in protected areas, or every disagreement about whether members of Government-appointed statutory bodies possess the requisite expertise.

61 The efficacy of the remedy would flow from the retention of jurisdiction, the imposition of stricter timelines and reporting requirements and the refusal to accept financial constraints as a catch-all excuse for the failure of enforce the right. Further, from the fact that, at least theoretically, failure to comply with the Court's orders could result in contempt proceedings.

62 *See supra* note 57.

to education. At a minimum, the negative reaction to the Court's robust intervention may hold a cautionary tale. However important the constitutional right in question, both the delineation of the underlying right and the choice of remedies must be nuanced and thoughtful in nature.

The proposed approach to Article 21A

i. The Beginnings of the Judicial Interpretation of Article 21A

I observed earlier that any attempt to define the contours of Article 21A necessarily involves entering unchartered waters. This is substantially, but not entirely, correct. Inspite of the fact that Article 21A has only recently entered into force, there is already a limited amount of judicial *dicta* on its scope and meaning.

The most prominent example is the opinion of Bhandari J. in *Ashoka Kumar Thakur,*[63] arguably the most significant affirmative action case to be decided by the Indian Supreme Court in the last decade or more. On its face, *Ashoka Kumar Thakur* would appear to have little to do with primary school education. The constitutional question centred on whether the reservation of places in educational institutions for members of the Other Backward Classes (i.e. socially and educationally backward classes of citizens of India) was violative of the constitutional guarantee of equality.[64] The context for the *dicta* on the right to primary education appears to have been the Petitioner's broad and overarching challenge to the rationality and *bona fides* of the Government's Education Policy, of which the subset of reservations was the particular cause of injury to them.[65]

In his separate opinion in *Ashoka Kumar Thakur*, Bhandari J. substantially joined the other justices in upholding the impugned affirmative action policies.[66] Nonetheless, there was a definite contrast in the tenor of

63 Ashoka Kumar Thakur v. Union of India & Others, (2008) 6 SCC 1 [Hereinafter Ashoka Kumar Thakur].

64 *Id.*

65 *See Id.* The Petitioners argued that the focus on the allocation of the "spoils" of University education to different societal groups and interests, at the expense of focusing on the worst-off in terms of educational access, disentitled the Government's reservation policy to any deference. In response, the Solicitor General appears to have argued that the Government was not barred from fighting a battle on multiple fronts, with respect to the inequalities inherent in access to education at all levels. He submitted data to establish before the Court that the Central Government had in recent years substantially enhanced funding for primary education, and that it was fully cognizant of its constitutional responsibilities in that regard. However, the mere fact that there were admitted deficiencies and shortcomings with respect to the Government's primary education program could not come in the way of its acting to correct disparities in access to higher education.

66 *Id.* Although it is not relevant for our purposes, it may be stated for the sake of accuracy that Bhandari J. (dissenting) would have struck down the impugned constitutional amendment to the

his judgment. He was sharply critical of the Government for prioritizing higher education (and, more particularly, affirmative action in higher education) over primary education, in what he considered to constitute an inversion of constitutional priorities. It is in this context that his opinion contains *dicta* on Article 21A. He envisaged a two-fold content for Article 21A; first, that all children in the requisite age group must compulsorily attend school, and second, that the education provided to them must constitute "*quality*" education.[67] This is a preliminary indicator that, when the question eventually arises in the context of concrete claims under Article 21A, the Supreme Court might be inclined to hold that a minimum core guarantee of quality is essential for satisfaction of the constitutional mandate.

How might that minimum core be defined? In *Avinash Mehrotra v. Union of India and Others*[68], Bhandari J. observed that the broad and generous interpretation afforded to other fundamental rights by the Indian Supreme Court offered significant guidance to how Article 21A ought to be understood.[69] Educating a child required more than "*a teacher and a blackboard, or a classroom and a book*".[70] While acknowledging that the case at

extent that it applied to unaided private educational institutions. The other judges did not find it necessary to resolve that particular issue in this case.

67 Id., "*The Article seeks to usher in "the ultimate goal of providing universal and quality education."...Implied within "education" is the idea that it will be quality in nature. Current performance indicates that much improvement needs to be made before we qualify "education" with "quality." Of course, for children who are out of school, even the best education would be irrelevant. It goes without saying that all children aged six to fourteen must attend school and education must be quality in nature. Only upon accomplishing both of these goals, can we say that we have achieved total compliance with Article 21A. Though progress has been made, the Parliament's observation upon passing Art 21A still applies: the goal of providing "universal and quality education" still remains unfulfilled.*" [Emphasis in original].
Bhandari J's observations have some historical support too. As far back as 1964, the then Education Minister, M.C. Chagla observed as follows: "*Our Constitution fathers did not intend when they enacted Article 45 that we just set up hovels or any sort of structure, put students there, give them untrained teachers, give them bad textbooks, no playgrounds, and say we have complied with Article 45 and primary education is expanding. The compliance that was intended, as I said, by our Constitution fathers was a substantial compliance. They meant that real education should be given to our children between the ages of 6 to 14.*" *See* Jayati Ghosh, Missing School, FRONTLINE, Aug. 02-15, 2008, available at http://www.hinduonnet.com/fline/fl2516/stories/20080815251604900.htm (last visited on Dec. 25, 2010).

68 MANU/SC/0555/2009 [Hereinafter *Avinash Mehrotra*].

69 *Id.* at Paragraph 30, "This Court has routinely held that another fundamental right to life encompasses more than a breath and a heartbeat. In reflecting on the meaning of "personal liberty" in Articles 19 and 21, we have held that "that `personal liberty' is used in the article as a compendious term to include within itself all the varieties of rights which go to makeup the `personal liberties' of man." Kharak Singh v. State of U.P., MANU/SC/0085/1962. Similarly, we must hold that educating a child requires more than a teacher and a blackboard, or a classroom and a book. The right to education requires that a child study in a quality school, and a quality school certainly should pose no threat to a child's safety. We reached a similar conclusion, on the comprehensive guarantees implicit in the right to education, only recently in our opinion in Ashoka Kumar Thakur v. Union of India, MANU/SC/1397/2008."

70 *Id.*

hand did not require (or perhaps even permit) the Court to detail the full contours of Article 21A, he opined that it was at least warranted to conclude that where clearly unsafe structures were employed to house schools, this could not be construed as constituting compliance with the mandate of Article 21A.[71]

Another possible constitutional challenge in the context of Article 21A could be to laws or policies that actively impede the achievement of the constitutional goal of universal primary education. An excellent example of the approach that might be adopted by the Supreme Court is provided by *Election Commission of India v. St. Mary's School*[72]. Here, the Supreme Court was considering the policy of requisitioning school teachers to conduct elections during normal school hours.[73] The Court itself framed the issue in terms of how to resolve the conflict between two conflicting constitutional priorities. It recognized the paramount importance of free and fair elections in the Indian context, and the constitutional role of the Election Commission of India with respect thereto. Nevertheless, it held that the fundamental right to primary education could not be subordinated to this other constitutional priority.[74] It took note of the "*deplorable condition*" of primary education in India.[75] The operative portion of the Supreme Court's judgment therefore provided that teaching staff should ordinarily be deployed for election duties only on holidays and non-teaching days.[76]

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71 *Id.* at Paragraphs 31 & 32. "The Constitution likewise provides meaning to the word "education" beyond its dictionary meaning. Parents should not be compelled to send their children to dangerous schools, nor should children suffer compulsory education in unsound buildings. Likewise, the State's reciprocal duty to parents begins with the provision of a free education, and it extends to the State's regulatory power. No matter where a family seeks to educate its children, the State must ensure that children suffer no harm in exercising their fundamental right and civic duty. States thus bear the additional burden of regulation, ensuring that schools provide safe facilities as part of a compulsory education.
In the instant case, we have no need to sketch all the contours of the Constitution's guarantees, so we do not. We merely hold that the right to education incorporates the provision of safe schools."

72 AIR 2008 SC 655.

73 *Id.*

74 Id. The Supreme Court referred to the judgments in *Mohini Jain* and *Unni Krishnan* which had located a right to education in Article 21 of the Constitution, and also to the insertion of Article 21A in the Constitution. It recognized that the right to education implicit in Article 21 of the Constitution was subject to reasonable limitations, but nevertheless refused to afford any significant degree of deference to the submissions of the Election Commission that the recruitment of teachers to monitor elections was necessary to the successful conduct of these elections.

75 *Id.*

76 *Id.,* "We, therefore, direct that all teaching staff shall be put on the duties of roll revisions and election works on holidays and non-teaching days. Teachers should not ordinarily be put on duty on teaching days and within teaching hours. Non-teaching staff, however, may be put on such duties on any day or at any time, if permissible in law."

The Supreme Court's analysis substantially focussed on Article 21 of the Constitution which, at least textually, is framed as a negative procedural due process right protecting life and personal liberty. Evidently, the coming into force of Article 21A might only slant the constitutional balance further in favour of the outcome the Court reached in any case.

I will return to this line of cases in a later portion of the essay, when I develop my own account of how the Supreme Court ought to enforce Article 21A, now that it has - though belatedly - come into force.

ii. A critical analysis of the Strength of the Right

Viewing the fundamental right to education through the prism of Tushnet's classification, it is hard to escape the conclusion that the right contains at least a minimal substantive content. It cannot escape notice that the right in Article 21A is not premised on the availability of resources, nor is it phrased in terms of a progressive obligation on the part of the State.[77] The beneficiaries of the right are identified in clear-cut and precise terms, being children between the ages of six and fourteen years.[78] The word "*shall*" presumptively connotes a mandatory obligation, and there is nothing in the backdrop of the framing of the right which would suggest otherwise. In fact, an alternative, non-mandatory interpretation of the word "*shall*" would be oxymoronic in the context of Part III of the Indian Constitution, although it is of course possible to conceive of other formulations of the right that might curtail its scope and reach even within the context of Part III.

As a purely doctrinal matter, therefore, a core strength of the right (in terms of judicial enforceability) is clearly present, although the harder question of the deference to be afforded to Parliament in its choice of means still remains to be considered. The latter portion of Article 21A – i.e. "*in such manner as the State may, by law, determine*" – strongly suggests that the means to be adopted to fulfil the mandate of the fundamental right are to be within the domain of the State. This squares well with general concerns about the competence of Courts to adjudicate difficult matters of social and economic policy. Essentially, Article 21A implies that the end is no longer negotiable, but the Executive is certainly entitled to adopt the policies it thinks would best reach that end.

I now turn to the question of the "minimum core" of the right. While powerful arguments have been raised regarding both the difficulty and the

77 *See supra* note 1.
78 *Id.*

undesirability of a minimum core approach to socio-economic rights,[79] I believe that they are overstated, at least if applied in the present context. It is undoubtedly difficult to delineate the substantive content of Article 21A at this juncture. But that would be true of almost any newly inserted fundamental right; it is hard to appreciate why Article 21A is more than usually problematic. Strauss has argued that American constitutional jurisprudence can be best understood as a series of common law decisions in concrete factual scenarios, constrained by precedent but nevertheless constantly evolving.[80] I believe that the contours of Article 21A will be similarly defined in incremental common law fashion. Nevertheless, acknowledging that the right will evolve is distinct from asserting that, as it stands now, it has no identifiable core content. The latter is a claim I would certainly contest.

The first identifiable minimal component is that all children in the identified age group must attend school. In view of the statistical reality discussed earlier,[81] this is far from a trivial irrelevance. Further, a meaningful opportunity to attend school must imply an opportunity without undue risk or discomfort, which would have implications for the maximum distance of schools that would be permissible (without the provision of transportation facilities).[82] In view of the success of the midday meal scheme,[83] and the pivotal role played by the Supreme Court in its popularization,[84] it is quite plausible that provision of a midday meal would be considered mandatory, inspite of the fact that this does not necessarily flow from the text of the constitutional provision.

Why then would I classify the strength of the substantive right as only intermediate? I believe that as long as universal access to primary education is not achieved, the Supreme Court will – and ought to – focus on enforcing access at a baseline level, even if it urges for quality education in a general sense. A pre-occupation with the content of education – at the expense of assuring universal access – would raise familiar institutional competency

79 *See, for example*, Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the myth of the Minimum Core*, 22 Am. U. Int'l L. Rev. 163.

80 David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877. *See also* David A. Strauss, The Living Constitution (2010).

81 *See supra* notes 7-9.

82 Bhandari J's opinion in *Avinash Mehrotra* already points in this direction, *supra* note 68.

83 *See* Right to Food Campaign (Midday Meals: Introduction), available at http://www.righttofoodindia.org/mdm/mdm_intro.html (last visited on Dec. 25, 2010).

84 *See* People's Union for Civil Liberties v. Union of India, Writ Petition (Civil) No. 196 of 2001, available at http://www.righttofoodindia.org/orders/nov28.html (last visited on Dec. 25, 2010).

questions. Perhaps more significantly, judicial pre-occupation with quality at the margin might distract from the baseline goal. I believe that this is a pragmatic realization which the Supreme Court's enforcement will likely reflect. Therefore, while acknowledging that the substantive content of Article 21A will gradually evolve, and reiterating that it does contain a minimal substantive core, I conclude that an expansive interpretation of the underlying right should not be an immediate judicial priority.[85]

iii. Remedies for the breach of Article 21A

Since this essay identifies governmental inertia to be a prominent cause of the imperfect realization of the constitutional goal of free and compulsory education, it is clear that the question of remedies probably requires greater attention than the contours of the underlying right itself.[86] I now turn to the types of remedies that the Supreme Court ought to consider, along with the potential benefits and pitfalls these might entail.

In *Ashoka Kumar Thakur*, Bhandari J. observed that it was essential that the Government revise budget allocations for education, and set a realistic target for fully achieving the right enshrined in Article 21A.[87] While acknowledging that this might require the judiciary to oversee government spending,[88] he stressed that the power of the purse was entrusted to Parliament, and that spending was consequently one area where the judiciary must not overstep its constitutional mandate.[89] Drawing an analogy to the jurisprudence developed by the Supreme Court in the realm of environmental law, he stressed that, inspite of these inherent limitations on the judiciary, it

85 Such an approach would parallel, in important respects, that of the South African Constitutional Court in the cases discussed above. Given the many similarities between the two countries (both being developing nations with vast economic and social disparities between different sections, to name just one), this would probably be more than mere accidental convergence. While the present essay has investigated South African constitutional jurisprudence only to a limited extent, it would certainly appear to be a fruitful area for future investigation by comparative constitutionalists in India.

86 *See Dialogue about Socioeconomic Rights*.

87 *Supra* note 63, "It has become necessary that the Government set a realistic target within which it must fully implement Article 21A regarding free and compulsory education for the entire country. The Government should suitably revise budget allocations for education. The priorities have to be set correctly. The most important fundamental right may be Article 21A, which, in the larger interest of the nation, must be fully implemented. Without Article 21A, the other fundamental rights are effectively rendered meaningless. Education stands above other rights, as one's ability to enforce one's fundamental rights flows from one's education. This is ultimately why the judiciary must oversee Government spending on free and compulsory education."

88 *Id*.

89 *Id.*, *"At the same time, spending is an area in which the judiciary must not overstep its constitutional mandate. The power of the purse is found in Part V, Chapter II of the Constitution, which is dedicated to the Parliament. (See: Articles 109 and 117 for "Money Bills."*)

remained within its scope to enforce the fundamental right to education.[90]

It is necessary to reiterate that *Ashoka Kumar Thakur* was not concerned in any sense with a constitutional claim regarding the denial of primary education. Hence, the discussion regarding the scope and import of Article 21A is *dicta*, and cannot perhaps be afforded the same significance as if it were squarely in the context of resolving a specific factual claim of denial of primary education. Nonetheless, these strongly worded observations in the opinion of Bhandari J. do represent an important starting point for our evolving understanding of Article 21A.

Perhaps the best elucidation of these observations is that the Judiciary will not dictate to the Government how much to spend or how to spend it, but will nevertheless hold it accountable for providing primary education to all. This would be enforced with strong remedies (much as Tushnet describes),[91] with periodic reporting requirements, the refusal to easily accept withdrawal from past commitments, judicial censure and of course the threat of contempt of court as a last resort. This obviously points back to *Godavarman*, and I assert below that that case is indeed a fair model for the mode of enforcement that Article 21A demands.

iv. A Normative Account of the Proposed Approach

Do we have any reason to expect the Supreme Court to develop a distinct jurisprudence with respect to Article 21A, significantly different from what we have seen in (for example) *Mohini Jain* and *Unni Krishnan*? I argue here in the affirmative, both as a predictive and as a normative matter. Firstly, I argue that the Amendment Act itself takes primary education out of the realm of democratic debate, and therefore democratic objections to Courts enforcing the right do not retain much salience. In other words, the Constitution now commands that primary education is a non-negotiable right, irrespective of the priorities of transient political majorities.

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90 *Id.*, "*Nevertheless, it remains within the judiciary's scope to ensure that the fundamental right under Article 21A of Part III is upheld. In M.C. Mehta v. Union of India (vehicular pollution) (1998) 6 SCC 63, this Court did not ignore the Article 21 right to life when deadly levels of pollution put the right at stake. Nor will this Court ignore the Article 21A right to education, when a dearth of quality schooling put it in jeopardy. The Government's education programmes and expenditures, wanting in many respects, are an improvement over past performance. They nearly [nevertheless??] fall short of the constitutional mark. Lacklustre performance in primary/secondary schools is caused in part because Government places college students on a higher pedestal. Money will not solve all our education woes, but a correction of priorities in step with the Constitution's mandate will go a long way.*"

91 *See Social Welfare Rights* at 1911-1912.

I shall try to develop in the following paragraphs an account that may appear fanciful or exaggerated, particularly when expressed in the stark terms I invoke here, but which I believe contains an important core of truth. The Indian Parliament has, in substance, sent the Indian Judiciary a simple message – "*In the realm of primary education (and primary education ONLY), save us from ourselves.*"

This understanding of the Amendment (and surrounding circumstances) explains many things. It explains the apparent paradox that involves Parliament unanimously enacting the constitutional amendment in 2002, and successive governments being unable or unwilling to bring it into force, or to enact an implementing legislation, for almost eight years. It explains the substantial and progressively intensifying (although clearly insufficient) steps taken by governments over the past few decades to provide primary education to all children. It explains why Parliament responds fairly positively to the judgments of the Supreme Court in *Mohini Jain* and *Unni Krishnan*, inspite of the fact that these judgments were arguably questionable in many respects.[92]

The explanation I put forward is also normatively compelling in the context of Indian constitutional jurisprudence because it assumes good faith and a desire to advance constitutional goals, on the part of all State actors, even while it takes account of their inherent failings too. In this view, Parliament, perhaps taking note of the fact that the nation is arguably within striking distance of achieving universal access to primary education (and that a justiciable right would not be an exercise in futility as it might have been in 1950), weighs in to bind whichever political majority might constitute the Executive at any given time.

My argument borrows something from Sheppele, in the sense that it is a "*pragmatic*" defence of social rights which is somewhat sceptical of the degree of self-determination that governments truly have.[93] It differs from her account in that I am not concerned with external limitations on sovereignty as much as internal ones, and that it does not require a view about the merits of a particular economic philosophy.[94] Further, the limitations I focus

92 *See supra* note 52.

93 *See* Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921.

94 To the extent that I assume that primary education will have to be provided substantially by the State, and at no cost, it might be said that I at least assume that markets will not work in the context of primary education in India. That would hardly seem like a very bold assumption. *See, for example,* Amartya Sen, *The importance of basic education*, Speech to the Commonwealth Education Conference, Edinburgh (2003), available at http://people.cis.ksu.edu/~ab/Miscellany/basiced.html (last visited on Dec. 25, 2010), "*Indeed, contrary to claims often made, we have not observed any basic*

on are the imperfections perhaps inherent in any democratic process, but likely to be accentuated when the very deprivation in question hinders those deprived from effectively marshalling adequate political support.[95] Thus, the Executive has made modest progress in the realm of primary education over the past decade, but is often distracted by other issues that appear to have greater short-term political salience.[96]

Seen in this light, the significance of a justiciable social or economic right might often be simply keeping the issue in question fairly high on the Government's agenda. The justiciability of the right also becomes important when we recognize that there are conflicting interests and priorities within a singe government. In this view, as Scheppele suggests in the context of Eastern Europe, constitutional courts can often be partners in a dialogue with the other branches of government, one that ultimately contributes to the realization of a constitutionally mandated right.[97]

The Supreme Court does, in fact, have considerable institutional experience in enforcing, or attempting to enforce, strong judicial remedies with respect to implied fundamental rights.[98] Some of these interventions have been remarkably successful; others have been a significant failure.[99] The majority, though, have probably been in the all-too-common

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reluctance by parents to send their children - daughters as well as boys - to school, provided affordable, effective and safe schooling opportunities actually exist in their neighbourhood. Of course, there are many obstacles in giving shape to the dreams of parents. The economic circumstances of the families often make it very hard for them to send their children to school, particularly when there are fees to be paid.

The obstacle of unaffordability must be firmly removed across the Commonwealth - indeed the world. I am, of course, aware that some champions of the market system want to leave school fees to the market forces. But this cannot but be a mistake given the social obligation to give the essential opportunity of schooling to all children. Indeed, Adam Smith, who provided the classic analysis of the power and reach of the market mechanism two and quarter centuries ago, wrote eloquently, sitting in Kirkcaldy (not far from here), why it would be wrong to leave this to the market..." [Emphasis Supplied].

Further, and even more significantly, to the extent that any claim is made about the importance of substantial State intervention in the realm of primary education (and, implicitly, about the inadequacy of market mechanisms) it is not one that is made by me, but by the Constitution itself.

95 For example, it has often been remarked that there has been a great deal of focus, both in terms of political debate as well as in actual budgetary allocations, on University and technical education, and much less on primary education. While there are certainly good reasons to focus on higher education, the comparative neglect of primary education does appear to involve a peculiar inversion of constitutional priorities. That is certainly the view taken by Bhandari J. in his opinion in *Ashoka Kumar Thakur*, *supra* note 63.

96 The controversy relating to reservations in education institutions, for example, might have been a significant factor in persuading the first United Progressive Alliance (UPA) government (2004-2009) that it did not retain enough political capital or budgetary flexibility to make a major push on the front of primary education.

97 *See supra* note 93.

98 *See, for example, supra* note 50.

99 *Id.*

intermediate zone of grey, and much disagreement about the propriety and efficacy of these remedies persists.[100] It could be considered that the Supreme Court, perhaps with laudable instrumental motives in mind, has been swimming against the current of the constitutional text and structure. The enactment of Article 21A offers the Court an opportunity to effectively enforce relatively stronger remedies to combat the political lethargy in this realm, without being accused of transgressing its proper role.

Conclusion

What lessons, then, for the judicial enforcement of Article 21A? First of all, for reasons I have given above, the example of *Mohini Jain* and *Unnikrishnan* is no longer apposite. It would be a clear abdication of the constitutional mandate – and indeed, profoundly disrespectful to democracy itself - for the judiciary to refrain from enforcing the right. The *Godavarman* model may represent the best route, with the caveat that the definition of the right should be undertaken with a greater degree of circumspection than has sometimes been the case with *Godavarman*. The cautionary note that needs to be struck with respect to the enunciation of the underlying right has a clear textual basis – "*in such manner as the state may, by law, determine*" – in Article 21A. It is clear that primary education must be provided, but it is unlikely that the Supreme Court will significantly constrain the Government with respect to the type of education that is considered to satisfy the constitutional mandate. Nor should the Court prioritize concerns about quality, at the margin, over effectively supervising the attainment of universal access at the earliest.

This means that while the substantive content of the right will undoubtedly evolve in common law fashion, the focus for the Supreme Court should be to enforce the right universally. The tension between Executive and Judiciary that *Godavarman* engendered is unlikely to be replicated here, for many reasons. The constitutional commitment to free and compulsory education is one voluntarily undertaken, and the Supreme Court would certainly be perceived, even by a Government traditionally suspicious of judicial overreach, to have the authority to oversee progress towards this constitutional goal. Enforcing Article 21A in a principled yet workable manner may well be the most consequential challenge the Indian Supreme Court faces in the coming decade. A delicate balance has to be struck, and the stakes for Indian democracy and constitutionalism could not be higher.

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100 *Id.*

Basic Structure and Ordinary Laws (Analysis of the Election Case & the Coelho Case)

*Pathik Gandhi**

1. Introduction

On 11.1.2007, The Supreme Court delivered a landmark judgment, which some appreciated as they believed that the Court was upholding the *fundamentalness* of fundamental rights, whereas others viewed the same as a complete abrogation of the basic Constitutional principles underlying our Constitution and as a thwart to representative democracy through excessive judicial activism. The former believed that the Supreme Court was fulfilling its duty as the sentinel of fundamental rights within our Constitution, whereas the latter believed that the Court acted in total disregard of the explicit provisions of the Constitution and belied the same.

The Supreme Court has, by extending applicability of the doctrine of Basic Structure to the laws included in the Ninth Schedule in *I.R.Coelho v. State of Tamil Nadu*[1], reopened the debate surrounding one of the most controversial provisions of our Constitution, Article 31B, which was introduced through the First Amendment to the Constitution in 1951. The Court has also reopened another debate as to whether fundamental rights are a part of the Basic Structure and the validity of Constitutional Amendments contravening fundamental rights.

In addition to this, the Supreme Court in *Kuldip Nayar v. Union of India*[2] discussed another issue pertaining to the applicability of the doctrine of Basic Structure to ordinary laws. This has reopened the debate, which existed from the landmark decision of the Court in *Indira Gandhi v. Raj Narain*.[3]

Thus in this paper, the researcher seeks to address the following issues. Firstly, the applicability of the doctrine of Basic Structure to ordinary laws and thereafter the decision of the Supreme Court in the *IR Coelho* case in light of the applicability of the doctrine to laws incorporated in the Ninth Schedule.

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1. AIR 2007 SC 861.
2. AIR 2006 SC 3127.
3. AIR 1975 SC 2299.

The researcher has restricted the scope of his paper to the applicability of Basic Structure to ordinary laws and the laws incorporated in the Ninth Schedule and discusses the evolution of the Basic Structure doctrine, however, in doing so he has refrained from going into the jurisprudential underpinnings of the doctrine. He also has refrained from discussing the *Fundamental Rights case* or the debates surrounding the *Golak Nath Case* at great length. He then focuses on the decision and the individual opinions of the judges in the *Election Case* and traces the consistent dicta with regards to the applicability of basic structure to ordinary legislations. In doing so, he also points out the aberrations of the Court in applying the said dicta. Thereafter he has sought to criticize the dicta based on Kelsen's theory of jurisprudence.

In the next part of this paper, the researcher has discussed the Constitutionality of Article 31B and the Ninth Schedule. He has discussed Mathew J.'s opinion in the *Election Case* and Seervai's critique of the same. The researcher has then analyzed the recent decision of the Court in *IR Coelho case* and has critiqued the judgment on several grounds.

2. Applicability of the Basic Structure to ordinary laws

• Evolution of the Doctrine - Scope of amending power

It is prudent to understand the context and the evolution of the Basic Structure doctrine. The question as regards the extent of amending powers of the Parliament has plagued the Supreme Court since the commencement of the Constitution. The crucial question which the Court has had to answer is whether the Parliament, while exercising its amending power under Article 368, can withdraw the fundamental rights that the people[4] had conferred upon themselves.[5] To answer this question we need to understand that Fundamental Rights are based in Part III of the Constitution. The legal status of any law is determined on the anvil of Article 13. This Article declares that all laws in force in the territory of India before the commencement of the Constitution shall to the extent of their repugnancy with the fundamental rights be void from the date on which the Constitution comes into force and any law made by the State which abridges or takes away the fundamental rights shall be struck down as unconstitutional. It is observed that the word 'law' as defined in Article 13 is an inclusive definition and it fails to mention

4. Popular sovereignty; Preamble: "We the People of India..."
5. Sathe, "Judicial Activism in India", p. 64. He raises this question in order to determine whether *the 'Bill of Rights' that had been settled after long negotiations between various sections of the society and was based on a consensus reflected in the Constituent Assembly could be altered and abrogated through the process of constitutional amendment.*

'constitutional amendment' within its ambit.[6] The question first came before the Supreme Court in 1952, in *Sankari Prasad v. Union of India*[7] when Patanjali Shastri J., speaking for the Bench, brought out the distinction between legislative power and constituent power and held that "law" in Article 13 did not include an amendment of the Constitution made in the exercise of constituent power and fundamental rights were not outside the scope of amending power.[8] A decade later the constituent power of the Parliament was again challenged in *Sajjan Singh* v. *State of Rajasthan.*[9] The Court was divided on the issue and the majority opinion expressed by Gajendragadkar C.J., adopted the stand taken by the Court in *Sankari Prasad* and declared that constitutional amendments were not covered by the prohibition expressed in Article 13(2).[10] The Supreme Court in 1967 reconsidered the question in *Golak Nath* v. *State of Punjab*[11] wherein the Court by a majority of 6:5 held that the fundamental rights were unamendable by the Parliament.[12] This decision faced severe criticism from several scholars,

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6. Article 13: Laws inconsistent with or in derogation of the fundamental rights-
   (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
   (2) The State shall not make any law, which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
   (3) In this article, unless the context otherwise requires,-
      (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
      (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas. [(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.]
7. (1952) S.C.R. 89.
8. The Court unanimously declared that the Constitution (1st Amendment) Act, 1951 was constitutional.
9. AIR 1965 SC 845.
10. As far as the minority is concerned, Hidayatullah J., brought out the fundamentalness of our fundamental rights by observing, *"if our fundamental rights were to be really fundamental, they should not become the plaything of a special majority"* p. 862.
11. AIR 1967 SC 1643.
12. Subba Rao C.J., in the majority opinion (for himself, Sikri, Shelat Shah and Vaidyalingam) and Hidayatullah J., in his concurring opinion reached the same conclusion though they took opposite views as to the source of the amending power. Subba Rao C.J., held that the Article 368 contained only the procedure for amendment, the power to amend was located in the residuary power of legislation (Article 248 read with Entry 97). On the other hand Hidayatullah J., was of the opinion that even though the power of amendment was not a residuary power, it was a *sui generis* legislative power and Article 368 contained a procedure for amendment.

notable among them being H.M.Seervai[13] and P.K.Tripathi.[14] According to Sathe, this case was an example of judicial activism in the late 1960s, which evoked severe reactions from the constitutional pundits which were brought up in the British tradition of legal positivism.[15] He believes that *"Golaknath marks a watershed in the history of the Supreme Court of India's evolution from a positivist Court to an activist Court."*[16]

This decision of the Supreme Court was overruled by all the judges except two[17] in *Kesavananda Bharati* v. *State of Kerala.*[18] In this case, by a majority of 7:6, the Court held that while *Golaknath* stood overruled, the power of amendment was not unlimited. Seven out of the thirteen judges held that Parliament's constituent power under Article 368 was constrained by the inviolability of the Basic Structure of the Constitution, which was one of the Basic features of the Constitution. The Basic Structure of the Constitution could not be destroyed or altered beyond recognition by a constitutional amendment.[19] The researcher does not consider a discussion

13. One of the most vehement critiques of this decision is H.M.Seervai, who is of the opinion that this decision turned on the language of Article 368 as originally enacted. However it is pertinent to note that the significance lies in the fact that, for the first time, the judges had openly taken a political position and was an assertion by the Court of its role as the protector of the Constitution.
14. Tripathi was of the opinion that if Subba Rao J.'s reasoning that the power of amendment is vested in the Parliament as a residuary power under Entry 97 of the Union List is accepted then it would lead to an absurd consequence of rendering Article 368 otiose. P.K. Tripathi, "Kesavananda Bharati v. State of Kerala: Who wins?", (1974) 1 SCC 4.
15. Sathe, "Judicial Activism in India", p. 66. He also goes on to observe that in order to reach the premise of the judgment, the judges had taken recourse to interpretational methods that were traditional and positivist. He explains this from the Courts interpretation that a constitutional amendment was 'law' for the purpose of Article 13 or that Article 368 of the Constitution, which provides for an amendment of the Constitution, did not contain the power of amendment but merely prescribed the procedure and the power was to be located in the plenary legislative power of Parliament contained in the residuary clause.
16. *Ibid.*
17. Sikri C.J., and Shelat J. Chief Justice Sikri said it was not necessary to decide whether *Golaknath* had been rightly decided and according to Justice Shelat, the *Golaknath* decision had become academic because even on the assumption that the majority decision in that case was not correct, the result on the questions now raised...would just be the same. AIR 1973 SC 1461 at p. 1566. Both Chief Justice Sikri and Justice Shelat were parties to the *Golaknath* majority; therefore they might have avoided saying that it was wrong.
18. AIR 1973 SC 1461.
19. These Seven Judges were, Chief Justice Sikri, Justices Shelat, Hegde, Grover, Mukherjea, Jaganmohan Reddy, and Khanna. The minority consisting of Justices Ray, Mathew, Beg, Dwivedi, Palekar and Chandrachud held that Parliament had unlimited power of constitutional amendment. See S.P.Sathe, "Judicial Review in India: Limits and Policy", 35 Ohio State Law Journal, pp. 870-84 (1974). Seervai, in his analysis of the case in his magnum opus, "Constitution of India" states that six of the seven majority judges held that there were implied and inherent limitations on the amending power of the Parliament, which precluded Parliament from amending the Basic Structure of the Constitution. However Khanna J. rejected this theory of implied limitations but held that the Basic Structure could not be amended away. All Seven judges gave illustrations of what they considered Basic Structure comprised of.

on the merits of the decision in the *Fundamental Rights Case* to be within the ambit of this paper. The decision has been discussed by constitutional experts and jurists[20] at great length and their position can be summed up in the following words: "*despite the procedural foibles, however, and the exasperating vagueness of the idea of 'basic structure,' Upendra Baxi was prescient when he described the Kesavananda opinion as "the constitution of the future"* [21]

The Decision in the Election Case

The Court for the first time faced the issue of the applicability of the Basic Structure in *Indira Gandhi* v. *Raj Narain*[22] wherein it was contended on behalf of the petitioners that when the amending power cannot be exercised to damage or destroy the basic features of the Constitution or the essential elements of the basic structure or framework thereof, the limitations on the exercise of legislative power will arise not only from the express limitations contained in the Constitution, but also from necessary implication either under articles or even in the preamble of the constitution. This was elucidated by contending that if the democratic way of life through parliamentary institutions based on free and fair elections is a basic feature,[23] which cannot be destroyed or damaged by amendment of the Constitution, it cannot similarly be destroyed or damaged by any legislative measure. The question was whether the Representation of the People (Amendment) Act, 1974 and the Election Laws (Amendment) Act, 1975 referred to as the Amendment Acts, 1974 and 1975 are unconstitutional because these Acts destroy or damage basic structure or basic features? The question as to whether Acts incorporated in the Ninth Schedule do not enjoy constitutional immunity because these Acts destroy or damage basic structure or basic features shall be discussed at length subsequently.

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20. Burt Neuborne, "The Supreme Court of India", 1 Int'l J. Const. L. 476; S.P.Sathe, "Judicial Activism: The Indian Experience", 6 Wash. U. J.L. & Pol'y 29; P.P.Rao, "Basic Features of the Constitution", (2000) 2 SCC (Jour) 1; N.A.Palkhivala, "Fundamental Rights Case: A Comment", (1973) 4 SCC (Jour) 57; P.K.Tripathi, "Kesavananda Bharati v. The State of Kerala: Who Wins?", (1974) 1 SCC (Jour) 3; Upendra Baxi, "The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment", (1974) 1 SCC (Jour) 45; Joseph Minattur, "The Ratio in the Kesavananda Bharati Case", (1974) 1 SCC (Jour) 73; David Gwynn Morgan, "The Indian Essential Features Case", 30(2) ICLQ (1981) 307; Upendra Baxi, "Some Reflections on the Nature of Constituent Power", Rajeev Dhavan, "Indian Constitution-Trends and Issues", (1978), p. 122.
21. Burt Neuborne, "The Supreme Court of India", 1 Int'l J. Const. L. 476.
22. AIR 1975 SC 2299.
23. To appreciate the above submission it is not necessary to go into the issue determining whether the doctrine of basic structure extends to free and fair elections and the researcher has not considered it prudent to include the discussion on the same within the ambit of this paper. However in this case, Khanna, Mathew and Chandrachud held that the impugned provision would contravene the principle of democracy.

The Court decided by a majority of 3:1, that ordinary laws are not subject to the test of the Basic Structure of the Constitution and the same is applied only to determine the validity of Constitutional Amendments. The majority opinion comprises of concurring opinions of Ray C.J., Mathew J. and Chandrachud J. Justice Beg dissented, holding that ordinary laws also have to be tested on the touchstone of the Basic Structure and Khanna J., abstained from deciding on the issue, as he did not consider it necessary to do so.[24]

It is necessary to understand the rationale of the individual opinions regarding this issue. As far as the majority is concerned, Chandrachud J., basing on his decision on the ratio in the *Fundamental Rights Case* held that the constitutional amendments have to be tested on the anvil of Basic Structure. In his esteemed view, one cannot logically draw an inference from this ratio that ordinary legislation must also answer the same test as a constitutional amendment.[25] He also justifies his stand on the ground that the amending power is subject to the theory of Basic Structure because it is a constituent power of the Parliament. This essentially refers to the distinction between legislative power and constituent power. Chandrachud brings out this distinction to emphasize the point that *"since the two are not the same a higher power should be subject to a limitation* (read as "Basic Structure doctrine") *which will not operate upon a lower power and there would be no paradox ...same genus, they operate at different fields and are therefore subject to different limitations"*.[26] As far as the opinion of Chief Justice Ray is concerned he believes that ordinary laws shall not be subject to the test of Basic Structure as by doing so one would "*equate legislative measures with Constitution Amendment."*[27] The only relevant test for the validity of a statute made under the plenary power of the Parliament, that is to legislate under Article 245, is

24. *The Election Case*, AIR 1975 SC 2299, ¶ 239: *"Argument has also been advanced that validity of Act 40 of 1975 cannot be assailed on the ground that it strikes at the basis structure of the Constitution. Such a limitation it is submitted, operates upon an amendment of the Constitution under Article 368 but it does not hold good when Parliament enacts a statute in exercise of powers under Article 245 of the Constitution. In view of my finding that the provisions of Act 40 of 1975 with which we are concerned have not been shown to impinge upon the process of free and fair elections and thereby to strike at the basic structure of the Constitution, it is not necessary to deal with the above argument. I would, therefore, hold that the provisions of Act 40 of 1975 with which we are concerned are valid and do not suffer from any constitutional infirmity."*
25. He arrived at this inference based on the principle *"a case is only an authority for what it decides"*. As per Chandrachud J., Ordinary laws have to answer only two tests for their validity: (1) The law must be within the legislative competence of the Legislature and (2) it must not offend against the provisions of Article 13(1) and (2) of the Constitution. Basic Structure is neither a provision in the constitution nor a part of fundamental rights; Para 691 of the Election Case.
26. ¶ 692, *the Election Case*. This was in response to the submission of Shri Shanti Bhushan that it is *paradoxical* that the higher power should be subject to a limitation which will not operate upon a lower power.
27. ¶ 132, *The Election Case.*

whether the legislation is within the scope of the affirmative grant of power or is forbidden by some provision of the Constitution. According to Rai J., if the contention were accepted then the plenary power to legislate would be subject to an additional limitation that no legislation can be made as to damage or destroy basic features or basic structures.[28] He observed that "*this will mean rewriting the Constitution and robbing the Legislature of acting within the framework of the Constitution*".[29] He noted that the Basic Structure is indefinable and the scope of the plenary power is more definite. Thus applying the doctrine of Basic Structure to ordinary laws would *denude* the power of Parliament and State Legislatures of laying down legislative policies, which would amount to a violation of the principle of separation of powers.

Mathew J. also endorsed this opinion and he was of the view than an ordinary law cannot be declared invalid for the reason that it goes against the vague concepts of democracy, justice, etc. The validity can only be tested with reference to the principles of democracy actually incorporated in the Constitution.[30] He also opined negatively on the issue whether the doctrine would apply to these ordinary laws after they are incorporated in the Ninth Schedule after a Constitutional Amendment to that effect.[31] This has been discussed at greater length hereinafter.

Beg J. has expressed his dissent by holding that the "basic structure" of the Constitution tests the validity of both, constitutional amendments as well as ordinary laws. This is because ordinary law-making itself cannot go beyond the range of constituent power. He relies on Kelsen's theory[32] that the norms laid down in the constitution are the supreme/basic norms and the legality of laws, whether purporting to be ordinary or constitutional, is

28. It is also pertinent to note that the distinction between implied limitations on the power of amendment of the Constitution and the theory of Basic Structure. The theory of implied limitations on the power of amendment of the Constitution has been rejected by seven Judges in Kesavananda Bharati's case. (We may just refer to the observations of Palekar J., at page 608, Dwivedi J., at page 916 and Chandrachud J., at page 977. To the same effect is the view expressed by Ray J., as he then was, Khanna J., and others. This theory has repeatedly been rejected by the Courts in England, Australia. See *The State of Victoria and The Commonwealth of Australia* 122 Commonwealth Law Reports 353; *Webb v. Outrim*, (1907) A.C., 81. Our Constitution has also not adopted the due process clause of the American Constitution and thus reasonableness of legislative measures is unknown to our Constitution and cannot be treated as an implied limitation on the Constitution. The crucial point is that unlike the American Constitution where rights are couched in wide general terms leaving it to the courts to evolve necessary limitations our Constitution has denied due process as a test of invalidity of law. In *A. K. Gopalan v. State of Madras*, AIR 1950 SC 27; due process was rejected by clearly limiting the rights acquired and by eliminating the indefinite due process.
29. ¶134, The *Election Case*
30. ¶ 346, *The Election Case*
31. ¶ 353, *The Election Case*
32. Has been substantiated hereinafter.

tested by the norms laid down in the Constitution.

- **Consistent Dicta-Inconsistent Application**

This dicta laid down by the majority in this case has been upheld by the Supreme Court in a plethora of cases, the first opportunity being made available in 1977 in *State of Karnataka* v. *Union of India and Anr*[33] wherein Beg C.J., delivering the judgment for the majority relied on the majority opinion (Justice Chandrachud's opinion) in *the Election Case* and held that in every case where reliance is placed upon the doctrine of Basic Structure, in the course of an attack upon legislation, whether ordinary or constituent, what is put forward as part of "a basic structure" must be justified by references to the express provisions of the Constitution[34] and went on to hold that the doctrine would not apply to determine the validity of ordinary legislations.[35] The Court upheld this principle in a plethora of cases[36] before reiterating the principle recently in, *Kuldip Nayar* v. *Union of India.*[37]

Even though the judicial dicta on the issue is well-settled that ordinary legislations cannot be tested on the grounds of basic structure, the Court has applied the same in a couple of cases. In 1997, the Supreme Court was faced with the task of determining the constitutionality of those Amendments,[38] which deprived the High Court of its jurisdiction under Articles 226 and 227, and also Section 28 of the Administrative Tribunals Act, 1985, providing for *"exclusion of jurisdiction of Courts except the Supreme Court under Article 136 of Constitution"*[39]. The Court in addition to striking down the Amendments to

33. AIR 1978 SC 68.
34. *State of Karnataka v. Union of India,* AIR 1978 SC 68 at ¶ 120.
35. Beg C.J., para, 249: *"Mr. Sinha also contended that an ordinary law cannot go against the basic scheme or the fundamental back-bone of the Centre-State relationship as enshrined in the Constitution. He put his argument in this respect in a very ingenious way because he felt difficulty in placing it in a direct manner by saying that an ordinary law cannot violate the basic structure of the Constitution. In the case of Smt. Indira Nehru Gandhi v. Shri Raj Narain, such an argument expressly rejected by this Court."*
36. *State of Andhra Pradesh and Ors. v. McDowell & Co. and Ors.* AIR 1996 SC 1627; *Public Services Tribunal Bar Association v. State of U.P. and Anr.* AIR 2003 SC 1115.
37. AIR 2006 SC 3127: (Sabharwal C.J., ¶ 45).
38. Article 323A(2)(d) and Article 323B(3)(d) introduced by Section 46 of the Constitution (42nd Amendment) Act, 1976.
39. Section 28 of the Administrative Tribunals Act, 1985: "Exclusion of Jurisdiction of courts– On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any Service or post, no court except–
    (a) the Supreme Court; or
    (b) any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947 or any other corresponding law for the time being in force, Shall have, or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or such service matters."

the Constitution also struck down Section 28 on the ground that taking away the power of judicial review from the High Courts violated the principle of judicial review which was a part of the basic structure doctrine.[40] The anomaly has been observed by Sabharwal C.J., in *Kuldip Nayar v. Union of India*[41] wherein he gives another instance where the Court has applied the doctrine of Basic Structure to ordinary legislations. In *Indra Sawhney v. Union of India,*[42] decided in 1999, a Bench of 3 Judges of the Supreme Court expressly held that a State enacted law[43] violated the principle of equality which was a part of the Basic Structure of the Constitution and the Court was of the opinion that what the Parliament cannot do in the exercise of its Constituent power, the State Legislatures too cannot achieve.[44]

• Jurisprudential Critique

The judicial dicta ranging from *the Election Case* in 1975 to *Kuldip Nayar* in 2006 on this issue has faced severe criticism from the Kelsenian School of thought. Before applying the same it is pertinent to understand Kelsen's school of thought. Kelsen propounded a hierarchical structure of the legal order, labeling it Grundnorm. He propounded a hierarchy of norms.[45] Since the validity of one norm depends on the validity of the other norm the relation between the norm that regulates the creation of another norm and the norm created in conformity with the former is that of subordination.[46] Its unity is brought about by the connection that results

40. Ahmadi C.J., ¶ 100.
41. AIR 2006 SC 3127: (Sabharwal C.J ¶ 42).
42. AIR 2000 SC 498
43. Kerala State Backward Classes (Reservation of Appointments or Posts in the Services under the State) Act, 1995.
44. Jagannadha Rao C.J., ¶ 65: "*What we mean to say is that Parliament and the legislatures in this Country cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet.) Whether creamy layer is not excluded or whether forward castes get included in the list of backward classes, the position will be the same, namely, that there will be a breach not only of Article 14 but of the basic structure of the Constitution. The non-exclusion of the creamy layer or the inclusion of forward castes in the list of backward classes will, therefore, be totally illegal, Such an illegality offending the root of the Constitution of India cannot be allowed to be perpetuated even by Constitutional amendment. The Kerala Legislature is, therefore, least competent to perpetuate such an illegal discrimination. What even Parliament cannot do, the Kerala Legislature cannot achieve."*
45. The same has been recognized by Ray C.J., in the *Election Case.* ¶ 33: *"The legal order is a system of general and individual norms connected with each other according to the principle that law regulates its own creation. Each norm of this order is created according to the provisions of another norm and ultimately according to the provisions of the basic norm constituting the unity of this system, the legal order. A norm belongs to a certain legal order, because it is created by an organ of the legal community constituted by this order. Creation of law is application of law. The creation of a legal norm is normally an application of the higher norm, regulating its creation. The application of higher norm is the creation of lower norm determined by the higher norm."*
46. Kelsen, "The Function of the Constitution", (1986), p.111.

from the fact that the validity of a norm, created according to another norm, rests on that other norm, whose creation in turn, is determined by a third one. This is a regression that ultimately ends up in the presupposed basic norm.[47] Now Kelsen is of the opinion that in a national legal order, the constitution represents the highest level of positive law and classifies the Constitution as the Basic Norm from which legislations derive their validity. This view has been endorsed by the dissenting judges in *the Fundamental Rights Case.*[48] The judges emphasized the distinction between constitutional law and ordinary law by recourse to the "criterion of validity." According to Ray J., the distinction exists in the fact that in the case of the Constitution the validity is inherent and lies within itself and ordinary laws derive their validity from higher norms. Every legal rule or norm owes its validity to some higher legal norm. The Constitution, argues Ray J., is the basic legal norm.[49] He bases his reasoning on the fact that *"the Constitution generates its own validity,"* and does not rely on any higher norm for its validity. In light of this it is pertinent to note that based on Kelsen's theory, there is a difference between superior and inferior legal norms in the mode of creation of the Constitution itself.[50] He is of the opinion that the basic norm is not created by a legal procedure by a law-creating organ because a Constitution being the 'ultimate legal principle'[51] is not created and given validity by a superior norm.[52] However, it is essential to note that a legal procedure[53] and a law-creating organ[54] are both necessary components of the amendment process. Hence, while the criterion of self-generating validity is rightly applied to the Constitution, the same cannot be said to extend to the amendment of the

47. Kelsen, "Pure Theory of Law", (1967), p. 226.
48. Ray, Mathew, Palekar, Chandrachud, Dwivedi and Beg JJ., who were part of the majority of 11 judges who decided to overrule the decision in Golaknath Case.
49. And is supported by P.K.Tripathi, "Some Insights Into Fundamental Rights" (Bombay: University of Bombay, 1972), p.43 and A.Lakshminath, "Justiciability of Constitutional Amendments" in Rajeev Dhavan, (ed.), "Indian Constitution: Trends and Issues", (1978), p. 145. However However, it is Prof. Lakshminath's submission that this cannot assist in the determination of the question whether constitutional law and an amendment to the Constitution, which is adopted pursuant to an express power conferred in that behalf by the Constitution itself, occupy the same status in a legal hierarchy.
50. Kelsen, "The Function of the Constitution", (1986).
51. P.K.Tripathi expressly equated the Constitution to Kelsen's basic norm (Grundnorm), P.K.Tripathi, "Some Insights Into Fundamental Rights" (Bombay: University of Bombay, 1972), p.43. Also see, Andreas Buss, "Dual Legal Systems and the Basic Structure Doctrine of Constitutions: The Case of India", 2 Can. J.L. & Soc'y 23 at p. 40.
52. Salmond, "Jurisprudence", 12th ed. 2002, p.83 is of the opinion that a Constitution is first established in fact and then the Courts formally recognize it as valid by common acceptances as a law.
53. Procedure provided in Article 368.
54. The Parliament in the Indian Context.

Constitution, which derives its validity from the Constitution. This proposition can be further substantiated with the argument that the Basic Structure, the anvil on which the Constitutional Amendments are required to be tested post *Kesavananda Bharati*, is itself a part of the Constitution. Thus applying the theory laid down by Kelsen, both ordinary laws and Amendments derive their validity from the Constitution and have been created by the procedure laid down in the higher norm, the Constitution,[55] and thus it is submitted that the proposition that the doctrine of Basic Structure (higher norm) shall apply only to constitutional amendments (lower norm) and shall not extend to ordinary legislations (lower norm) does not hold good.

Even if the presumption lies in the proposition that constitutional amendments are at a higher standard (higher norm) than ordinary legislations, as held by Chandrachud J. in the *Election Case*,[56] it is submitted that the touchstone on which the validity of the higher norm is determined shall extend to determine the validity of the lower norm (ordinary legislation) and thus the doctrine of Basic Structure will extend to ordinary legislations. This leads one to the question as to whether a legislature enacts a constitutional amendment in exercise of constituent power, the nature of which the researcher has discussed subsequently in this paper.

3. Basic structure and IX Schedule

Before determining whether the doctrine of Basic Structure applies to the legislations included in the Ninth Schedule, the researcher considers it pertinent to briefly deal with the genesis and evolution of the Ninth Schedule and the constitutional challenge faced by it.

Article 31B and Ninth Schedule: Scope

Article 31B[57] and the Ninth Schedule[58] were introduced in the Constitution by the First Amendment[59] to assist the process of legislation to

55. Kelsen, "The Pure Theory of Law", (1967), p. 226: *"a superior norm determines merely the procedure by which another norm is to be created. Since the validity of one norm depends on the validity of the other norm the relation between the norm that regulates the creation of another norm and the norm created in conformity with the former can be metaphorically presented as a relationship of super and subordination."*
56. ¶ 692, *The Election Case.*
57. Article 31B. Validation of certain Acts and Regulations- *Without prejudice to the generality of the provisions contained in Article 31A*, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, *or ever to have become void*, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part, and *notwithstanding any judgment, decree or order of any court or tribunal to the contrary*, each of the said Acts and Regulations shall, *subject to the power of any competent Legislature to repeal or amend it,* continue in force.
58. The Ninth Schedule when incorporated contained 13 Items, all relating to land reform laws immunizing them from challenge on the grounds of Contravention of Article 13 of the Constitution.

bring about agrarian reforms[60] and confer on such legislative measures immunity from possible attack on the ground that they contravene the fundamental rights. The effect of Article 31B can be summarized briefly; Article 31B provides that the Acts and Regulations specified in the Ninth Schedule shall not be deemed to be void or ever to have become void on the ground that they are inconsistent with or take away or abridge any of the rights conferred by Part III of the Constitution. The provisions of the Article are expressed to be without prejudice to the generality of the provision in Article 31A and the concluding portion of the Article supersedes any judgment, decree or order of any court or tribunal to the contrary. It is extremely unfortunate to note that the number of items in the Ninth Schedule have increased from 13, when initially enacted, to more than 284.[61] Furthermore it is also regrettable to observe that the laws included in the Ninth Schedule are no longer restricted to those enacted to further agrarian and land reforms.[62]

The laws included relate mostly to the abolition of various tenures like Maleki, Taluqdari, Mehwassi, Khoti, Paragana and Kulkarni Watans and of Zamindaris and Jagirs. The place of pride in the schedule is occupied by the Bihar Land Reforms Act, 1950, which is Item 1 and which led to the enactment of Article 31-A and to some extent of Article 31B. The Bombay Tenancy and Agricultural Lands Act, 1948 appears as Item 2 in the Ninth Schedule.

59. Section 5, Constitution (First Amendment) Act, 1951 (June 18, 1951).

60. These provisions were essentially introduced because the High Court of Patna in *Kameshwar v. State of Bihar*, AIR 1951 Patna 91, held that a Bihar legislation relating to land reforms was unconstitutional while the High Court of Allahabad and Nagpur upheld the validity of the corresponding legislative measures passed in those States. To immunize these laws from Fundamental Rights, the First Amendment brought in Articles 31A and 31B.

61. The reason the same is unfortunate as it goes against the intent of the Parliament, who in 1951, were the same as the Constitutional-makers. This is evident from the following views of Jawaharlal Nehru while discussing the inclusion of the Ninth Schedule. Chandrachud C.J., in his opinion in *Waman Rao v. Union of India,* (1981) 2 SCC 362 succinctly puts forth Nehru's views as follows; *"We may also mind that Jawaharlal Nehru had assured the Parliament while speaking on the 1st Amendment that there was no desire to add to the 13 items which were being incorporated in the Ninth Schedule simultaneously with the 1st Amendment and that is was intended that the Schedule should not incorporate laws of any other description than those which fell within Items 1 to 13. Even the small list of 13 items was described by the Prime Minister as a 'long schedule."*

62. Entry 17: Sections 52A to 52G of the Insurance Act, 1938; Entry 18: The Railway Companies (Emergency Provisions) Act, 1951; Entry 19: Chapter IIIA of the Industries (Development and Regulation) Act, 1951; Entry 90: The Mines and Minerals (Regulations and Development) Act, 1957; Entry 91: The Monopolies and Restrictive Trade Practices Act, 1969; Entry 95: The General Insurance Business (Nationalization) Act, 1972; Entry 96: The Indian Copper Corporation (Acquisition of Undertaking) Act, 1972; Entry 97: The Sick Textile Undertakings (Taking Over of Management) Act, 1972; Entry 100: The Foreign Exchange Regulation Act, 1973; Entry 104: The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974; Entry 126: The Essential Commodities Act, 1955; Entry 127: The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976; Entry 133: The Departmentalisation of Union Accounts (Transfer of Personnel) Act, 1976; Entry 216: The Gujarat Devasthan Inams Abolition Act, 1969; Entry 257A: The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of appointments or posts in the Services under the State) Act, 1993. The above-mentioned legislations are a few instances.

The insertion of laws in the Ninth Schedule at regular intervals can be briefly summarized in the following table:[63]

Amendment	Acts/Provisions added
1st Amendment (1951)	1-13
4th Amendment (1955)	14-20
17th Amendment (1964)	21-64
29th Amendment (1971)	65-66
34th Amendment (1974)	67-86
39th Amendment (1975)	87-124
40th Amendment (1976)	125-188
47th Amendment (1984)	189-202
66th Amendment (1990)	203-257
76th Amendment (1994)	257A
78th Amendment (1995)	258-284

- **Constitutionality of Article 31B: Judicial Exposition**

The constitutionality of Article 31B and the Ninth Schedule first came up for challenge in *Sankari Prasad v. Union of India*[64] wherein the Court upheld the Constitutionality of the First Amendment.[65] The decision in *Sankari Prasad* was reaffirmed by the Supreme Court in *Sajjan Singh* v. *State of Rajasthan.*[66] In that case, Gajendragadkar C.J., observed that the genesis of the amendment

63. As reproduced by Sabharwal C.J., in *I.R.Coelho v. State of Tamil Nadu*, AIR 2007 SC 861.
64. (1952) SCR 89. The Court also pronounced on the distinction between Amending Power and Legislative Power and stated that Amending power was a Sovereign Power
65. Patanjali Shastri J., speaking for the Court in the unanimous opinion based his reasons for upholding the validity of the First Amendment in the following words, *inter alia*, para 30, *"It was said that they related to land which was covered by item 18 of List II of the Seventh Schedule and that the State legislatures alone had the power to legislate with respect to that matter. The answer is that, as has been started, articles 31A and 31B really seek to save a certain class of laws and certain specified laws already passed from the combined operation of article 13 read with other relevant articles of Part III. The new articles being thus essentially amendments of the Constitution, Parliament alone had the power of enacting them... The question whether the latter part of article 31B is too widely expressed was not argued before us and we express no opinion upon it."* It is necessary to understand the political milieu of the day. "When Justice Patanjali Shastri delivered the unanimous judgment in Shankari Prasad, India was witness to the golden years of the Nehru era. Not even his worst critics suspected or distrusted the democrat in Nehru." The courts thus had decided that there was no threat to democracy from the constituent power. Moreover, the judgment was not in any way influenced by the will to undermine the developmental process or to keep a hold over the programmes of planned development. See Mohammed Ghouse, "Conscience Keepers of Status Quo", Indian Bar Review, Vol. 9(1), 1982, p. 4.
66. AIR 1965 SC 845.

made by adding Articles 31A and 31B is to assist the State Legislatures to give effect to the economic policy to bring about much needed agrarian reforms.[67] This Amendment came up for challenge again in the famous *Golak Nath Case*[68] in 1967, wherein it was upheld.[69]

After this case the Parliament passed the Constitution (29th Amendment) Act, 1972 and amended the Ninth Schedule to the Constitution by inserting therein two Kerala Amendment Acts in furtherance of land reforms namely, the Kerala Land Reforms Amendment Act, 1969;[70] and the Kerala Land Reforms Amendment Act, 1971.[71] These amendments were challenged in *Kesavananda Bharati's case*. The decision in *Kesavananda Bharati's case* was rendered on 24th April, 1973 by a 13 Judge Bench and, by majority of seven to six, *Golak Nath's case* was overruled. The Constitution 29th Amendment was declared to be valid.[72] In *Kesavananda Bharati's case* the validity of Article 31B was not in question. The constitutional amendments under challenge in *Kesavananda Bharati's case* were examined assuming the constitutional validity of Article 31B. Khanna J. opined that the fundamental rights could be amended, abrogated or abridged so long as the Basic Structure

67. Hidayatullah and Mudholkar JJ., concurred with the opinion of the Chief Justice upholding the amendment but, at the same time, expressed reservations about the effect of possible future Amendments on Fundamental Rights and of the Constitution. Justice Mudholkar questioned, *"It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of the Article 368?"* (This has been quoted from *IR Coelho,* ¶ 8 and it is interesting to note that the doctrine of basic structure was envisaged or recognized by Mudholkar way back in 1965.)

68. The researcher does not wish to concern himself in the debate surrounding this case as he considers the same to be beyond the scope of this paper. However, the debate surrounding fundamental rights pre and post *Golaknath* has been discussed exhaustively by Prof. Blackshield in his Articles published in *JILI* in 1966 and 1968.

69. Subba Rao C.J., by a majority of 6:5, rejected the ratio of the Court in *Sankari Prasad case* and in the *Sajjan Singh case* and held that Fundamental Rights are sacrosanct and are beyond the reach of the Amending Power of Parliament. He located Amending Power in the Scheme of Distribution of Legislative Power. He located it in residuary powers found in Entry 97, List I read with Article 248. Hidayatullah J., gave a concurring opinion, however differed with the Chief Justice on the issue of location of Amending Power as considered the same to be *sui generis.*

70. Kerala Act 35 of 1969.

71. Kerala Act 35 of 1971.

72. While understanding this decision it is important to remember that six learned Judges (Ray, Phalekar, Mathew, Beg, Dwivedi and Chandrachud, JJ) who upheld the validity of 29th Amendment did not subscribe to the Basic Structure doctrine. They held it to be unconditionally valid. The other six learned Judges (Chief Justice Sikri, Shelat, Grover, Hegde, Mukherjee and Reddy JJ) upheld the 29th Amendment subject to it passing the test of Basic Structure. The 13th learned Judge (Khanna, J), though subscribed to the doctrine, upheld the 29th Amendment agreeing with six learned Judges who did not subscribe to the doctrine. Therefore, it would not be correct to assume that all Judges or Judges in majority on the issue of Basic Structure doctrine upheld the validity of 29th Amendment unconditionally or were alive to the consequences of the Basic Structure doctrine on 29th Amendment.

of the Constitution is not destroyed but at the same time, upheld the 29th Amendment as unconditionally valid.[73] Khanna J. upheld the 29th Amendment in the following terms:

> "*We may now deal with the Constitution (Twenty ninth Amendment) Act. This Act, as mentioned earlier, inserted the Kerala Act 35 of 1969 and the Kerala Act 25 of 1971 as entries No. 65 and 66 in the Ninth Schedule to the Constitution. I have been able to find no infirmity in the Constitution (Twenty ninth Amendment) Act.*"[74]

The constitutional validity of all the legislations incorporated in the Ninth Schedule again came up for question in 1981, when the Supreme Court was asked to determine the constitutional validity of all Amendments to the Ninth Schedule in the case of, *Waman Rao* v. *Union of India.*[75] This is because in this case, the Constitution (First Amendment) Act, 1951 which introduced Article 31-A into the Constitution with retrospective effect, and Section 3 of the Constitution (Fourth Amendment) Act, 1955 which added the new clause (1), sub-clauses (a) to (e), for the original clause (1) with retrospective effect was questioned. In addition to this, Section 5 of the Constitution (First Amendment) Act, 1951, which introduced Article 31B was questioned in addition to the constitutionality of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961.[76] The Court unanimously upheld the First and Fourth Amendments.[77] This decision is a classical manifestation of "*Judicial Convenience or Judicial Arbitrariness*".[78] Professor

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73. It cannot be inferred from the conclusion of the seven judges upholding unconditionally the validity of 29th Amendment that the majority opinion held fundamental rights chapter as not part of the Basic Structure doctrine. The six Judges which held 29th Amendment unconditionally valid did not subscribe to the doctrine of Basic Structure. The other six held 29th Amendment valid subject to it passing the test of Basic Structure doctrine.
74. ¶ 1536, *Kesavananda Bharati's Case.*
75. AIR 1981 SC 271. Hereinafter, *"Waman Rao Case".*
76. ¶ 1, *Waman Rao Case.*
77. It must be pointed out here the fluctuating nature of the judicial change. When in the 1950's the Parliament was desperately trying to bring in fast reforms, the court adopted a conservative stance and scuttled all modest attempts on the part of the government. Later in the 1970's it arrogated to itself the role of protecting democracy from the political masters of the day and again sought to scuttle the attempts of the government, though for entirely different reasons. Two divergent and contradictory positions of the political milieu emerge from the facts discussed above: Firstly, the political stage has remained in a state of constant flux, its policies radiating a policy towards change, towards a democratization of economic and thus a greater justice to all. The courts remaining antithetical to the political stance, showing extreme wariness has remained sharply conservative, strangely status-quoist, unwilling to bend to the proclaimed socialist ideal of the government. An even more pertinent question would be why the courts would keep upholding the validity of the Articles 31A & 31B even though it has already shorn them of the umbrella-like protection that they were meant to promote.
78. Views of Professor Errabi.

Errabbi terms it so, because the Supreme Court in this case, drew a line, treating the decision in *Kesavananda Bharati's case* as the landmark. The Acts were put in the Ninth Schedule prior to that decision, that is, 24th April 1973, were immune from challenge. Those laws and regulations will not be open to challenge on the ground that they are inconsistent with or take away or abridge any of the rights conferred by any of the provisions of Part III of the Constitution.[79] However the laws included thereafter are subject to challenge and can be examined on the touchstone of Articles 14, 19 and 31. The various constitutional amendments, by which additions were made to the Ninth Schedule on or after April 24, 1973 will be valid only if they do not damage or destroy the Basic Structure of the Constitution.[80] The Court upheld Article 31B and the First Amendment and Chandrachud C.J., stated;

> *"The Amendments, especially the 1st, were made so closely on the heels of the Constitution that they ought in deed to be considered as a part and parcel of the Constitution itself. These Amendments are not born of second thoughts and they do not reflect a fresh look at the Constitution in order to deprive the people of the gains of the constitution. They are, in the truest sense of the phrase, a contemporary practical exposition of the Constitution."*

The primary ground on which this case faces criticism is the utter disregard of the judiciary to the explicit text of Article 31B. It is the researcher's submission that the Court failed to take into account the wordings of Article 31B, which does not either explicitly or impliedly prescribe such a date line to distinguish laws incorporated in the Ninth Schedule.

- **The Election Case And Seervai's Analysis**

The issue whether the Basic Structure applies to laws in the Ninth Schedule has to be analyzed in light of Mathew J.'s decision in *the Election Case*. He is against the proposition that a constitutional amendment putting

79. ¶ 51, *Waman Rao Case.*

80. The reasoning of the Court for such a date-line is as follows; (1) The theory that the Parliament cannot exercise its amending power so as to damage or destroy the basic structure of the Constitution, was propounded and accepted for the first time in *Kesavananda Bharati*, (2) A large number of properties must have changed hands and several new titled must have come into existence on the faith and belief that the laws included in the Ninth Schedule were not open to challenge on the ground that they were violative of Article 14, 19 and 31. The Court felt it would not be justified in upsetting settled claims and titles and in introducing chaos and confusion into the lawful affairs of a fairly orderly society. (3) The first 66 items in the Ninth Schedule, which were inserted prior to the decision in *Kesavananda Bharati* mostly pertain to laws of agrarian reforms. There are a few exceptions amongst those 66 items, like Items 17, 18, 19 which relate to Insurance, Railways and Industries. But almost all other items would fall within the purview of Article 31A(1)(a).

an Act in the Ninth Schedule would make the provisions of the Act vulnerable for the reason that they damage or destroy a basic structure constituted not by the fundamental rights taken away or abridged but some other basic structure.[81] He justifies his stand in rejecting the proposition on the grounds that the ratio in *Kesavananda Bharati* v. *State of Kerala* cannot be construed to lead to such a conclusion.[82] This brings us to the question as to whether the validity of a statute incorporated in the Ninth Schedule can be determined on the grounds that it violates any other part of the Basic Structure besides those fundamental rights which pertain to the Basic Structure? Mathew J., relying on Sikri C.J.'s opinion in *the Fundamental Rights Case* came to the conclusion that even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to basic structure. However, the Act cannot be attacked for a collateral reason, namely, that the provisions of the Act have destroyed or damaged some other basic structure, say, for instance, democracy or separation of powers.

Also pertinent to note is Khanna J.'s clarification of his stand in *Kesavananda Bharati Case* that fundamental rights can be a part of the Basic Structure. This clarification, as observed by Seervai raises a few serious problems of its own. "*The problem was: in view of the clarification, was Khanna J. right in holding that Article 31B and Schedule IX were unconditionally valid? Could he do so after he had held that the basic structure of the Constitution could not be amended?*"[83] Seervai also notes another problem which will arise if the power of amendment is limited by the doctrine of basic structure, which is that though the Acts included in the Ninth Schedule do not become a part

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81. ¶ 355, *The Election Case.*
82. He relied on Chief Justice Sikri's opinion on this issue: "*the constitution Twenty-ninth Amendment Act, 1971, is ineffective to protect the impugned Acts there if they abrogate or take away fundamental rights. This would not show that the learned Chief Justice countenanced any challenge to an Act on the ground that the basic structure of the Constitution has been damaged or destroyed by its provisions not constituted by the fundamental rights abrogated or taken away."* Furthermore Shelat and Grover, JJ. have said in their judgment that the Twenty-ninth Amendment is valid, but the question whether the Acts included in the Ninth Schedule by that amendment or any provision of those Acts abrogates any of the basic elements of the constitutional structure or denudes them of their identity will have to be examined when the validity of those Acts comes up for consideration. Similar observations have been made by Hegde and Mukherjea, JJ. and by Jaganmohan Reddy, J. Khanna, J. only said that the Twenty-ninth Amendment was valid.
83. Seervai, "Constitution of India", 4th ed. Vol. III, ¶ 30.48. This problem was solved in *Minerva Mills v. Union of India*, AIR 1980 SC 1789, wherein Chandrachud J., held that by holding that Acts inserted in Schedule IX after 25 April, 1973 were not unconditionally valid, but would have to stand the test of fundamental rights.

of the Constitution, by being included in the Ninth Schedule[84] *they owe their validity to the exercise of the amending power.*[85] Thus can these Acts, if for instance they contravene the Basic Feature of Secularism be declared valid as a result of the exercise of amending power? It is Seervai's submission in light of Khanna J.'s clarification that if Parliament, exercising constituent power, cannot enact an amendment destroying the basic feature (eg. Secularism) of the State, neither can Parliament, exercising its constituent power, permit the Parliament or the State Legislatures to produce the same result by protecting laws, enacted in the exercise of legislative power, which produce the same result.[86]

- **I.R. Coelho v. State of Tamil Nadu**

This issue was again opened up for discussion before the Supreme Court recently in the landmark case of *I.R.Coelho* v. *State of Tamil Nadu,*[87] wherein a nine judge bench decided on the issue and upheld the stand taken by Mathew J., in *the Election Case* and held that "*though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.*"[88]

In light of the above-mentioned observation in the *Coelho case*, it is pertinent to understand the decision given therein in the context of the

84. This is clear from the provision of Article 31B that such laws are subject to the power of any competent legislature to repeal or amend them - that no State legislature has the power to repeal or amend the Constitution, nor has Parliament such a power outside Article 368, except where such power is conferred by a few articles.
85. Seervai, "Constitution of India", 4th ed. Vol. III, ¶ 30.48.
86. Seervai, "Constitution of India", 4th ed. Vol. III, ¶ 30.65.
87. Decided on 11.01.2007; SC-2007-28; AIR 2007 SC 861. Hereinafter read as the *'Coelho Case'*. It is pertinent to briefly mention the factual matrix surrounding this case. The Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 vested certain land including forest land in the Janmam Estate in the State of Tamilnadu. The Act was struck down in *Balmadies Plantations Ltd. v. State of Tamil Nadu,* (1972) 2 SCC 133 because the acquisition of forest land was not found to be a measure of agrarian reforms under Art.31 A of the Constitution. Similarly Section 2(c) of the West Bengal Land Holding Revenue Act, 1979 was struck down as arbitrary and unconstitutional. The Special Leave Petition by State of West Bengal was dismissed. The 34th Amendment and 66th Amendment to the Constitution inserted these two acts in Ninth Schedule in its entirety. These insertions were challenged before five judges Bench on the ground that portions, which were struck down could not be validly inserted in the Ninth Schedule. By an order passed on 14.9.1999 reported in (1999) 7 SCC 580 a Constitution Bench of Supreme Court referred the matter to the larger bench of nine judges observing that after 24th April, 1973 (the date when *Kesavananda Bharti* judgment was delivered) the inclusion of the acts, which were struck down by the Courts as violative of Part III of the Constitution of India in Ninth Schedule is beyond the constituent power of the Parliament since they damage the basic or essential features of the Constitution or its basic structure.
88. *IR Coelho v. State of Tamil Nadu*, AIR 2007 SC 861 (Sabharwal C.J., ¶ 81).

applicability of the Basic Structure to laws included in the Ninth Schedule. The primary issue, which faced the Court, was to determine the extent and immunity that Article 31B provides.[89]

At the very outset, the *IR Coelho Court* clearly states that the decision in the case is based on the presumption that Article 31B is valid and shall not look into the same.[90] The Court held that after the 24th April 1973, the laws that were included in the Ninth Schedule could not escape scrutiny by the Courts based on the rights contained in Part III of the Constitution and such laws are *"consequently subject to the review of fundamental rights as they stand in Part III"*.[91] However, the test is not restricted to this stage, since the basic structure of the Constitution includes some of the fundamental rights, any law granted Ninth Schedule protection deserves to be tested against these principles. If the law infringes on the essence of any of the fundamental rights or any aspect of the Basic Structure then it will be struck down. The extent of abrogation and limit of abridgement shall have to be examined in each case.[92]

There have been several decisions relating to what constitutes the Basic Structure over the years.[93] The very fact that its contours are constantly unfolding and being revealed in successive judgments is an indication of its nebulous and ill-defined nature.[94] The *IR Coelho* case is the latest milestone in the judicial description of what constitutes the Basic Structure. Justice Sabharwal was mindful of the decision delivered a couple of months earlier in the *M.Nagaraj Case.*[95] In that case, the Court, while considering the debate between the need to interpret the Constitution textually, based on original intent on the one hand, and the indeterminate nature of the Constitutional text that permits different values to be read into the Constitution, held that the Basic Structure of the Constitution need not be found in the Constitutional text alone.[96] This view of the Court found reiteration in *IR Coelho Case*

89. ¶ 43, *IR Coelho Case.*
90. ¶ 42, *IR Coelho Case.*
91. ¶ 63, *IR Coelho Case.*
92. ¶ 62, *IR Coelho Case.*
93. *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461; *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299; *Minerva Mills v. Union of India*, AIR 1980 SC 1789; *Waman Rao v. Union of India*, AIR 1981 SC 781, *S.R.Bommai v. State of Karnataka*, (1994) 2 SCC 1; *M.Nagaraj v. Union of India*, AIR 2007 SC 71.
94. Mathew J., in *Indira Gandhi v. Raj Narain,* has aptly stated: *"The Concept of a basic structure as brooding omnipresence in the sky apart from specific provisions of the constitution is too vague and indefinite to provide a yardstick for the validity of an ordinary law."*
95. ¶ 76, *IR Coelho Case.*
96 This was explained in the following words: *"Systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic*

wherein the Court noted that textual provisions and such overarching values could both form part of the Basic Structure.[97]

In light of this the Court was faced with the task of answering the following questions: whether all fundamental rights are included in the Basic Structure doctrine? If the answer to the question is in the negative, then the Court is required to determine, which fundamental rights can be identified as part of the Basic Structure.

The Court, while discussing the hierarchy it has created amongst the fundamental rights, takes recourse under the distinction between the 'rights test' and the 'essence of rights test'. At this juncture, the view of the Court warrants mention: *"We are of the view that while laws may be added to the Ninth Schedule, once Article 32 is triggered, these legislations must answer to the complete test of fundamental rights. Every insertion into the Ninth Schedule does not restrict Part III review, it merely excludes Part III at will. For these reasons, every addition to the Ninth Schedule triggers Article 32 as part of the Basic Structure and is consequently subject to the review of the fundamental rights as they stand in Part III"*.[98]

This would mean that if a law was to be included in the Ninth Schedule the scrutiny of all fundamental rights would be available as per the 'rights test'. However, the Court does not stop at this but goes on to say that every amendment that places a law in the Ninth Schedule after 24th April 1973[99] would have to satisfy the Basic Structure test.

A natural implication of this distinction is that the laws placed in the ninth schedule are not a formal part of the Constitution. An ambiguity which is created by drawing this distinction is that the distinction between the amendment and the law that it includes in the Ninth Schedule gets blurred. It becomes impossible to separate the laws, which constitute the body of the amendment from the amendment itself.[100]

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whole. These principles are part of Constitutional Law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Articles 14, 19 and 21."

97 While discussing this issue, the Court articulated a distinction between what is termed as the "essence of the rights test" and the "rights test", that is between the the foundational value behind an express right and the express right provided in the text of the Constitution.

98 ¶ 63, *IR Coelho Case.*

99 In stating this, the Court impliedly upheld the decision in the *Waman Rao Case*.

100 In the opinion of Kamala Sankaran, one would then ask what is the amendment, apart from the laws that it places in the ninth schedule, an empty shell surely, and if so, what would be the content of such an amendment law that would remain to be tested on the essence of rights test, if one were to remove the laws that it seeks to immunize? She is of the opinion that reading the

The decision in *Coelho* can be best summed up in the conclusion given by Sabharwal C.J;

> "*All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19 and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the Basic Structure if the fundamental right or rights taken away or abrogated pertains or pertain to the Basic Structure*".[101]

4. Conclusion: Critique Of The I.R. Coelho Case

It is the submission of the researcher that decision in *IR Coelho's case* is in complete disregarded to the explicit text of the concerned Article. Article 31B expressly states that none of the Acts and Regulations mentioned in the Ninth Schedule shall be deemed to be void on the ground that the same contravenes Part III of the Constitution. It is hereby submitted that the very existence of Article 31B in the Constitution would become redundant if the 'rights test' as propounded in *M.Nagaraj* and *I.R.Coelho* is applied to the laws included in the Ninth Schedule. The Supreme Court has created a hierarchy of rights by including a few fundamental rights within the ambit of the doctrine of Basic Structure.[102] The researcher is unable to agree with such an arbitrary classification based on the fundamentalness of the fundamental rights. Such a distinction does not find mention in the Constitutional text.[103]

Sabharwal C.J., also did not appreciate the fact that the doctrine of Basic Structure as it emerged in the *Kesavananda Bharati Case* was restricted

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two positions in the judgment together, one could then hold that for all practical purposes the basic structure, at least for the purpoises for the alws that are placed in the ninth schedule and are now under challenge, equals all the rights in Part III of the Constitution. Kamala Sankaran, "From Brooding Omnipresence to Concrete Textual Provisions: IR Coelho Judgment and Basic Structure Doctrine" (2007) Vol 49, JILI p. 240-248.

101. ¶ 81, *IR Coelho Case.*

102. Articles 14, 15, 16(4), 19 and 21 are few rights recognized as a part of the Basic Structure. See *IR Coelho Case*, ¶¶ 57-60. (Sabharwal C.J.)

103 Article 31B does not draw such a distinction. It is conceded that the Constitution in Articles 358 and 359 does prioritize a few rights over the others. However such a classification has been made by the Constituent Assembly or by the Parliament in exercise of its Constituent Power under the Constitution.

to test the constitutionality of Constitutional Amendments. It is the submission of the researcher, which has also been recognized by the Supreme Court, that ordinary laws do not become a part of the Constitution by mere inclusion in the Ninth Schedule and thus it is respectfully submitted that the Supreme Court has erred by expanding the scope of the Basic Structure doctrine to Ninth Schedule laws. This is further supported by the proposition that an amendment or repeal of these laws would not attract Article 368 but would be subject to ordinary legislative procedure.[104] This is evident from the text of Article 31B which reads as follows: *"...subject to the power of any competent Legislature to repeal or amend it..."*.

Furthermore, Sabharwal C.J., in the *I.R.Coelho Case* upheld the arbitrary dateline of 24th April, 1973 as created by Chandrachud C.J, in the *Waman Rao Case.* It is the researcher's submission that the reasoning given by Chandrachud C.J., as mentioned hereinabove is not justified and does not find mention, either explicit or implied, in the text of Article 31B. Professor Errabi rightly terms it, *"a classical exposition of judicial convenience and judicial arbitrariness".*[105]

The Courts should exercise restraint and, taking into consideration the text of the Article, restrict the applicability to laws pertaining to land reforms. This can be construed from the language of Article 31B which reads as follows; *"Without prejudice to the generality of the provisions contained in Article 31A..."*. This can be construed to mean that the interpretation of Article 31B should be narrower than that of Article 31A. Furthermore it is essential to take into consideration the context under which Article 31A and 31B was introduced and the legislative intent behind the same. The following quote is an extract from the speech made by Pandit Jawaharlal Nehru while introducing Article 31B in Parliament;[106]

> *"When I think of this Article the whole gamut of pictures come sup before my mind, because this Article deals with the abolition of the Zamindari system, with land lays and agrarian reform ...the whole object of these Articles in the Constitution was to take away and I say so deliberately to take away the question of Zamindari and land reform*

104. In addition to the above grounds, the laws included in the Ninth Schedule can also be declared to be unconstitutional on the ground of "lack of legislative competency" under Article 246.
105. It has been also observed that this is against the doctrine of Separation of Powers. However, the researcher is of the view that the doctrine of Separation of Power does not find strict application in the Indian Context and thus does not merit the observation.
106. The Parliamentary Debates, Part II, Volumes XII and XIII (May 15 - June 9, 1951).

> *from the purview of the courts. That is the whole object of the constitution and we put in some provision...May I remind the House that this question of land reform is most intimately connected with food production. We talk about food production and grow-more-food and if there is agrarian trouble and insecurity of land tenure nobody knows what is to happen. Neither the Zamindari nor the tenant can devote his energies to food production because there is instability."*

Therefore we can see that the power under Article 31B is being abused and exercised beyond the scope of the purpose for which it was enacted. The only remedy available to settle this issue is in the form of a Constitutional Amendment restricting the scope of this Article. The creation of hierarchies by the Court also makes it imperative to raise a note of caution. The Court has gone on to create an artificial hierarchy between the fundamental rights themselves, by giving express to emphasis Articles 14, 15, etc. Additionally, in furtherance of this spurt of judicial activism, the Court also creates a hierarchy among different elements of the basic structure doctrine in itself.

Thus, to conclude, it is the researcher's submission that the approach of the Court towards this issue serves as a classic case of Judicial Activism, or Judicial Terrorism.[107] However, in doing so, it is extremely unfortunate to note that the Supreme Court has failed to appreciate the language of Article 31B and the legislative intent behind the same. To conclude, the researcher is of the opinion that the Courts should adopt judicial activism with restraint and circumspect, and in the process pay due regard to the explicit text of the Constitution and the Constitutional ethos.

Regarding the question of whether the Ninth Schedule is necessary today or not, it is the contention of the researcher that the purpose for which the Ninth Schedule was enacted has more or less been met today. Even more importantly, post-1991 there has been a drastic shift in policy in the central government. The government no longer believes in a pro-active policy of social reform, but letting the benefits of economic reform "trickle down" to the poorest. This reflects an underlying assumption on the part of the policy makers that the social milieu today is far more conducive to such a policy, and not one of social revolution. In such a scenario, the Ninth Schedule becomes redundant with respect to the original purpose of its inclusion. There is thus a grave danger of it being misused for serving other means. The judiciary may not be the best safeguard against this misuse,

107. In the words of the renowned scholar, late S.P.Sathe.

seeing the ad-hoc manner in which it has accepted the existence of the Schedule at one point of time and rejected it at other times. The stance taken by the judiciary reflects on its distrust of the policy makers and not of the policy itself.

The Flying Shoe: How a Supreme Court Decision Queers The Pitch Relating to *in Facie Curiae* Contempt

*Gopal Sankaranarayana**

Introduction

For long, public law discourse in India has revolved around the continuing conflicts between the executive and the judiciary. With the lines blurred, every attempt by the Courts to regulate State action has been met with stern disapproval by those who advocate judicial restraint. However, events of the last year have led to these critics being aided from a wholly unexpected quarter.

On the 20th of March, 2009, when a petitioner appearing in person before the Supreme Court flung her footwear at the Bench, little did she know that her target was the law of the land. At that time, the victims of her action, Justices Pasayat and Ganguly, were quick to dictate orders condemning the action, albeit diverging when it came to the procedure to be followed.[1] Justice Ganguly adopted a careful positivist line and indicated that the procedure under Section 14 of the Contempt of Courts Act, 1971 would have to be invoked by the Court, while Justice Pasayat declined to stand on such ceremony when the contempt was so apparent, and directed that the accused be sentenced to three months' simple imprisonment.

The difference of opinion between the two Judges eventually led to the matter being referred to the Chief Justice of India, who constituted a bench of Justices Kabir, Singhvi and Dattu to finally resolve the issue. It is the finding of this Bench in *Leila David (2)* v. *State of Maharashtra*[2] that statutory requirements may be ignored where a Court is exercising its power as a court of record that have brought scrutiny to bear on an otherwise unremarkable proceeding.

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My gratitude (as always) to my senior Mr.K.K.Venugopal, Sr.Advocate., who has been unrelenting in pushing his wards to better themselves. If I have in any way fallen short in this endeavour, the fault is entirely that of my wife Haripriya Padmanabhan, who, despite the demands of the court, the chamber, the kitchen, the hearth and the crib, has ensured that she will always be a better lawyer than me.

1. *Leila David (2)* v. *State of Maharashtra*, (2009) 4 SCC 578.
2. (2009) 10 SCC 337.

I. The Constitutional Scheme

In the early case of *Sukhdev Singh Sodhi* v. *Teja Singh*[3], Justice Vivian Bose had traced the history of contempt jurisprudence in India, locating the earliest statutory provision to be Clause 4 of the Charter of 1774 which stated that the Supreme Court of Bengal would have the same jurisdiction as the Court of the King's Bench in England, accompanied by a power to punish for contempt. At common law, the position was clear that a superior court of record had the inherent power to punish for contempt, and this was the consistent position of the Privy Council as well.[4]

This power that was considered intrinsic in these Courts was continued by virtue of Section 106 of the Government of India Act, 1915, until the Government of India Act, 1935 which referred to the High Courts as courts of record in Section 220 and created the Federal Court with similar powers in Section 203. With the coming of the Constitution, Articles 129 and 215 continued the anointment of the superior courts as courts of record with the power to punish for contempt.[5] As one of the early commentaries which dealt with the judicial history on the subject said –

> "We have narrated all the above data to bring home the point that the power to punish summarily for contempt is not a creature of statute but an inherent incident of every Court of Record. This inherent jurisdiction cannot be abrogated and it has been recognized from time to time in the relevant Letters Patent, and the constitutional Acts in India."[6]

II. The Statutory Limitation

While the Constitutional provisions recognized the existence of the superior courts as courts of record, the legislature also recognized this pre-

3. 1954 SCR 454.
4. Justice Bose painstakingly traces the genesis of the principle by relying on the principles of British common law as enunciated in Belchamber's Practice of the Civil Courts (1884) and the Hailsham Edition of Halsbury's Laws of England. Interestingly, Justice Bose refers to Justice Sulaiman's judgment in *In re Abdul Hasan Jauhar*, ILR 48 All 711, which is reported as *Hadi Husain & Ors.,* v. *Nasir Uddin Haider & Ors.,* AIR 1926 All 623, and where, in considering the power of the High Court to punish for contempt of subordinate courts, the Court concluded that such a power was indeed inherent, and that the new Contempt of Courts Act merely amplified that position (See Paras 28 to 40).
5. However, both Articles 19(2) and 142(2) recognized the fact that free speech and the power of the Supreme Court to make orders in relation to investigation or punishment of contempt would be subject to law that was enacted.
6. Ramachandran, V.G & Gopalan, V.R, *The Contempt of Court under The Constitution*, Eastern Book Company, (1962), p.13.

eminent position in the three statutes that were enacted to codify the principles of contempt law – The Contempt of Courts Act 1926, The Contempt of Courts Act 1952 and The Contempt of Courts Act 1971. Each legislation repealed its predecessor, making certain cosmetic alterations, and ensuring that the power of the Supreme Court and the High Courts to punish for contempt was retained. However, there are two strands of debate that have emerged from the interplay between the Constitution and the statute:

- First, would the Act of 1971 in any way limit the power of the Supreme Court under Article 129 regarding the *extent of punishment* that may be imposed by it for contempt of itself?
- Second, would the summary procedure adopted by the Supreme Court be in any way limited or regulated by the Act of 1971?

While both questions deal essentially with the limits of the inherent power of the Supreme Court, it is the second that will engage us for the present. As for the first, a Constitution Bench of the Supreme Court in *Supreme Court Bar Association* v. *Union of India.*[7] has explicitly left the question open in the following words:

> "As already noticed, the Parliament by virtue of Entry 77, List I is competent to enact a law relating to the powers of the Supreme Court with regard to contempt of itself and such a law may prescribe the nature of punishment which may be imposed on a contemnor by virtue of the provisions of Article 129 read with Article 142(2). Since no such law has been enacted by the Parliament, the nature of punishment prescribed under the Contempt of Courts Act, 1971, may act as a guide for the Supreme Court but the extent of punishment as prescribed under that Act can apply only to the High Courts, because the 1971 Act ipso facto does not deal with the contempt jurisdiction of the Supreme Court, except that Section 15 of the Act prescribes procedural mode for taking cognizance of criminal contempt by the supreme Court also. Section 15, however, is not a substantive provision conferring contempt jurisdiction. The judgment in Sukhdev Singh's case as regards the extent of 'maximum punishment' which can be imposed upon a contemnor must, therefore, be construed as dealing with the

7. (1998) 4 SCC 409.

> powers of the High Courts only and not of this Court in that behalf. We are, therefore, doubtful of the validity of the argument of the learned Solicitor General that the *extent of punishment* which the Supreme Court can impose in exercise of its inherent powers to punish for contempt of itself and/or of subordinate courts can also be only to the extent prescribed under the Contempt of Courts Act, 1971. We, however, do not express any final opinion on that question since that issue strictly speaking, does not arise for our decision in this case. The question regarding the restriction or limitation on the extent of punishment, which this Court may award while exercising its contempt jurisdiction may be decided in a proper case, when so raised."[8]

As far as the summary procedure adopted in contempt cases are concerned, the Act of 1971 devotes an entire provision to the situation of contempt occurring in the face of the Supreme Court or the High Court. Section 14 of the Act reads as follows:

> "14. Procedure where contempt is in the face of the Supreme Court or a High Court.
>
> (1) When it is alleged, or appears to the Supreme Court or the High Court upon its own view, that a person has been guilty of contempt committed in its presence or hearing, the Court may cause such person to be detained in custody, and, at any time before the rising of the Court, on the same day, or as early as possible thereafter, shall-
>
> (a) cause him to be informed in writing of the contempt with which he is charged;
>
> (b) afford him an opportunity to make his defence to the charge;
>
> (c) after taking such evidence as may be necessary or as may be offered by such person and after hearing him, proceed, either forthwith or after adjournment, to determine the matter of the charge; and
>
> (d) make such order for the punishment or discharge of such person as may be just.

8. *Ibid*, at Para 38.

(2) Notwithstanding anything contained in sub- section (1), where a person charged with contempt under that sub- section applies, whether orally or in writing, to have the charge against him tried by some Judge other than the Judge or Judges in whose presence or hearing the offence is alleged to have been committed, and the Court is of opinion that it is practicable to do so and that in the interests of proper administration of justice the application should be allowed, it shall cause the matter to be placed, together with a statement of the facts of the case, before the Chief Justice for such directions as he may think fit to issue as respects the trial thereof.

(3) Notwithstanding anything contained in any other law, in any trial of a person charged with contempt under sub-section (1) which is held, in pursuance of a direction given under sub-section (2), by a judge other than the Judge or Judges in whose presence or hearing the offence is alleged to have been committed, it shall not be necessary for the Judge or Judges in whose presence or hearing the offence is alleged to have been committed to appear as a witness and the statement placed before the Chief Justice under sub- section (2) shall be treated as evidence in the case.

(4) Pending the determination of the charge, the Court may direct that a person charged with contempt under this section shall be detained in such custody as it may specify: Provided that he shall be released on bail, if a bond for such sum of money as the Court thinks sufficient is executed with or without sureties conditioned that the person charged shall attend at the time and place mentioned in the bond and shall continue to so attend until otherwise directed by the Court: Provided further that the Court may, if it thinks fit, instead of taking bail from such person, discharge him on his executing a bond without sureties for his attendance as aforesaid."

Section 15 also makes specific reference to the Supreme Court in the context of the procedure for prosecuting criminal contempt. Section 23 records the fact that as far as the regulation of procedure of contempt

jurisdiction is concerned, the Supreme Court and High Court may make rules *not inconsistent with the provisions of this Act*. All of these provisions would suggest that Parliament has clearly demarcated the power of the superior courts as far as procedures are concerned.

In its interpretation, the Supreme Court has repeatedly ensured that it acknowledges the 1971 Act. For example, when faced with the prospect of a departure from the strict norms laid down in Section 15 of the Act,[9] the Court adopted the directions of the Delhi High Court in *Anil Kumar Gupta's* case[10] and said that as a practice direction to be followed, if an informant were not one of the persons mentioned in Section 15, the petition would be placed before the Chief Justice on the administrative side to take cognizance if required.[11] When the proposition was doubted and referred to a larger Bench,[12] a veritable plethora of cases were considered by the Court to support the proposition that even in exercise of the inherent jurisdiction of the Courts, the provisions of the Act were to be accommodated[13] . Specifically following the precedent set by *J.R.Parashar*[14] and *M.S.Mani,*[15] the Court approved the observations in *Duda*[16] and concluded by exhorting the superior courts to frame the required practice directions.[17]

At the time of writing this piece, the same view has been reiterated by the Supreme Court in allowing the appeal of the communist leader *Biman Basu*[18] on the ground that the procedure under Section 15 had not been complied with by the High Court of West Bengal. In so holding, the Court has relied on its earlier observations in *S.K.Sarkar's* case,[19] and proceeded to hold as follows:

> "It is settled law that the High Courts even while exercising their powers under Article 215 of the Constitution to punish for contempt, the procedure prescribed by law is required to be

9. As per Section 15, if cognizance is to be taken of criminal contempt by the superior courts, it can only be by or with the express consent of the respective law officers, or on the *suo motu* motion of the Court concerned.
10. *Anil Kumar Gupta* v. *K.Suba Rao*, ILR (1974) 1 Del 1 at p.7.
11. This was first enunciated in *P.N.Duda* v. *P.Shiv Shanker*, (1988) 3 SCC 167 at Para 54.
12. *Bal Thackrey* v. *Harish Pimpalkhute*, (2005) 1 SCC 254.
13. *Pritam Pal* v. *High Court of M.P.*, 1993 Supp (1) SCC 529; *L.P.Misra* v. *State of U.P*, (1998) 7 SCC 379; *Pallav Sheth* v. *Custodian*, (2001) 7 SCC 549.
14. *J.R.Parashar* v. *Prashant Bhushan*, (2001) 6 SCC 735.
15. *State of Kerala* v. *M.S.Mani*, (2001) 8 SCC 82.
16. *Supra*, n.11.
17. *Supra*, n.12 at Para 26.
18. Judgment in C.A.No.607/2005 dated 25th August 2010, delivered by Justices Reddy and Nijjar.
19. *S.K.Sarkar* v. *V.C.Misra*, (1981) 1 SCC 436.

> followed (See *L.P.Misra (Dr.)* v. *State of U.P., Pallav Sheth* v. *Custodian*). The High Court in the present case relied on the decision of this Court in *C.K. Daphtary* v. *O.P. Gupta* wherein this Court overruled the objection raised on behalf of the alleged contemnor that the contempt petition filed in the Supreme Court without the consent of the Attorney General was not maintainable. The decision was rendered prior to the Act coming into force. There was no provision of law at the relevant time which prevented the Courts from entertaining a petition filed by interested persons even without the prior consent in writing of the Attorney General or the Advocate General, as the case may be."[20]

Even on the administrative side, this institution has sought to pay heed to the moderation offered by Section 23, as is evident from the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975. While these Rules lay down the modalities for hearing and disposal of contempt matters in the Apex Court, care has been taken in Parts I and II to ensure compliance with the mandate of Sections 14 and 15 of the 1971 Act.

It could therefore safely have been assumed that as far as the procedure to prosecute contempt of itself, where Parliament has expressly made mention of the Supreme Court and the High Courts, the legislative intent would trammel the judicial one.[21] However, when faced with Section 14 of the Act, the judgment in *Leila David*[22] seems to make a sudden departure from the strict track endorsed in dealing with Section 15. This anomaly may be clarified by examining the very nature of contempt in the face of the Court and the altered approach of the Courts in trying the same.

III. *Ex Facie Curiae* and Summary Procedures

Of all the various types of contempt, it is in the context of contempt which occurs directly in the face of the court, that exercise of its summary

20. *Supra*, n.16, at Para 17, as accessed on 26.08.2010 from http://judis.nic.in/supremecourt/ imgs.aspx. The Contempt of Courts Acts of 1926 and 1952 were very brief enactments, with no procedural provisions akin to Section 15 of the 1971 Act.
21. This is a view reflected by Dr.Durga Das Basu in his Silver Jubilee edition of the Commentary to the Constitution, where he says – "It follows from the foregoing discussion that though the substantive and inherent power of these superior Courts to punish for contempt has been affected by this Act, in matters of procedure and limitation, the latter shall prevail." Basu, Durga Das, *Commentary on the Constitution of India*, Volume H, S.C.Sarkar & Sons, 6th edn., (1983), at p.227. He however, later proceeds to state that if Section 15(2) is treated as a limitation on the courts of record, such a position deserves further consideration, *sans* an amendment to the Constitution (at p.228). As we have seen at footnote 7 (*Supra*), this question has been left open by the Supreme Court.
22. *Supra,* n.2.

jurisdiction is most justified.[23] Instances of where such jurisdiction has been invoked include where missiles, eggs or stones have been thrown at the judge, briefs have been snatched, witnesses or counsel have been threatened or insulted, where the presiding officer has been abused, and where clandestine tape recording of court proceedings have been carried out.[24]

For over 250 years, and as ubiquitously recorded, it is the words of Wilmot J in *Almon's* case[25] that have linked the summary procedure to the prosecution of such contemptuous conduct. As he said:

> "The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for contempt of court, acted in the face of it."[26]

However, it is the celebrated and oft-repeated passage of Lord Denning that has re-emphasized the relevance of such jurisdiction. In *Morris*[27], he observed:

> "The phrase 'contempt in the face of the court' has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power – a power instantly to imprison a person without trial – but it is a necessary power."[28]

The eminent Judge could not have been more right when he refers to this as a "great power". For, in his own country three centuries earlier, the

23. Eady & Smith, *Aldridge, Eady & Smith on Contempt*, Sweet & Maxwell, 2nd edn., (1999) at p.571.
24. For these and other examples, *See Generally*, Eady & Smith, *Supra*, n.23 at pp.574-579, Ramachandran & Gopalan, *Supra*, n.6 at pp.91-93 and Lowe & Sufrin, *The Law of Contempt*, Butterworths, (1996) at pp.15-31.
25. *R* v. *Almon*, (1765) Wilm 243.
26. *Ibid*, at 254; In Lowe & Sufrin, *Supra*, n.24 at pp.470-471, the discussion shows that Justice Wilmot's opinion was never delivered due to certain intervening factors, and was actually published by his son only as late as 1802. In footnote 3 at p.471, the authors draw attention to the work of Sir John Fox who showed, through a series of works in the early part of the nineteenth century, the very tenuous and weak foundations of Justice Wilmot's opinion, being without historical basis, contrary to his the claims in his Opinion. This has however never stopped these words becoming an indelible part of the jurisprudence on contempt law.
27. *Morris* v. *Crown Office*, [1970] 2 QB 114.
28. *Ibid*, at p.122.

punishment for attacking a judge would make imprisonment seem a mild option. In 1681, when an accused at the Salisbury Summer Assizes threw a brickbat at Chief Justice Richardson, the offender was hanged in the court, preceded quite unnecessarily by the offending hand being cut off and fixed to a scaffold.[29] The amputation of the right hand was the common form of punishment at the time, with the same being visited on one James Williamson as well for throwing a stone at the Bench in Chester Castle.[30]

Thankfully, this barbaric means of justice is far gone, and with principles of natural justice taking firm root in the modern era, adequate safeguards have been provided in the law. Both in England and India, it has been considered reasonable to adopt a summary procedure only in exceptional cases, most often restricted to cases of contempt in the face of the court. While in England the summary process involves exclusion of the jury, in India as sanctified by Section 14 of the Act of 1971, the court is required to grant a minimal opportunity of hearing and defense to the accused. This may or may not require further proceedings (*brevi manu*). Most essentially, such a course necessarily involves the three steps reflected in Section 14(1)(a) to (c) to be followed. Even when committed in its face, the Court is required to furnish the accused with the details of the charge, grant him/her an opportunity to respond, and then, take necessary evidence into consideration.

IV. The Leila David View

It is on this very point that Justices Pasayat and Ganguly had differed in *Leila David*. The former adopted a stern approach, stating that "*This conduct is contemptuous. There is no need for issuing any notice as the contemnors stated in open Court that they stand by what they have said and did in Court*".[31] As a result, he convicted the accused and sentenced them to 3 months simple imprisonment. Justice Ganguly disagreed saying – "*Mere unilateral recording in the order that the contemnors stand by what they said in Court is not a substitute for compliance with the aforesaid mandatory statutory requirement"*.[32]

On reference, the Attorney General, the Solicitor General and the President of the Supreme Court Bar Association (all of whom were present when the unfortunate incident occurred) made their submissions to the Court that as the footwear was cast in full view of the court, there would be "*little*

29. 2 Dyer 188 b (notes), *cf.* Oswald, James Francis, *Contempt of Court, Committal and Attachment and Arrest upon Civil Process*, Bibliolife LLC, (2009) at pp.24-25.
30. *Ibid*, at p.25.
31. *Supra*, n.1 at Para 1.
32. *Ibid*, at Para 11.

justification in going through the procedure prescribed in Section 14"[33] and that following such procedure "*would be redundant*".[34] Strangely, in support of his stand in departing from the provisions of the 1971 Act, the Attorney General placed particular reliance on *Vinay Chandra Mishra's* case[35], where the lawyer in question was punished by suspending his license to practice by adverting to Article 142.

The unanimous Court of 3 judges endorsed the course adopted by Justice Pasayat in departing from the mandate of Section 14 in the following words:

> "While, as pointed out by Mr. Justice Ganguly, it is a statutory requirement and a salutary principle that a person should not be condemned unheard, particularly in a case relating to contempt of Court involving a summary procedure, and should be given an opportunity of showing cause against the action proposed to be taken against him/her, there are exceptional circumstances in which such a procedure may be discarded as being redundant."[36]

As a result, a mandatory statutory requirement was "*discarded*", the conviction and sentence imposed by Justice Pasayat remained, and all 4 accused were to undergo the period of imprisonment imposed.

The primary error in this judgment manifests itself in the following observation of the Bench:

> "As far as the suo motu proceedings for contempt are concerned, we are of the view that Dr. Justice Arijit Pasayat *was well within his jurisdiction in passing a summary order*, having regard to the provisions of Articles 129 and 142 of the Constitution of India. Although, Section 14 of the Contempt of Courts Act, 1971, lays down the procedure to be followed in cases of criminal contempt in the face of the court, it does not preclude the court *from taking recourse to summary proceedings* when a deliberate and wilful contumacious incident takes place in front of their eyes and the public at large, including Senior Law Officers, such as the Attorney General for India who was then the Solicitor General of India."[37] (emphasis supplied)

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33. *Supra*, n.2 at Para 15.
34. *Ibid*, at Para 20.
35. *Vinay Chandra Mishra, Re.,* (1995) 2 SCC 584.
36. *Supra*, n.2 at Para 29.
37. *Ibid*, at Para 28.

Justice Pasayat did not in fact pass a "summary order" nor did he take recourse to "summary proceedings". The only summary proceedings in prosecuting criminal contempt known to law both in India and in the rest of the commonwealth clearly involves a measure of natural justice, i.e. a show cause notice in writing with a response to be furnished. The approach adopted by the learned judge achieved a subversion of all the minimal safeguards[38] carefully hewn into a process where the presiding officer acts both as prosecutor and judge.

(a) The heat of the moment: It is eminently possible in a climate where tempers are frayed and emotions high that both the judge and the offender would require some reflection before a final view is taken on the offence. As some authors suggest – "*An attacked judge cannot forget the attack and his vision of whether the attack was contempt or not and what is the measure of punishment to be meted out, may sometimes be blurred*."[39] It is possible that hindsight would offer an avenue to purge the contempt that might not have been earlier available.[40] In addition, Section 14(4) permits the detention of an offender pending the determination of the charge against him/her. In view of such protection, it would be impossible to contend that the contempt was so serious that it could not wait for a framed charge and a reasoned response from the alleged contemnor.

(b) The precision of the charge: Full information of the charge being made against the contemnor is an essential ingredient of the procedure to be followed under Section 14(1)(a), and is a staple of all criminal procedures around the world. Without the exactitude of the charge being clarified, it would be possible for an individual's liberties to be breached because of an insufficient defense.

(c) The option to defend: Although the specific facts of *Leila David* would suggest the complete lack of contrition on the part of the accused, it is likely that another accused in a similar circumstance would well apologize, or at the very least engage legal representation if given the opportunity.[41] It would also be possible to contend insanity or another equally tenable excuse for such conduct. Absent such an option, the exercise by the Court of its power of punishment would not be summary, but cursory, and occasion a grave miscarriage of justice.

38. These safeguards are dealt with in considerable detail in Eady & Smith, *Supra*, n.23 at pp.583-596.
39. *Supra*, n.6 at p.14.
40. The same caution is voiced by the Phillimore Committee in its Report of 1974 at Paragraph 33.
41. *R* v. *Montgomery*, (1995) 2 All ER 28.

In addition to all the above, even in exercising the summary power, there is much caution that is advised. In *Parashuram Detaram Shamdasani* v. *The King Emperor*[42], Lord Goddard said –

> "Their Lordships would once again emphasise what has often been said before that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised."[43]

It would merit mention that in delivering its judgment in *Leila David*, the Supreme Court relied on the cases of *Nand Lal Balwani*[44] (where a shoe was thrown) and *Charan Lal Sahu*[45] (where unsavoury language was used in a petition), to support the conviction of the accused. However, the Court has omitted to notice that in both these cases, due notice was given, charges framed and opportunities afforded to file affidavits, which is clearly in consonance with the mandate of the 1971 Act.

The other factor which probably erroneously weighed with the Court is the Attorney General's reliance on *Mishra's* case[46] with its wide exercise of powers, which was however wholly and comprehensively overruled by the Constitution Bench in *Supreme Court Bar Association.*[47]

Also, it must not be forgotten that Justice Pasayat's terse judgment did not deal only with the individual who threw the slipper, but also three others who allegedly used intemperate and offensive language with the Court. Surely, all four of the accused could not have been dealt with in such a casual manner that the one who attempted to assault the judge was treated on par with those who were abusive to pass the identical sentence on all of them. Yet, that was what the Court did, and which did not merit interference on reference.

V. The Sequitur

The factual matrix of *Leila David* notwithstanding, a matter of principle is now at stake. A decisive judgment of three judges of the Supreme Court

42. [1945] AC 264; *See also* the Court of Appeal's view in *Balogh* v. *St Albans Crown Court*, [1974] 3 W.L.R. 314.
43. *Ibid*, at p.270.
44. *Nand Lal Balwani, Re,* (1999) 2 SCC 743.
45. *Charan Lal Sahu* v. *Union of India*, (1988) 3 SCC 255.
46. *Supra*, n.35.
47. *Supra*, n.7 at Paras 56, 77 and 78.

has on reference concluded that Section 14 may be departed from in certain circumstances, the exact parameters of which remains undefined. As a result, when contempt is now committed in the face of a superior court, it would be permissible for the Court to give the mandate of the provision a go-by (albeit the well-advised use of the word "shall"), and to convict forthwith. Section 14, which is express in terms as far as the Supreme Court and High Courts are concerned, is now rendered timorous in the face of the inherent powers of the courts of record. The contrasting approach of the Court to Section 15 is glaring, and it is clear that a reconsideration of *Leila David* beckons.

Till such time, however, one must garner comfort from the wise words of Justice Felix Frankfurter:

> "The power to punish for contempt of court is a safeguard not for judges as persons but for the function which they exercise."[48]

48. *Pennekamp* v. *Florida*, 328 US 331, 336 (1946).

A new language of morality: From the trial of Nowshirwan to the judgment in Naz Foundation

*Arvind Narrain**

Introduction

"Clauses 361 and 362 (the predecessor provisions to Section 377 of the IPC) relate to offences respecting which it is desirable that as little as possible be said...we are unwilling to insert either in the text or in the notes anything which could give rise to public discussion on this revolting subject, as we are decidedly of the opinion that the injury which could be done to the morals of the community by such discussion would more than compensate for any benefits which might be derived from legislative measures framed with greatest precision."

Lord Macaulay[1]

"*The offence is one under Section 377 IPC, which implies sexual perversity. No force appears to have been used. Neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking."*

Fazal Rab Choudary v. State of Bihar[2]

"A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state,however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself."

J. Albie Sachs, National Coalition for Gay and Lesbian Equality v. Ministry of Justice and others[3]

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** A version of this piece has also appeared in Law like Love: Queer perspectives on law, Yoda Press 2011. Report on the Indian Penal Code, c.f. Dhagamwar, Vasudha; 1992, *Law, Power and Justice*. New Delhi: Sage Publications, pp.117.

1. Report on the Indian Penal Code, Vasudha Dhagamwar, *Law, Power and Justice*, Sage Publications, New Delhi, 1992, p.117.
2. (1982) 3 SCC 9.
3. *National Coalition For Gay and Lesbian Equality v. Minister of Justice,* [1998] {12} PCLR 1517 at para 81

> *"In our view, Indian Constitutional law does not permit that statutory criminal law to be held captive by the popular misconceptions of who the LGBT's are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual."*
>
> *C.J. Shah, Naz Foundation v. Union of India and others*[4]

The decision in *Naz Foundation v. Union of India*[5], marks the culmination of a very important journey in Indian law. For the first time in Indian judicial history, LGBT persons were looked at not within the frame of criminality or pathology but rather from within the framework of dignity. The shift or transition was itself remarkable when one considers the history of the interpretation of Section 377 by the judiciary.

The historic 'injustice' of the law lay not only in sanctioning arbitrary state action against LGBT persons but more fundamentally in setting in place a regime of citizenship wherein the lives and loves of LGBT persons were consistently read within the framework of 'unnatural sexual acts'. The question of love or intimacy, desire or longing was always reduced in the judicial register to 'carnal intercourse against the order of nature'. The judicial archive hints at the possibility of recovering a lost history of love, by reading within the interstices and gaps of decided case law. To recover in some fashion, what Ranajit Guha would have called 'the small voice of history' this article will focus on the story of Nowshirwan Irani who was persecuted in 1932 Sind for having a consenting relationship with Ratansi. Nowshirwan stands in for a subaltern Oscar Wilde, an unwitting and largely unknown martyr who symbolized in his person the trials and tribulations of LGBT persons for over one hundred and fifty eight years.

It was not the coming into force of the Constitution which marked a moment of azaadi for LGBT persons in India, but really its re-interpretation by C.J. Shah and J. Muralidhar in 2009. The shift in what the Constitution was to mean for LGBT persons was signalled by the Justices in the oral arguments where for the first time, the judicial attitude to homosexuality changed. By showing empathy for LBGT suffering and by refusing to think and talk about homosexuality merely within terms of 'excess' and 'societal degeneration', the Justices gave a new vocabulary to the law in which to talk about homosexual expression.

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4. 160 (2009) DLT 227.
5. *Ibid.*

The language the Justices evolved was the notion of 'constitutional morality', which was an advance in the way morality has been thought of in law. Morality as seen from the words of Lord Macaulay was a justification for the very enactment of Section 377 and the Judges turn the notion of morality upside down by concluding that constitutional morality requires that Section 377 be struck down. Constitutional morality requires that the values of the right to form intimate relationships be protected and that freedom from persecution by the law be guaranteed to LGBT persons.

This article will explore the paradigm shift from societal morality to constitutional morality, from carnal intercourse to a right to intimacy and from the tribulations of a Nowshirwan to the celebrations which greeted the Naz Foundation judgment.

Nowshirwan Irani : A subaltern Oscar Wilde ?

I never came across anyone in whom the moral sense was dominant who was not heartless, cruel, vindictive, log- stupid and entirely lacking in the smallest sense of humanity. Moral people, as they are termed, are simple beasts. I would sooner have fifty unnatural vices than one unnatural virtue. It is unnatural virtue that makes the world, for those who suffer, such a permanent Hell.

Oscar Wilde[6]

Another requirement of mine, was that these personages themselves be obscure, that nothing would have prepared them for any notoriety, that they would not have been endowed with any of the established and recognized nobilities–those of birth, fortune, saintliness, heroism or genius; that they would have belonged to those billions of existences destined to pass away without a trace; that in their misfortunes, their passions, their loves and hatreds, there would be something grey and ordinary in comparison with what is usually deemed worthy of being recounted; that nonetheless they be propelled by a violence, an energy, an excess expressed in the malice, vileness, baseness, obstinacy or ill-fortune this gave them in the eyes of their fellows and in proportion to its very mediocrity–a sort of appalling or pitiful grandeur.

Michel Foucault[7]

If there is one provision in the Indian Penal Code seemingly furthest from the language of love and intimacy it seems to be Section 377. With its focus on 'carnal intercourse against the order of nature' and its requirement of 'penetration sufficient to constitute an offence', there seems little possibility

6. This is from a letter written by Oscar Wilde after his imprisonment for two years for committing acts of gross indecency. cf. Colm Toibin, *Love in a dark time*, Picador, London, 2003.
7. Michel Foucault, *Power,* Penguin, London, 1994. p.160.

that the dry judicial record can actually speak of emotions like love and longing. The case law interpretation under Section 377 has by and large focused on non consensual sex between adults and children and the judiciary has been quick to characterize homosexuals and homosexuality as something to 'be abhorred by civil society', 'unnatural' 'animal like', 'sexual perversity' and 'despicable specimen of humanity.'

While it may be true that the majority of reported cases under the provision have to do with non-consensual sex, there is another more hidden narrative where couples who have engaged in consensual intimacy have been subjected to the persecution of the law. It is in these cases that if one reads from within the silent spaces in the judgment, one can notice that Section 377 does indeed persecute homosexual intimacy. One can also notice that the judiciary is remarkably blind to this possibility inspite of a wealth of evidence which points towards this inexorable conclusion. A look into the judicial archive finds three appellate court decisions in which the protagonists are consenting young men.[8] One of these cases, the case of Nowshirwan Irani, will be examined more closely to get a sense of the forbidden history of desire which remains a part of the untold history of Section 377.

In a reported decision from Sind in 1935, Nowshirwan Irani a young Irani shopkeeper was charged with having committed an offence under Section 377 with a young lad aged around 18 called Ratansi. The prosecution story is that Ratansi visited the hotel of the appellant and had tea there. Nowshirwan asked Ratansi why he had not come to the hotel for sometime and Rantansi replied that he had no occasion for it. He then went to the pier to take a boat, but on finding that he had no money came back to Masjid Street where he saw Nowshirwan standing on the road a little distance from the hotel. Nowshirwan asked Ratansi to come to his house and when he did, he locked the door and started taking liberties with the youngster who resented the overtures and wanted to go away. Nowshirwan removed his trousers, loosened the trousers of Ratansi and made the lad to sit on top of his organ. Ratansi got up from his lap, but in the meantime Nowshirwan had spent himself, wiped his organ and put on his pants. The reason this incident came to light was that a police officer Solomon along with his friend Gulubuddin saw the incident through the keyhole, marched in and took both Ratansi and Nowshirwan to the police station.

8. The three obscure couples whose lives take on a kind of pitiful grandeur by mere virtue of having the misfortune to get prosecuted under Section 377 are Minawalla and Tajmahomed, (AIR 1935 Sind 78) Nowshirwan Irani and Ratansi (AIR 1934 Sind 206) and Ratan Mia and Abdul Nur ((1988) Cr.L.J. 980.

The judge was not convinced by the story of the prosecution that Ratansi had been subject to forcible carnal intercourse by Nowshirwan. The judge was convinced that Ratansi was made to pose as a complainant and hence made hopelessly discrepant statements. The judge was not prepared to rely on the evidence of Solomon and Gulubuddin the two eyewitnesses whose conduct he found strange. Further the medical evidence could neither prove forcible sexual intercourse (the prosecution story) nor did it prove an attempt to commit the act of sodomy. In the opinion of the Judge, 'as the appellant has not even if we take the worst view against him gone beyond a certain stage of lascivious companionship, I do not think he deserves to be convicted for any of the offences with which he was charged or could have been charged.'

The story of Nowshirwan and Ratansi is a story of sexual desire acting itself out between two men of different class backgrounds. The limited material present in the appellate decision gives us a clue that even the judge was convinced as to the consensual nature of the relationship. As the judge notes, 'Moreover the medical evidence militates against the story of a forcible connexion on the cot, the appellant who is a fairly hefty young man having intercourse in the manner stated originally. There is not the slightest symptom of violence on the hind part of the lad.' He concludes that, 'If he was in the house of the accused behind locked doors, I have not the slightest hesitation in believing that he had gone there voluntarily.'

The story of desire secreted within the judicial narrative seems to be that Nowshirwan and Ratansi knew each other and therefore Nowshirwan makes the first move and asks Ratansi why he had not come to the hotel for sometime. Rantansi after finishing his tea, leaves the hotel only to come back in the same direction. When he comes back, Nowshirwan is waiting on the road and asks him to come to his house. They seem to have some sort of pre-arranged code by which they signal to each other the desire to meet in Nowshirwan's room. Following this arrangement, they go to Nowshirwan's room. Due to a misfortune of an over zealous police man or a police man with a grudge, what should have been an intimate act between two consenting parties in their bedroom becomes a public scandal.

A consenting act between two men is sought to be twisted by the prosecution into a story of Ratansi being forced into having sex with Nowshirwan. Ratansi is coerced by the demands of those around him to pose as a complainant against the very person with whom he had earlier had a consenting sexual relationship. The fact that it is a consenting relationship

does nothing to exculpate Ratansi from ironically becoming a victim of judicial ire. There is indeed a special fury reserved by the Judge for Ratansi.

In the judges' words, '[Ratansi] appears to be a despicable specimen of humanity. On his own admission he is addicted to the vice of a catamite. The doctor who has examined him is of the opinion that the lad must have been used frequently for unnatural carnal intercourse.' In the course of appreciating the medical evidence, the judge notes, "There was not the slightest symptom of violence on the *hind part* of the lad."

Thus the story of an encounter between two people of the same sex who desire each other, gets reduced in the judicial reading to the act of a perverse failed sexual connection. The use of terms like 'animal like' and 'despicable' places the sexual act within the framework of moral abhorrence. One has to read the silence in the judicial text to hazard a guess as to the nature of the intimacy between Nowshirwan and Ratansi. The two knew each other and possibly had met before in Nowshirwan's room. Nowshirwan's room might possibly have been a space where the coercive heterosexism of the outside world could be dropped for the brief time which Nowshirwan and Ratansi spent with each other. That brief time they spent together might possibly have been a moment when they imagined a world not yet born and a time yet to come, when their desire would be accepted without a murmur. This imaginative realm of impossibility, is what is rudely interrupted when Solomon spies through the key hole.

One can guess that their meeting together might have been noticed on earlier occasions by Solomon, hence alerting him to take action on that fateful day in 1935 Sind when Nowshirwan met Ratansi yet again. Solomon stands in for the willed heterosexism of the larger world or what Oscar Wilde would have called the 'unnatural virtue' in which the world abounds which will give no space for any the growth of any intimacy which challenges its own laws.

It is this fragile experiment of creating this 'little community of love'[9] outside the bounds of law's strictures and society's norms, which is set upon by society in the form of Solomon and then given the judicial imprimatur of a' failed sexual connection'. The tragic story of Nowshirwan and Ratansi speaks to the absence of a certain vocabulary. The language of love and intimacy, longing and desire, and the expression of spontaneous bodily affection finds no safe habitation within the terms of the law. What

9. Lawrence Liang and Siddharth Narrain, *Striving for Magic in the City of Words*, http://www.himalmag.com/Magic-in-the-city-of-words-_nw3197.html *accessed* on 28.08.09.

law seeks to do is degrade this act of experimental creation of new forms of intimacy and limit its expression. The language of law has an impoverishing effect as it strips the physical act of its rich emotional connotations and reduces the act of human intimacy to a 'perverse failed sexual connection.' By stripping the act of sex of its multiple meanings it produces Nowhirwan as a subject of the criminal law.

One could re-read Nowshirwan and Ratansi as unwitting frontiersmen in the history of the battle against Section 377 and among its first recorded tragic victims. In another register, Nowshirwan and Ratansi stand in for Oscar Wilde and Lord Alfred Douglas, with Ratansi being forced to stand in as witness not just against Nowshirwan but also forced to deny a part of his own being in terms of his own part in creating that 'little community of love'. Just as Oscar Wilde was betrayed by Alfred Douglas who described his lover as "the greatest force for evil that has appeared in Europe during the last three hundred and fifty years", so too Nowshirwan in his hour of greatest need is confronted by Ratansi who becomes the complainant against him. The story of Nowshirwan and Ratansi exemplifies the perversities of a law which turns lover against lover and converts the act of intimacy into the crime of carnal intercourse.

Nowshirwan's story remains emblematic of the ethical and moral poverty of the judicial discourse even as it grappled with homosexual expression for over one hundred and fifty eight years. It is important to note that inspite of the coming into force of the Indian Constitution with the language of equality, non discrimination, dignity, the judiciary continued to characterize homosexuality with terms such as 'unnatural', 'perversity of mind', 'immoral' and 'animal like'. This ethical language of rights was never seen fit to apply to LGBT persons. The first time the judiciary moved outside the range of responses outlined above was one hundred and fifty eight years after the coming into force of the Indian Penal Code and fifty nine years after the coming into force of the Indian Constitution. The occasion happened to be the hearing of the *Naz Foundation v. Union of India* and others.

The changed social context: From Nowshirwan to the Naz Foundation

The social context in the late nineties and the beginning of the new century is dramatically different from the time Nowshirwan happened to be persecuted. The norms which strait jacketed the expression of Nowshirwan and Ratansi and the law which deemed Nowshirwan a criminal begins to be questioned. This practice of questioning the set ways of the heterosexist

world begins with the emergence of the queer struggle with its insistence on problematising norms of gender and sexuality. It is this context of an emerging community far less isolated than the world which Nowshirwan and Ratansi tried to create far ahead of their times, which underpins any engagement with Section 377 in the contemporary era. In simple terms, when people like Nowshirwan are arrested under the law in contemporary times, it becomes a concern of people beyond the network of family and friends. Queer people across the country rally together and begin to support those who are subjected to the law's perSectionution. Thus people who are arrested under Section 377 be it the arrest of gay men in Lucknow 2006 or the arrest of HIV/AIDs workers in Lucknow 2001 become a part of a contemporary history of struggle against Section 377 as compared to unknown frontiersmen such as Nowshirwan and Ratansi.

The bringing together of the stories of Nowshirwan and Ratansi and those persecuted under the law in contemporary times finally culminates in a legal challenge to very same law. The petition challenging Section 377 is filed by Lawyers Collective on behalf of Naz Foundation before the Delhi High Court in 2001. The petition challenged the constitutional validity of Section 377 and made an argument for Section 377 to exclude the criminalization of same sex acts between consenting adults in private. The petition in technical terms asks for the statute to be 'read down' to exclude the criminalization of same sex acts between consenting adults in private so as to limit the use of Section 377 in cases of child sexual abuse.

The petition itself though filed by a single NGO gradually began to represent the entire community. This process of making a 'public interest litigation' truly 'public' began by Lawyers Collective and Naz Foundation hosting a series of meetings on different stages of the petition. Over the next seven years, this process of continuous consultation with the community, contributed towards Section 377 becoming a more politicized issue. The key stages of the petition included the affidavit filed by the Union of India (Home Ministry) which indicated that the Government would stand by the law, the affidavit filed by the National AIDS Control Organization (NACO) which in effect said that Section 377 impedes HIV/AID's efforts and the impleadment of JACK (an organization which denied that HIV causes AID's) and BP Singhal (a former BJP Member of Parliament, representing the opinion of the Hindu Right wing that homosexuality was against Indian culture) into the petition. This process of discussion fed back into the community fuelling feelings of outrage and indignation, hope and despair and anger and fear as each stage of the petition unleashed a torrent of emotions.

The periodic meetings were thus a way in which the activist community was kept deeply involved in developments and a way in which the community continued to respond to the changing scenario. What particularly tilted the balance was the impleadment of BP Singhal into the petition. Suddenly the scales seemed to have tilted with Naz appearing increasingly isolated among the cacophony of voices opposing the petition. It seemed that a range of forces were coming together to protect what the community saw as a patently unjust law. In a meeting called by Lawyers Collective to discuss this development, it was proposed that some queer groups should also implead themselves within the petition so as to support the petitioner.

It was with the birth of this idea that, Voices Against 377 (A Delhi based coalition of child rights, womens rights and LGBT groups) decided to implead themselves within the petition to support the petitioner. The key emphasis of Voices was the rights of LGBT persons while Naz because of its status as an organization working on HIV/AIDS would continue to emphasize on how Section 377 impeded HIV/AID's interventions and hence the right to health of LGBT persons.

There were enormous delays spanning a sum total of seven years when the case was initially dismissed by the Delhi High Court, appealed in the Supreme Court and finally sent back to the Delhi High Court. Initially the Delhi High Court dismissed the petition just as it was gathering steam on the ground that the petitioner Naz Foundation was not affected by Section 377 and hence had no 'locus standi' to challenge it. However when the dismissal was challenged before the Supreme Court, the Supreme Court sent the case back to the Delhi High Court to be heard expeditiously. Since the petition was filed by Naz Foundation in 2001 it has gathered greater public support both in terms of public opinion and in terms of an increasing support even within the sphere of the courtroom. It was in September of 2008 that after a long wait the matter was finally posted for final arguments before a Bench comprising Chief Justice Shah[10] and Justice Muralidhar[11] of the Delhi High Court.

The final arguments before the Delhi High Court: Empathy, dignity and group sex

By the time the matter was posted for final arguments in September of 2008, seven years after the petition was initially filed, the key difference was it had become far more a part of the issues which defined contemporary

10. *Henceforth* referred to as C.J. Shah.
11. *Henceforth* referred to as J. Muralidhar.

India. There was a real buzz both in terms of the media coverage and there was an eager anticipation with respect to the final hearings. The Court itself during the hearings was attended by community members who closely followed each twist in argument and each response by the judges. The proceedings themselves as they unfolded were covered extensively and widely by the media and the community was also kept updated by daily minutes of the hearings which were posted on community online forums.[12]

The petitioner's core argument centered on the right to health and how Section 377 impeded HIV/AIDS interventions. The arguments were substantiated by case studies particularly of Lucknow 2001[13] when Section 377 was used to target a HIV/AIDS intervention with the Men having Sex with Men (MSM) community. So Section 377 far from being justified by a compelling state interest actually was an impediment to achieving the right to health of a particularly vulnerable Section of the population.

The core argument of Voices Against 377 was that, "Section 377 is a law which impinges on the dignity of an individual, not in a nebulous sense, but affecting the core of the identity of a person..Sexual orientation and gender identity are part of the core of the identity of LGBT persons. You cannot take this away...". They argued that, "Morality is insufficient reason [to retain the law] in a case like this where you are criminalizing a category and affecting a person in all aspects of their lives, from the time the person wakes up to the time they sleep."

Mr. Shyam Divan, the Counsel for Voices, argued that if the court did not declare its relief limiting the scope of Section 377, it would cast a doubt on whether LGBT persons enjoyed 'full moral citizenship' of this country. He argued that, 'a moral argument cannot snuff out the right to life and personal liberty of LGBT persons.'

The core argument of the Government of India astonishingly was that if Section 377 was read down to exclude consenting sex acts between adults in private, it would affect the right to health of society.[14] The Counsel

12. All the subsequent quotations with respect to the proceedings from the Delhi High Court are taken from the transcript of the proceedings. The transcripts do provide a rough idea of the way the proceedings went before the Delhi High Court, however they are not a verbatim transcript of all that transpired before the Court. It is available at www.altlawforum.org.
13. *See* Human Rights Watch, "*Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India*", July 2002, Vol.14, No. 5(C), p.19. This Report was cited by the petitioners in their written arguments.
14. It should be noted that the affidavits filed by the Union of India were contradictory with the Home Ministry making the case that the law was required to keep in place a societal morality and NACO making the argument that the law hampered HIV/AID's interventions.

representing the Union of India was the Additional Solicitor General, Mr P.P. Malhotra. He cited various studies to show that homosexuality caused a very serious health problem. Citing one study he said, 'the sexual activity enjoyed by homosexuals results in bacterial infections, and even cancer. There are activities like golden showers, and insertion of objects into the rectum which cause oral and anal cancer. A study of homosexual practices shows 37% enjoyed sodomitical activities and 23% enjoyed water sports.' Referring to notions of decency and morality the ASG noted that, 'in our country it is immoral on the face of it. Society has a fundamental right to save itself from AIDS. This right is far greater than any right of the less than 1% who are in this programme. The health of society should be considered and it is the greatest health hazard for this country. If permitted it is bound to have enormous impact on society as young people will then say that the High Court has permitted it.'

B.P. Singhal made a strong argument that Section 377 was against Indian morality. In the words of his counsel, homosexuality was 'a perverted kind of sex [...] in the name of thrill, enjoyment and fun the young shall walk into the trap of homosexual addiction. The tragic aspect of this is that alcohol, drug and disease are the natural concomitants of homosexual activity.' He 'submitted that he was on morality, the joint family structure and that we must not import evils from the west. We have traditional values and we must go by that. It would affect the institution of marriage and if women get doubt about what their husbands are doing, there will be a flood of cases of divorce.'

JACK's counsel submitted that there was 'no scientific evidence that HIV causes AIDS', that a 'change in this provision would mean that all marriage laws would have to be changed', and that 'under Section 269 and 277 of the IPC anyway any intentional spreading of an infectious disease would be an offence'. JACK's counsel then asserted that Naz did not come to Court with clean hands and was part of an international network which was using HIV to push an agenda.

Judicial empathy: Listening to LGBT voices.

The Court in the post liberalization era has not been a hospitable space or indeed the last refuge of what the Supreme Court had characterized as the 'oppressed and the bewildered'. In fact the Court has been positively hostile to a whole range of applicants right from slum dwellers to all sections of organized labour. So it was with a great deal of trepidation that queer activists awaited the hearing. How would the judges indeed understand

complex issue of sexuality and rights? How indeed would we be able to persuade them that this was an issue of rights? Should we not have learnt from the experience of Public Interest Litigation in the 90's and stayed away from the Court as any guarantor of rights were some of the thoughts circulating like a nervous eddy through the queer community.

The judicial response has generally been subject to analysis in terms of the reasoned argument and the decided case. By contrast little attention has been paid to the gamut of responses by judges on a day to day basis in Courts. As Lawrence Liang notes, 'Witnessing the courts functioning on a day to day basis also allows you to uncover another secret archive, an archive of humiliation and power. It is said that seventy percent of our communication is non verbal and this must be true of legal communication as well. The secret archive that interests me consists not of well reasoned judgments or even the unreasonable admonishment of the courts, but the various symbolic signs and gestures that accompany them. An incomplete index of the archive includes the stare, the smirk, the haughty laugh, the raised eyebrow, the indifferent yawn, the disdainful smile and the patronizing nod amongst many others.'[15]

In this secret archive of what Liang correctly characterizes as 'humiliation and power', what emerged almost as a complete surprise was another index of responses, which can rightly be characterized as standing in for the quality of judicial empathy. What came through the questions and comments of the Judges was not an intention to humiliate but instead a strong sense of empathy for the suffering of LGBT persons.

C.J. Shah communicated this judicial empathy in ample measure and took judicial notice of the social discourse of homophobia by saying that we all know with what kind of sneers and mockery this issue is treated in society. To substantiate this point, he narrated the moving instance of a boy who was subject to jibes and sneers because of his sexuality and so was unable to do his exam. It was only after a judicial intervention he was allowed to do his exam without harassment and in C.J. Shah's words, 'he thankfully passed.'

If one were to abstract three important moments in the Court room arguments spanning over eleven days:

The first important moment was when the Counsel for Naz, Mr. Anand Grover read the opinion of Albie Sachs in *National Coalition For Gay and*

15. Lawrence Liang, *Devastating Looks: Smirks, Quirks and Judicial Authority,* http://kafila.org/2007/05/04/devastating-looks-smirks-quirks-and-judicial-authority/ *accessed on* 10.01.9.

Lesbian Equality v. Minister of Justice[16]. This decision by the South African Constitutional Court ruled that the offence of sodomy violated the right to equality and dignity and struck it down. J.Sachs passionately argued concurring opinion was in particular animated by the high ideals of the South African Constitution and exceeded the staid limits of conventional judicial prose in its ability to evoke empathy. It conveyed with intensity and power, the extent of injustice perpetrated by an anti sodomy law. As J. Sachs powerfully noted, 'In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.'[17]

The Judges were visibly moved by J. Sachs opinion and conferred among themselves. C.J. Shah wished the Additional Solicitor General (ASG) was in Court to listen to J. Sach's opinion. Almost subtly, you could sense that the burden had shifted from the Counsel to the judges. They now had to contend with the weighty presence of J. Sachs and the burden of history when they wrote their judgment. In case there were any doubts on this point, Voices Against 377 submitted an outline of submissions which argued that, 'This case ranks with other great constitutional challenges that liberated people condemned by their race or gender to live as second class citizens, such as *Mabo v. Queensland*[18] (where the High Court of Australia declared that the aboriginal peoples of Australia had title to lands prior to colonization), *Brown v. Board of Education*[19], (where the United States Supreme Court held that segregated schools in the several states are unconstitutional in violation of the 14th Amendment) and *Loving v. Virginia*[20], (where the United States Supreme Court held that laws that prohibit marriage between blacks and whites were unconstitutional).[21]

The Second important moment was when the judges zoned in on what they saw as the core argument for retaining Section 377, public morality. They asked counsel for Voices Against 377 how would he respond to the

16. *National Coalition For Gay and Lesbian Equality v. Minister of Justice,* [1998] {12} PCLR 1517.
17. *Ibid.* at para 127.
18. (1992) 175 CLR 1.
19. 344 U.S. 1 (1952).
20. 388 U.S. 1 (1967).
21. *See* Outline of Arguments on behalf of Voices Against 377 para 12.4, submitted in *Naz Foundation v. Union of India*, Writ Petition no 7455 of 2001. cf. Arvind Narrain et. al., The Right that dares to speak its Name, Alternative Law Forum, Bangalore, 2009. pp-29-47.

public morality justification for retaining Section 377? Mr. Shyam Divan response on behalf of Voices Against 377 was 'Any law or statutory provision that denies a person's dignity and criminalizes his or her core identity violates Article 21 of the Constitution. Section 377 operates to criminalize, stigmatize, and treat as "unapprehended felons", homosexual males. The provision targets individuals whose orientation may have formed before they attained majority. It criminalizes individuals upon attaining majority, for no fault of the person and only because he is being himself. Article 21 absolutely proscribes any law that denies an individual the core of his identity and it is submitted that no justification, not even an argument of "compelling State interest" can sanction a statute that destroys the dignity of an estimated 25 lakh individuals.'[22]

This argument that the state cannot plead, 'compelling state interest' when the core value of dignity is at stake, seemed to resonate deeply with the judges with them repeatedly asking the ASG to respond to what they characterized as 'a very strong argument on dignity'.

The third important moment were the series of exchanges between the Judges and the ASG and the counsel for B.P. Singhal and JACK. By contrast to the evident empathy with which the judges heard both Naz and Voices the ASG as well as the counsels for JACK and BP Singhal were subject to questions which showed the judicial impatience with the nature of arguments and hinted at the deep structure of their judicial sympathies. I will just highlight one such exchange:

At one particularly funny moment counsel for BP Singhal, Mr Sharma, referred to *R. v. Brown*[23] which was a decision of the House of Lords in which they ruled that consensual sado masochistic practices between adults was not entitled to protection on grounds of privacy.

Mr. Sharma then referred to *R. v. Brown* to make the point that "homosexuals enjoy group sex and even enjoy committing violence. This is sexual perversity and when they were consenting adults, criminal acts warranting prosecution were committed in the course of such perversity." He said that "it was disconcerting to see tendency of homosexuals to indulge in group sex."

Chief Justice Shah noted that "when the *R. v. Brown* judgment was delivered, sodomy was not a crime in the U.K. So even if Section 377 is read down and homosexual acts between consenting adults does not amount to

22. *Ibid.* at para 9.2 and 9.3.
23. [1993] 2 All ER 75.

an offence under Section 377, it would still be an offence if grievous hurt is inflicted on the passive partner even if partner has consented to it."

Chief Justice Shah wanted to know about the relevance of the judgment. Mr. Sharma responded that "anus is not designed by nature for any intercourse and if the penis enters the rectum, victim is found to get injury". The activity itself causes bodily harm.

Chief Justice Shah asked whether the submission that this act itself causes injury, because it is unnatural or is likely to cause injury had been argued before. Whether in any culture, western, oriental, in several countries where ban is lifted, in WHO Reports, has anyone argued that act itself causes injury? Can you force Brown to the logical conclusion that sex between two males itself is a cause of injury? This submission has never been raised before any Court till now? Why is that?

Mr. Sharma continued to read from Brown to make the point that "drink and drugs are employed to obtain consent and increase enthusiasm, there is genital torture on anus, testis, blood letting. Burning of penis..."

Mr. Anand Grover intervened to say that Brown was to do with violence and dealt with a fact situation not contemplated by Wolfenden and that this was recognized by the judgment itself.

Counsel for B. P. Singhal read from this judgment to make the point *that* 'homosexuals enjoy group sex and even enjoy committing violence. This is sexual perversity and [.....]criminal acts warranting prosecution were committed in the course of such perversity. He said that 'it was disconcerting to see tendency of homosexuals to indulge in group sex.'

C.J. Shah sharply interjected to ask if it was based on personal knowledge that Mr Sharma knows that homosexuals enjoy group sex'?

The social context of empathy: Where does it come from ?

The empathy demonstrated by the Judges in the course of the hearings, their sensitivity not only to instances of brutal violence but equally to the more subtle language of discrimination and this made the Court proceedings for the brief moment of the hearings a magical space. LGBT persons who were so used to the sneers and jeers of society suddenly felt that they were not only heard but also respected. The judges just through the art of empathetic listening restored dignity to a section of society on whom the Government seemed intent on pouring nothing but contempt and scorn. The Judges in the hearings did something unique. They spoke about sex without a sneer

and for the first time in recorded judicial history of the Indian Courts managed to actually talk about homosexual sex within the context of intimacy and love. The discourse of love and affection, intimacy and longing became a part of the judicial register and displaced the relentless focus on the stripped down homosexual act as a threat to civilization at its very roots. The conflation of homosexuality with excess through the focus on group sex, was challenged by the nature of judicial questioning and the discourse about homosexuality was linked to contexts of emotion and feeling. A new path was being forged in learning to talk about the intimacy which Nowshirwan and Ratansi shared, within the terms of the law. For the first time it seemed possible to see Nowshirwan and Ratansi and many others like them in terms other than the basely carnal, and for opening out that possibility, one should credit the empathetic listening which C.J. Shah and J. Muralidhar demonstrated.

Leaving aside the question of the eventual judgment, the question which interests us is what accounted for the judicial empathy for LGBT suffering? We can essay some possible reasons.

Firstly, it has often been noted that the difference between the *Bowers* judgement which retained the sodomy law in 1986 and the *Lawrence* judgment which struck down the sodomy law in 2003 in the United States was that in the *Lawrence* Court every judge knew somebody who was gay or lesbian where in the *Bowers* Court, not a single judge knew any gay or lesbian people. Both Judges in this case knew J. Cameron and J. Kirby two openly gay judges who have spoken in India in judicial academies and other such forums about LGBT rights. These public meetings with fellow judges who were gay gave a face and a name to homosexuality. What appears strange and distant is made familiar, and what might have evoked dislike and misunderstanding evokes empathy and understanding.

Secondly, much had changed since 2001 when the petition was originally filed. In the intervening period the range of activities on queer rights has brought queer issues to a center stage as never before. Section 377 had moved from merely being a provision in the IPC to becoming a metaphor for all that is wrong with our sexual universe. The open letter signed by eminent luminaries such as Vikram Seth and Amartya Sen, the pride parades in major Indian cities the periodic media reporting of LGBT rights violation all signaled a changing India, an India to which the judiciary could not be blind to. If Indian society was changing to encompass new understandings of rights, the judiciary could not be completely immune to this current.

Finally, regardless of how much we theorize to understand the powerful societal influences which were brought to bear upon the final arguments, there still needs to remain some space for the highly subjective and deeply personal. What was it in the very being of C.J. Shah and J. Muralidhar which accounted for their remarkable empathy? Where did that remarkably human quality of relating to human suffering come from? That will continue to remain a mystery and we can do no more than hope that the quality of judging continues to be imbued with the spirit which makes judges listen to the voices of human suffering.

The judgement in *Naz Foundation* v. Union of India: From private immorality to constitutional morality

While the judgment in *Naz Foundation v. Union of India* deserves to be studied from many perspectives,[24] this final Section will focus on the judicial use of the term 'constitutional morality.'

The question of morality has been central to the concerns around Section 377 and were sought to be addressed by different parties in the *Naz Foundation* case. Both the Union of India as well as intervenors such as B.P. Singhal and JACK constantly sought to make the point that reading down the Section would destroy society's morals. The Judges too were deeply troubled by the question of morality and constantly sought to get the parties to respond to the question of morality as a ground for retaining Section 377.

The way the judgment dealt with the question of morality was by introducing the term 'constitutional morality' which became the term on which the rest of the judgment hinged. To understand the key role that the notion of 'constitutional morality' played in the judgment its important to contextualize the debates on the LGBT rights and morality which was played out historically and which formed a part of the debates before the Delhi High Court.

24. To do a quick listing of its many innovative approaches:
   1) It redefines privacy as not just being about the place but about the person. ie that the right to privacy is also about the protection afforded to decesions about one's intimate life.
   2) It reads sexual orientation as an analogous ground of discrimination to sex and thereby opens out the possibility that the prohibited grounds under Art 15 could move beyond the specifically listed grounds. It also notes that the protection of Art 15 extends not only to discrimination by the state but also to discrimination by civil society.
   3) It links sexuality and identity and makes the case that though Sec 377 may be facially neutral in its operation it ends up targetting LGBT persons and hence violates the equal protection clause in Art 14.
   4) It also argues that the judiciary is not bound to defer to the legislature when it comes to the question of fundamental rights and has a sovereign role in protecting unpopular minorities. See Arvind Narrain et. al., Eds., *The Right that Dares to Speak its Nam*e, Alternative Law Forum, Bangalore, 2009.

The very origins of the law has its historical roots in a notion of morality which was rooted in a Judeo Christian sensibility. It can be traced historically to a time when there was no separation between law and morality and law was meant to reflect a religious morality. Thus the offence of sodomy for which the initial punishment was death penalty was a part of Canon law which became in turn a part of English Law and finally ended up on the statute of the Indian Penal Code. This notion of law and morality as an integrated system, was first challenged by the Wolfenden Committee Report in 1957 which was set up to examine the criminalization of homosexuality.

The Report in its recommendations made a strong argument for the decriminalization of consenting same sex acts between adults in private. As the Wolfenden Committee famously noted, "It is not, in our view, the function of the law to intervene in the private lives of citizens....Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality, which is, in brief and in crude terms, not the law's business"[25]

The Recommendations of the Wolfenden Committee Report in turn became the subject matter of one of the most famous legal debates in history between Lord Devlin and Prof. H.L.A. Hart, which has remained a staple of legal education around the world, ever since it first took place.

Lord Patrick Devlin articulated the classic defence of why homosexuality should continue to remain a criminal offence. In his view, even if homosexuality was a private immorality it should continue to be punished as Devlin argued that homosexuality was an attack upon a 'society's constitutive morality'. In his view a society's existence depended upon the maintainance of shared political and moral values. To maintain those values and in fact to ensure societal survival it was essential that even a private immorality like homosexuality should continue to remain a criminal offence.

It was as a counter to Devlin's statement that Prof. H.L.A. Hart articulated the classic defense of the Wolfenden Committee Recommendations. Hart, following from Mill's defence of liberty argues that the basis of the criminal law lies in preventing harm to others. There is no basis in Hart's philosophy for the law to actually intervene to legislate a public morality. Hart argues that there is no empirical evidence for the proposition that if law did not support a public morality, society would collapse. If such was indeed the case we should assume that there can be no change in societal

25. Wolfenden Committee Report, 1957 at para 24.

morality as any change is social morality becomes equated to a collapse of societal morality. In effect Hart offered a resounding defence of the core recommendation of the Wolfenden Committee that, 'there must remain a realm of private morality, which is, in brief and in crude terms, not the law's business.'[26]

Suffice it to say Hart's work in general and definitely the work which came out of his debate with Devlin has been central to debates around the criminalization of homosexuality in legal circles around the world. Even when conservative judges and lawyers have been unsympathetic to the homosexual voice, they have been able to relate to the philosophical core of the positivist argument i.e. law has no place in enforcing morality. There was little space in England of the 60's for an articulation of a queer viewpoint which would have had acceptance in mainstream legal circles. To illustrate this climate of disgust towards homosexual rights as it were Lacey quotes one example, "C.P. Harvey, a judge, was sympathetic to legalization, but only because of the need to reduce the risk of blackmail used by one homosexual partner on the break up of a relationship. He also so fit to congratulate Herbert on 'a remarkable feat' in having 'worked up such a dazzling display from such squalid material'."[27]

The impact of Hart's thinking in India cannot be underestimated. Every student of law and jurisprudence has had to contend with his thinking. So every student of law encounters homosexuality and the defense of decriminalization through the Hart–Devlin debates. Legal academic circles and in particular jurisprudence professors will still swear by Hart's work as the acme of positivist jurisprudence. Academically minded judges too have cited Hart in the judgments of the Indian High Courts and Supreme Courts. In short, in a difficult terrain of a complete lack of exposure to the discourse of homosexual rights, the work of H.L.A. Hart provides a remarkably useful starting point for speaking to judges, lawyers and legal academics in a language that they not only know, but have been taught to venerate.

Such being the case, the Naz judgment could have been well justified in making the argument for the decriminalization of homosexuality based on Hart's position that it was not the law's business to regulate a zone of private morality. Such an understanding would have been sufficient to achieve the result of reading down Section 377 to exclude consensual sex between adults from the ambit of criminalization. However the judges choose to tread on a more ambitious path.

26. Wolfenden Committee Report, 1957 at para 24.
27. *Ibid.* p.259.

The judges begin by referencing Dr. Ambedkar, who in the Constituent Assembly noted, "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic."[28]

They go on to state that, "Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality."[29]

"Moral indignation, howsoever strong, is not a valid basis for overriding individual's fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view."[30]

What the judges do through articulating the notion of constitutional morality is change the terms in which homosexual expression has been thought of by the judiciary. From the first tentative steps when Hart and Wolfenden made space within the law for 'private immorality', now homosexual expression is seen as not just something which needs to be 'tolerated' but rather as something which needs to be protected as protecting the expression of homosexuality goes to the heart of the meaning of the freedoms guaranteed under the Indian Constitution. In a reversal of the terms of the debate it become 'moral' to protect LGBT rights and 'immoral' to criminalize people on grounds of their sexuality. To protect what Devlin might have called, 'society's constitutive morality' and the Judges call 'constitutional morality', it becomes essential to ensure that LGBT expression is protected.

Constitutional morality in the judges reading, requires that LGBT persons are treated as equal citizens of India, that LGBT persons cannot be discriminated against on grounds of their sexual orientation and that LGBT persons right to express themselves through their intimate choices of who their partner is be fully respected. Its only when the dignity of LGBT persons is respected that the Indian Constitution lives up to its foundational promise. Taken one step further constitutional morality also requires the court to

28. *Naz Foundation v. Union of India and Ors.*, (para 79), 160 (2009) DLT 227.
29. *Ibid.*
30. *Ibid.* para 86.

play the role of a counter majoritarian institution which takes upon itself the responsibility of protecting Constitutionally entrenched rights, regardless of what the majority may believe.

In the Judges fitting conclusion, '"If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised."[31]

The theme of 'constitutional morality' thus brings about a paradigm shift in the way the law thinks about LGBT persons. Protecting the rights of LGBT persons is not about only about guaranteeing a despised minority their rightful place in the constitutional shade, but equally it speaks to the vision of the kind of country we all want to live in and what does it mean for the majority.

Indian law seems to have traversed the journey from Nowshirwan to the Naz Foundation, from persecution for intimacy to making some space for the 'little communities of love'. However the victory still remains fragile and needs to be nurtured and safeguarded. One of the hopes of what the Naz judgment could portend is best articulated by the Judge who was one of the inspirations for the judges in *Naz Foundation*, J. Albie Sachs. J. Albie Sachs looking to the future of a South Africa, post decriminalisation of homosexual expression noted, 'It leads me to hope that the emancipatory effects of the elimination of institutionalised prejudice against gays and lesbians will encourage amongst the heterosexual population a greater sensitivity to the variability of the human kind.'[32]

31. *Ibid.* para 130.
32. *National Coalition For Gay and Lesbian Equality v. Minister of Justice,* [1998] {12} PCLR 1517 at para 138.

The New Jurisprudence of Scarce Natural Resources: An analysis of the Supreme Court's judgment in *Reliance Industries Limited v Reliance Natural Resources Limited* (2010) 7 SCC 1

*Zoheb Hossain** and *Alok Prasanna Kumar*** (***)

Conflict over the extraction and exploitation of exhaustible and non-renewable natural resources (or the "resource curse"[1]) was not far from the minds of the framers of the Constitution of India. For instance, the Constitution not only vests all land, minerals and things of value under the territorial waters and the Exclusive Economic Zone in the Union of India to be used for the benefit of the Union (Article 297), it also directs the Government, to distribute the material resources of the community for the common good to benefit everyone and prevent a concentration of wealth in the economic system (clauses (b) and (c) of Article 39). This is further constrained by the mandatory requirements of Article 14 and Article 19(1)(g) read with clause (6) of Article 19 of the Constitution of India which demand that laws adhere to the principle of equal treatment of all and protection of freedom of business, trade and commerce subject to reasonable restrictions.

While the above provisions have individually been the subject of much interpretation and jurisprudential discourse by the Supreme Court of India,[2] they have not been seen as part of a greater whole; a mechanism that protects the natural resources of the country from misuse and keeps the "resource curse" at bay. Probably the first instance of the Supreme Court appreciating the said scheme in the Constitution is seen in the judgments delivered in the

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*** The authors were part of the team of advocates who appeared in this case and assisted Mr. Mohan Parasaran, Additional Solicitor General of India in his arguments before the Supreme Court of India. We wish to record our gratitude to him for his valuable guidance in writing this case comment.

1. See for instance Joseph E. Stiglitz, *Making Natural Resources into a Blessing rather than a Curse*, in "Covering Oil" Ed. Svetlana Tsalik and Anya Schiffrin, Open Society Institute (2005); See also Richard M. Auty, "Sustaining Development in Mineral Economies: The Resource Curse Thesis" (1993). London: Routledge.

2. For a discussion on the scope of territorial application of India's laws *vis-a-vis* Article 297 see *Aban Lloyd Chiles v Union of India* (2008) 11 SCC 439. However, this case is arguably the first which interprets Article 297 in depth and with reference to its relation to the other provisions of the Constitution.

landmark case of *Reliance Industries Limited v. Reliance Natural Resources Limited*[3] ("the Reliance case"). In the separate, but largely concurring judgments delivered by Sathasivam J (on behalf of himself and the CJI)[4] and Sudershan Reddy J,[5] the Supreme Court has enunciated what we believe are the basic principles of what can be called the jurisprudence of scarce natural resources. For the purposes of this comment, and in understanding the scope of the principles of this emerging area of jurisprudence, we are restricting ourselves to exhaustible, non-renewable natural resources such as minerals, petroleum and natural gas.

While some individual aspects of this new emerging area have been elaborated upon in earlier judgments of the Supreme Court of India, we feel that the Reliance case brings together these aspects and coherently lays down the principles of the new jurisprudence of scarce natural resources, firmly grounding the same in the provisions of the Constitution of India. We argue that these principles could not have come at a more opportune time as India grapples with various conflicts (ranging from political to outright armed conflict) over the extraction and distribution of natural resources in different parts of the country. Given economic policies which have placed a premium on economic growth and industrialization, it is only inevitable that the hunger for raw materials will lead to more, and not less, conflict over scarce natural resources. It is also likely that the Courts will have a huge role in resolving such disputes involving not just the State and citizen, but also disputes between different groups of citizens with different and conflicting interests. We feel that the framework laid down by the Supreme Court in the Reliance case is worthy of emulation in the future and must be built upon to ensure that India does not succumb to the resource curse.

This comment is split into three sections. In the first, we summarize the factual background, the procedural history and the main findings of the Supreme Court in the Reliance case. In the second section, we take a closer look at the concurring judgment of Reddy J in this case, with focus on the principles that govern regulation of scarce natural resource extraction and exploitation elaborated by him in his judgment. In the last and concluding section, we will see how the Court has understood the constitutional scheme in a laudable manner that deserves to be followed in subsequent cases.

3. (2010) 7 SCC 1.
4. Ibid, 6–68.
5. Ibid, 69–178.

Factual Background and Summary of Main Findings

One may validly ask why the Court was dealing with questions of constitutional importance in a dispute that arose from a Company Petition filed in the Bombay High Court. The answer, as we outline in this section, lies in the peculiar facts which led to these questions being taken up, focussing primarily on how and why the Government was involved in this particular case.[6]

The genesis of the matter is traceable to the year1999, when Reliance Industries Limited (RIL), entered into a Production Sharing Contract with the Union of India wherein RIL was awarded the rights to explore the EEZ of India for natural gas. A Production Sharing Contract is one of the mechanisms through which Governments enter into partnerships with Private Entities to extract oil and natural gas.[7] Having found commercial quantities of natural gas off the Krishna Godavari (KG) Basin in 2003, plans were drawn up by RIL in consultation with the Government, to begin extraction of the same. In the meantime, after the death of its founder, Dhirubhai Ambani, RIL itself was re-structured into two groups of companies headed by his two sons, Mukesh and Anil Ambani. In the course of the re-arrangement proceedings, one of the companies in the group headed by Anil Ambani , Reliance Natural Resources Limited (RNRL) claimed that it had a right to be supplied 28 mmscmd of natural gas at $ 2.34 for a period of 17 years on the basis of a family MoU entered into between the two brothers, and approached the High Court of Bombay in the Company Petition, seeking enforcement of the same.[8]

The Single Judge of the High Court of Bombay in his final judgment and order dated 15.10.2007, held that the suitable arrangements made to supply natural gas had to be made in accordance with Government policy and legislation, and therefore directed the parties to re-negotiate in accordance

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6. The Court was also concerned, in the *Reliance case*, with the interpretation of the scope of certain provisions of the Companies Act, 1956, but we have limited ourselves to the constitutional law issues that were thrown up. It is also our belief that the company law issues, while interesting in themselves, were secondary to the more important questions of law raised in the context of the PSC and the Government's powers of regulation over natural resources, since, as Reddy J points out, private arrangements can never override policy considerations. See *Reliance* (supra n 6) 70, para 134.

7. The other such mechanisms include concessions, participation agreements, and service contracts. See Ernest E. Smith & John Dzienkowski, *A Fifty Year Perspective on World Petroleum Arrangements,* 24 Texas International Law Journal 13 (1989).

8. Mmscmd stands for Million Standard Cubic Metres per Day. The size of the RIL find was estimated at 11.5 trillion cubic feet See http://www.eia.doe.gov/cabs/India/pdf.pdf (Last accessed 27th September, 2010).

with the same.[9] Both parties filed appeals appeal before a Division Bench of the High Court of Bombay.

During the pendency of the dispute, the Bombay High Court had passed orders injuncting the creation of third party rights in the natural gas at KG D6. However, as the demand for natural gas increased and the production date of the KG D6 field grew closer, the Government, sought lifting of the injunction in the Bombay High Court. For this purpose, the Union of India was impleaded as a party in the dispute between RIL and RNRL, and after hearing the parties, the Court passed orders lifting the injunction and permitting commercial exploitation of natural gas from the KG D6 field. Following this, the Government set out the Gas Utilization Policy, giving priority to certain sectors of the economy such as power generation, fertilizers, LPG, and transportation.[10]

In its final judgment and order dated, 15.06.2009, the Division Bench of the Bombay High Court disposed of the appeals holding, *inter alia*:

1. A fixed quantum of gas, i.e. 28 mmscmd for a period of 17 years stands allocated to RNRL from the KG D6 field.
2. RIL will have to supply RNRL natural gas at rates prescribed in the private arrangements irrespective of Government decisions on the same.
3. The price, quantity and tenure as decided in the private arrangement between Mukesh Ambani and Anil Ambani will prevail over the Government fixed price, quantity or tenure. RIL was free, as per the terms of the PSC, to sell the natural gas extracted at any price since the price fixed by the Government was only for purposes of valuation.
4. Government decisions will apply only to the 10% of the natural gas extracted and saved, i.e., "profit gas".
5. Any further allocations of gas made by the Government will apply only to the 10% of the gas which is the "government's take".[11]

Aggrieved by the same, all the parties concerned filed appeals before the Supreme Court of India. The Union of India was specifically aggrieved since the High Court's judgment had completely subordinated the Government's power to regulate the natural gas sector to the private

9. *Reliance Natural Resources Limited v Reliance Industries Limited* [2009] 149 CompCas 129 (Bom).
10. The Gas Utilization Policy is available at http://petroleum.nic.in/gasutilpolicy.doc (last accessed 03 Sept. 2010). However, no decision was taken with respect to the power plants sought to be set up by the RNRL group since the same matter was under litigation.
11. *Reliance Industries Limited v Reliance Natural Resources Limited* 2009 (111) Bom LR 2507.

arrangements between parties, simply because the latter was prior in time. The Court also seemed to have ignored the fact that the extraction and supply of natural gas was governed by the PSC, entered into prior to the date of the MoU between Mukesh and Anil Ambani and would prevail over subsequent arrangements entered into by one of the parties. The interpretation of the PSC by the Bombay High Court also had the effect of vesting the ownership of natural gas in the KG D6 field entirely in the producer, i.e., RIL despite express provisions of the Constitution and the PSC itself which clearly stated that the ownership of natural gas continues to remain with the Government till it reaches onshore and put into delivery to a customer.

The three-judge Bench of the Supreme Court, in its verdict through two concurring judgments, overturned the Bombay High Court's judgment and held as follows:

1. All natural gas vests in the Union of India by virtue of Article 297, and title vests to the delivery point in accordance with Article 27.1 of the PSC.
2. Since some functions of the Union relating to the exploration and supply of natural gas have been privatized, such private parties are also bound by other Constitutional obligations that would have been applicable to the Union of India if such functions had not been privatized.
3. The power of the Union of India to regulate supply and production of natural gas is paramount under the Constitution. It is put into operation through relevant statutes and the PSC itself and this cannot be superseded by a private arrangement.
4. Allocation of natural gas made by the EGOM cannot be overridden by a contractor through a private arrangement.
5. Contractor, i.e. RIL, is bound by the decisions of the EGOM on price, quantity and tenure of supply of natural gas.
6. Supplies of natural gas can only be made in accordance with the policies of the Government and RNRL will have to approach the Government seeking allocation of gas before any supplies are made to it. Further, such supplies must be in accordance with the price, quantity and tenure fixed by the Government in the decisions of the EGOM.

Analysis

The judgment of the Supreme Court is significant, not only because of the identity of the companies involved, and the mind boggling sums at

stake, but also because of the categorical manner in which the Supreme Court has affirmed the power of the Government to regulate the natural gas sector, and approved of the present method of regulation of this scarce commodity. Presently, under the Gas Utilization Policy evolved by the Empowered Group of Ministers, consumers of natural gas on a large scale generally request for supplies of the same, and the allocations are made in accordance with the priorities listed out in the Policy. It must be noted that this particular method of regulation has been adopted primarily because of the large demand for natural gas and the scarce supply of the same (being limited to a few fields across the country).

Whether this manner of regulation would survive scrutiny of the Courts under Article 14 and 19 of the Constitution is debatable, but since there was no actual challenge of the merits of the policy itself posed by any of the Respondents, the Court did not enter into this analysis. Rather, the Court merely took note of the manner of regulation and the reasons for the same, while approving the manner of regulation of the natural gas sector in the country. The Supreme Court, specifically, the elaborately researched and reasoned judgment of Reddy J, has analyzed the constitutional scheme for the regulation of natural resources in great depth and clarity.[12]

Reddy J notes that the Constitution vests the natural resources within the territory of India with the Union. This, he points out, is not "ownership" in the traditional sense as it is understood. It is not upto the complete discretion of the Government of the day on how to make use of the resources. In that sense it is not a power that is being vested on the Government.[13] Rather, it is an obligation or duty[14] placed upon the Government to make use of these resources in the manner prescribed by the Constitution. Reddy J uses the terms "hardwired" and "genetically encoded"[15] to describe the way the Constitution restricts the manner in which the Government may deal with the natural resources of India.

These obligations Reddy J finds in Part III and Part IV of the Constitution. Specifically, Reddy J finds these in Articles 14 and 39(b) of the Constitution. The link between Articles 14 and 39(b) has been made before

12. It is also hard to miss the tone of incredulity in Reddy J's judgment as to why these issues had to be raised in what began essentially as a private dispute. As he himself puts it so clearly, it was because one of the parties laid claim to a significant part of India's natural gas resources on the basis of a secret private pact, free of governmental oversight and regulation. *Reliance,* (supra n. 6) 75, para 145.
13. "Power" being used here in the Hohfeldian sense. See WH Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 Yale Law Journal 16 (1913).
14. In the same sense as Hohfeld ibid uses the term.
15. *Reliance, (*supra n. 6) 102, para 239.

and in the context of natural resources as well[16], but this is the first time it is linked specifically to the ownership of the natural resources by the Union. Briefly, the State should ensure that not only is there equal access to the natural resources but also that there is a distribution of the same that would not end up favouring a few and to the detriment of all. This assumes significance in the context that extraction and exploitation of natural resources is no longer the exclusive domain of the State. Private players have been allowed to participate in the process, in the interests of increasing investments and efficiency, and in that context, questions emerge as to how the State should play its role as regulator of this sector of the economy.

In this case, as already mentioned, the whole scheme of regulation itself was not under challenge, and Reddy J does not subject every aspect of the regulation of the oil and natural gas sector to constitutional scrutiny.[17] However, he does lay down broad principles to be followed in interpreting the scope of the provisions of the Production Sharing Contract.

Broadly, these are:

"*(1) transfer title of those resources after their extraction unless the Union receives just and proper compensation for the same;*

(2) allow a situation to develop wherein the various users in different sectors could potentially be deprived of access to such resources;

(3) allow the extraction of such resources without a clear policy statement of conservation, which takes into account total domestic availability, the requisite balancing of current needs with those of future generations, and also India's security requirements;

(4) allow the extraction and distribution without periodic evaluation of the current distribution and making an assessment of how greater equity can be achieved, as between sectors and also between regions;

(5) allow a contractor or any other agency to extract and distribute the resources without the explicit permission of the Union of India, which permission can be granted only pursuant to a rationally framed utilization policy; and

16. In the context of coal, see *Sanjeev Coke Manufacturing Company v Bharat Coking Coal* (1983) 1 SCC 147.
17. For a more detailed examination of the process by which the bids were awarded and PSCs were entered into, see *Centre for Public Interest Litigation v Union of India* (2000) 8 SCC 606.

(6) no end user may be given any guarantee for continued access and of use beyond a period to be specified by the Government."[18]

While they have been laid down in the specific context of Production Sharing Contracts, nonetheless, they provide a useful basis for examining the validity of regulation in other sectors as well. This exercise will probably have to be carried out by the Court in a future instance where such a challenge is made to the manner in which regulation is carried out. Reddy J lays these down in the context of the issues broadly faced by every nation in its attempt to regulate the extraction and exploitation of natural resources. These, he identifies as follows:

" (1) adequate supplies to meet overall energy and industrial needs;

(2) equitable access across all sectors, especially those which have implications for quality of life; and

(3) equitable pricing, even if market forces are allowed to play a much larger role.

(4) energy security of the nation;

(5) energy defense links;and

(6) inter-generational equities"[19].

He also identifies the problem of conservation of the same in light of the scarcity of the known sources as being a concern which States grapple with in the context of regulation of natural resources.

These concerns are clearly not exclusive to the area of natural gas or petroleum. These concerns are valid in the context of a range of natural resources which are important in meeting India's energy and infrastructural needs. To that extent, the principles laid down in the context of natural gas in this judgment would be entirely applicable in future instances in determining the validity and scope of regulations in the context of other scarce natural resources. These principles, in our humble opinion, offer valuable guidance that should be followed in the future, not only by Courts, but also by the Government in framing regulatory policies for natural resources.

Conclusion

Conflict over scarce natural resource is not a hypothetical or remote possibility. Nor is it necessarily going to take the form of a legal dispute

18. *Reliance* (supra n. 6) 104 – 05, para 249 – 251.

19. *Reliance* (supra n. 6) 95 – 97.

between large conglomerates, decided by the forensic abilities of their lawyers and acumen of judges. Unregulated and unrestrained exploitation of scarce natural resources has led to serious outbreaks of violence in tribal areas[20] and also seriously undermined the functioning of democratic institutions[21]. In this context, the Constitution's exhortation to the State to ensure that the material resources of the community be used for the good of everyone and not concentrated in a few hands is not a mere homily or an ideological canon; it is an imperative placed upon the State to ensure that democratic institutions and the welfare of the citizens is not seriously compromised by the "resource curse". Reddy J recognizes that unchecked and unregulated exploitation of natural resources is disastrous not only to the environment and the economy, but also to the very fabric of democracy and institutions of governance in the country.[22]

Although the Union of India is the absolute owner of such natural resources as are found in the territorial waters and in the territory of India, its "rights" as a property owner are circumscribed by this Constitutional imperative of Part IV and the rights of the citizens under Part III of the Constitution. In that sense, the Government does not strictly "own" the property in the sense of how "ownership" is understood in the context of a private owner. The extent of the powers and the limitation of the powers of the Government in exercise of its function as the owner of scarce natural resources as articulated by the Supreme Court above clearly bear this out.

It could be said that the jurisprudence with reference to scarce natural resources as sought to be laid out above is akin to the Public Trust Doctrine which has been used in the context of the environment.[23] There are some differences though, the obvious one being that whereas the public trust doctrine seeks to protect and preserve what it is trying to protect, viz. the natural environment,[24] the jurisprudence of scarce natural resources recognizes

20. The connection between the unchecked exploitation of natural resources in Chattisgarh and "Maoist violence" in India see *Fire in the Hole,* Foreign Policy Sept/Oct 2010 available at http://www.foreignpolicy.com/articles/2010/08/16/fire_in_the_hole (last accessed 03 Sep. 10).

21. For an examination of the influence of "iron ore barons" on the politics of Karnataka and Andhra Pradesh see *The Revenge of the Reddy Republic*, Tehelka, *Vol 6, Issue 45, November 14, 2009,* http://www.tehelka.com/story_main43.asp?filename=Ne141109the_revenge.asp (last accessed 03 Sept. 10) and *Despite Mining Scandals, Indian Mining Bosses Thrive,* The New York Times, August 18, 2010 http://www.nytimes.com/2010/08/19/world/asia/19india.html?_r=1 (last accessed 03 Sept. 10).

22. It is no surprise that his concurring opinion begins with a quote from Dr. B.R. Ambedkar on the importance of ensuring economic justice in protecting political democracy in India *Reliance* (supra n. 6) 69, para 132.

23. See *MC Mehta v Kamal Nath* (1997) 1 SCC 388.

24. For a detailed discussion by the Supreme Court in the context of environmental concerns see *MC Mehta* ibid, 407 - 413 paras 24-34.

that these resources have necessarily to be exploited for the betterment of citizens, but the exploitation of the same is constrained by considerations relating not only to the environment and equity towards future generations but also efficiency and wider benefit.

It must be mentioned that this new jurisprudence is only now emerging, and in the limited facts and circumstances of the *Reliance case*, served well to prevent the concentration of natural resources in a few hands. Its development will naturally be guided by the kinds of cases that are taken up by the appellate courts of this country, but the basic framework has been laid down in this case. The principles have been enunciated with reference to the scheme in the Constitution, and in our humble opinions, correctly so. Trickier and more complicated concerns will inevitably arise with regard to the issue of the proper utilization of scarce natural resources, and the same, we submit, will have to be decided in light of the scheme in the Constitution. The *Reliance case* being the pathfinder in this regard, Courts in the future will be well served to follow the paths marked out by the Hon'ble Judges of the Supreme Court of India.

THE DOCTRINE OF STRICT SCRUTINY AND CROSS-CONSTITUTIONAL BORROWING: READING *SUBHASH CHANDRA V. DELHI SUBORDINATE SERVICES SELECTION BOARD* 2009 (11) SCALE 278

*Malavika Prasad**

Introduction

The Indian judiciary has only recently attempted developing a normative context to justify its resort to strict judicial scrutiny of laws. In essence, such practice not only reverses the traditional presumption of constitutionality in favour of State action but also necessitates that the impugned legislation advances a *compelling interest* of the State and is narrowly tailored to advance such an interest through the *least rights restrictive* means available.[1]

The advent of the doctrine in Indian constitutional jurisprudence was seen in *Anuj Garg v. Hotel Association of India*[2], where the Supreme Court examined and struck down a protective discrimination provision in Punjab Excise Act, 1914 that restricted women's right to employment and equal treatment. Subsequently, in *Ashoka Kumar Thakur v. Union of India*[3], the Supreme Court rejected this argument, without making reference to *Anuj Garg*[4], and instead placing a rather skewed reliance on *Saurabh Chaudhary*[5] holding that strict scrutiny could not be applied in the context of affirmative action programmes, seeing as the Constitution expressly provides for and thus permits affirmative action.[6] The doctrine was then employed in *Subhash Chandra v. Delhi -Subordinate Services Selection Board*[7] and in *Muralidhar Rao*

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1. *See* Craig R. Ducat, *Constitutional Interpretation - Rights of the Individual*, E13 (West Thomson Learning, 7th ed. 2000, vol. II).
2. AIR 2008 SC 663.
3. (2008) 6 SCC 1.
4. A reference to *Anuj Garg* (delivered in December 2007) was not possible as the arguments for parties in *Ashoka Thakur* had been concluded in November 2007, while the judgment was delivered in April 2008. *See,* Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement,* 50 (II) JILI (2008), 177, 179, note 10.
5. (2003) 11 SCC 146.
6. The argument that the very existence of provisions for affirmative action in areas that would otherwise constitute *suspect classification,* precludes the application of this doctrine has generally constituted the criticism levelled at the application of this doctrine in India. *See also, Bhikaji Narain Dhakras and Ors. v. The State of Madhya Pradesh and Anr.* (1955) 2 SCC 589; *A.S. Krishna v. State of Madras*, (1957) SCR 399.
7. 2009 (11) SCALE 278.

v. State of AP[8], thus widening the scope for applicability of this stringent standard of review.

In this paper, the researcher will examine the import and application of strict scrutiny into Indian constitutional jurisprudence in context particularly with the exposition on strict scrutiny in *Subhash Chandra.* The researcher will attempt to expose the haphazard application of this doctrine, keeping in mind the contexts that warrant the application of strict scrutiny.

The scope of this paper is limited to an examination of the cross-constitutional borrowing of this standard of review with little methodological rigour, and its unmerited acontextual and therefore haphazard application. This paper shall not address the specific question of whether strict scrutiny can be applied to affirmative action programmes in India, attempts to resolve the contradiction between *Anuj Garg* and *Ashoka Thakur* have been made both in academic writing[9] as well as judicial exposition.[10] Further, the paper shall not concern itself with the possible ramifications of applying strict scrutiny to affirmative action programmes, such as the prospective development of a symmetrical notion of equality, in derogation from the constitutional mandate of substantive equality.

Facts and Judgment

In *Subhash Chandra v. Delhi Subordinate Services Selection Board*[11], the Supreme Court addressed a challenge to the validity of two circulars issued by the Government, Union Territory of NCT Delhi. The first circular was a clarification on the caste status of migrant Scheduled Caste/Scheduled Tribe/ Other Backward Classes (SC/ST/OBC) persons in their State of migration, while the second contained instructions regarding the issue of OBC certificates to migrants, resident in Delhi, who belonged to the SC/ST/OBC in their State of origin. The appellants who were migrants in Delhi and who were notified as SC/ST/OBC category in their State of origin, claimed the benefit of reservation in State services receivable by these groups in NCT Delhi, and thus challenged the said circulars.

The question emanating from the appellants' claim to SC/ST/OBC status in NCT Delhi based on their caste status in their State of origin had been sufficiently countenanced and conclusively refuted previously by the

8. Delivered on 8.02.2010 *as accessed at* http://hc.ap.nic.in/orders/wp_15267_2007.html.
9. *See* Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement,* 50 (II) JILI (2008), 177;
10. *Naz Foundation v. Government of NCT*, 160 (2009) DLT 277.
11. 2009 (11) SCALE 278 (hereinafter referred to as *Subhash Chandra).*

Court in *Marri Chandra Shekhar Rao v. Dean, Seth G. S. Medical College,*[12] *Action Committee v. Union of India*[13] and *M.C.D v. Veena.*[14] The recognition of castes, races or tribes as SC/ST/OBCs is in relation to particular States or Union Territories.[15] The rationale for State-wise recognition of SC/ST/OBC is that the nature and extent of disadvantages and hardships faced by various castes and tribes vary from State to State[16]. State-wise notification of SC/ST/OBC ensures that reservation and benefits of the State accrue only to castes and tribes that are assessed to be SC/ST/OBC in that particular State; migrant SC/ST/OBC persons cannot claim these benefits in the State to which they have migrated.[17] The Court reiterated this position of law.[18]

The Court also held that the presidential notifications of Scheduled Castes and Tribes cannot be extended to migrant SC/ST persons by way of circulars; such extension being permissible only through legislation by the Parliament, as under Articles 341(2) and 342(2).[19] Furthermore, the Court employed strict scrutiny in adjudging the constitutionality of deprivation of reservation benefits to those SC/ST members lawfully entitled to the same within NCT Delhi, caused by the inclusion of migrant SC/ST persons within the purview of the said benefits.[20]

Critique of the Judgment

Applicability of Strict Scrutiny

The Honourable Court viewed the issue from the lens of Article 16(4) and went on to conclude that such circular cannot result in a situation wherein those residents of Delhi belonging to the SC, and thus, lawfully entitled to be regarded for service quotas within the State, would be deprived thereof, "*by way of bringing in another class of persons within the purview of the said category of Scheduled Castes, who are not entitled to the said benefit*";[21] such deprivation of a "*constitutional right*"[22], in the opinion of the Court, would warrant judicial review by the standard of strict scrutiny.

12. (1990) 3 SCC 130.
13. (1994) 5 SCC 244.
14. (2001) 6 SCC 571.
15. *See* Articles 341 and 342 of the Constitution of India, on State-wise recognition of SC/STs and *M.C.D v. Veena,* (2001) 6 SCC 571, for the law on State-wise recognition of OBCs.
16. *Action Committee v. Union of India*, (1994) 5 SCC 244, ¶9.
17. *Marri Chandra Shekhar Rao v. Dean, Seth G. S. Medical College and Ors.* (1990) 3 SCC 130, ¶13.
18. *Subhash Chandra, ¶¶*27-32.
19. Ibid, *¶¶*40,41.
20. Id., *¶¶*43-44.
21. Ibid, ¶43.
22. Id.

That administrative instructions via **circulars** cannot add "*another class of persons within the purview of the... category of Scheduled Castes",* such addition being permissible only by the procedure followed under Article 341(2)[23]*,* forms the sole and absolute ground for the unconstitutionality of such inclusion. In this light, the subsequent discussion on strict scrutiny is wholly misplaced and is thus rendered infructuous.

Assuming for the sake of argument that such inclusion of "*another class of persons within the purview of the... category of Scheduled Castes"* was possible by way of an executive circular, judicial scrutiny is triggered when classes that are not entitled to special benefits under Article 16 are wrongly included in the list of beneficiaries of the special provisions.[24] However, no special standard of scrutiny had been enunciated by this Court thus far, in matters arising under Article 16(4).[25]

Judicial review by strict scrutiny has traditionally been applied, and is seen to be merited, in only two distinct contexts: *first,* classifications that infringe, invade, restrain or burden the exercise of fundamental rights[26], *second,* **any** classification based on suspect criteria[27].

In *Subhash Chandra*, the Court plunges into a haphazard discussion on the applicability of strict scrutiny, frequently oscillating between these two contexts, and thus fails to make a contextual analysis of the need for strict scrutiny of the matter. The Court holds that the commission of a "*constitutional violation*"[28] of the nature of a deprivation of a "*constitutional right"*[29] would entitle Courts to apply strict scrutiny, indicating that the Court viewed the matter in the former context. The Court however frequently strays into discussions on the applicability of this doctrine in "*protective discrimination cases*"[30] indicative of scrutiny of classifications based on 'suspect

23. *E. V. Chinnaiah v. State of Andhra Pradesh* (2005) 1 SCC 394, ¶96.
24. *Indra Sawhney v. Union of India,* AIR 1993 SC 477, per Sawant, J., ¶615.
25. *Indra Sawhney*, per Jeevan Reddy, J., ¶113;
26. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 339-40 (1972); *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 670 (1966); *Zablocki v. Redhail,* 434 U.S. 374, 388.
27. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); *Brown v. Board of Education*., 347 U.S. 483, 495 (1954). *See also, Anuj Garg v. Hotel Association of India,* AIR 2008 SC 663, ¶39.
28. *Subhash Chandra,* ¶43.
29. Ibid*,* ¶43, While discussing the compelling interest requirement, "*This process is under the intense gaze of the court because the government is impinging upon somebody else's core constitutional rights...*"; In observing that "*The government must have a* [sic] *overwhelming compelling interest to justify limitations on the freedom of association, free exercise of religion, free speech, right to vote, right to travel et al.*" the Court recognizes the "fundamental" freedoms, as recognized by United States Supreme Court, infringements of which have been subject to strict scrutiny.
30. Id.*,* ¶43, "*At the heart of the applicability of this doctrine in protective discrimination cases...*".

criteria'.[31]

It is submitted that the wrongful inclusion of a class of people within the list of Article 16(4) beneficiaries does not give rise to either of the contexts that merit this exacting standard of judicial review.

In order for an infringement to merit strict scrutiny, the right in question must necessarily be 'fundamental', as opposed to otherwise important rights, and must thus be guaranteed by the Constitution implicitly or explicitly[32].

The question of Article 16(4) conferring a fundamental right has undergone sufficient debate.[33] Judicial decisions hold that this provision merely confers a discretionary power on the State to make any special provision for the advancement of these classes.[34] The provisions under Articles 15(4) and 16(4) may be understood as embodying policy imperatives, comparable with Directive Principles of State Policy, coupled with the conferral of discretionary power to enable the fulfilment of the policy of reservations for the disadvantaged.[35] In this light, the argument that Article 16(4) confers **no right**, much less a fundamental right, on any backward class of citizens or on SC/ST seems to prevail. Thus, a demand for reservations by a member of a backward class or SC/ST on the basis of the "right to reservation" emanating from Articles 15(4)/16(4) is unjustified and thus unsustainable.

However, a relevant consideration is the possible **right to be considered** as eligible for service or other quotas, once the State has **already provided for** reservations for backward classes/SC/ST. This right enjoys no constitutional protection as a "fundamental right"; at best, such a right would be a legal right conferred upon a backward class/SC/ST individual **by the law creating special provisions.**

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31. Id., ¶43, While discussing Johnson v. California, 543 U.S. 499, "strict scrutiny is designed to 'smoke out' illegitimate uses of race..."
32. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33-35 (1973).
33. See M.P. Singh, *Are Articles 16(4) or 15(4) Fundamental Rights?*, (1994) 3 SCC (Jour) 31, arguing that Articles 15(4) and 16(4) do confer fundamental rights; Paramanand Singh, *Fundamental Right to Reservation: A Rejoinder*, (1995) 3 SCC (Jour) 6, H. M. Seervai, *Constitutional Law of India*, 556, 558, ¶9.172 (Universal Law Publishing Co. Ltd., Delhi, 4th ed. 1991, vol. 1) arguing that these provisions are merely enabling provisions.
34. *C. A. Rajendran v. Union of India,* (1968) 1 S. C. R. 721, 733, The Court also observed "*...there is no constitutional duty imposed on the Government to make a reservation...*"; *See also P & T SCs and STs Employees' Welfare Assn. v. Union of India*, (1988) 4 SCC 147; *Indira Sawhney v. Union of India,* 1992 Supp (3) SCC 217.
35. Paramanand Singh, *Fundamental Right to Reservation: A Rejoinder, (1995) 3 SCC (Jour) 6.*

Finally, regard must be had to the fact that the bill of rights in Part III of our Constitution specifically declares that **all rights** enlisted therein are "fundamental rights", thus rendering the possibility of some rights being "more fundamental" than others itself nugatory. While some of the **rights per se** could be considered as more fundamental than some others, the constitutional protection guaranteed to **all of the Part III rights is** the same, within our constitutional scheme. Thus all Part III rights necessarily must be subject to the same standard of review as Courts are precluded from according a preferred position to certain rights in India.

It is thus clear that the first context is not only absent in the instant case, there being no infringement of a fundamental right, but also absent generally in the Indian constitutional scheme, as all Part III rights are 'fundamental rights', none less fundamental than the other.

The second context that merits strict scrutiny arises when State action is directed against a minority group, thereby creating a classification based on criteria that is rooted in either 'immutable status'[36] or 'fundamental choice'[37].

A suspect class is one that is "*saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian process.*"[38] Therefore, a suspect classification arises when a minority is discriminated against vis-à-vis a majority group, at the hands of a majoritarian political process.[39] In the present matter, the two groups with opposing interests are the SC/STs native to Delhi, and migrants who are recognised as SC/ST in their State of origin, both of which are minorities in their own respect. In the matter of inclusion of migrant SC/STs as beneficiaries of reservation, it is evident that neither group qualifies as a 'suspect class' vis-à-vis the other; thus negating the possibility of discrimination emanating from

36. *Frontiero v. Richardson*, 411 U.S. 677, 686 "...sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."
37. Religion and place of residence are fundamental choices protected by the Constitution. *See* Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement,* 50 (II) JILI (2008), 177, 197-199.
38. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973).
39. Classifications have also been regarded as "suspect" in cases of affirmative action such as *Regents of University of California v. Bakke,* 438 U.S. 265 (1978), Powell, J., *Fullilove v. Klutznick,* 448 U.S. 448 (1980), Stewart, Stevens, Rehnquist, JJ., *Richmond v. J. A. Croson Co.,* 448 U.S. 469 (1989), *Adarand Constructors Inc. v. Pena,* 515 U.S. 200 (1995). However, the question of subjecting affirmative action measures to strict judicial review is outside the scope of this paper, as discussed in the Introduction.

a majoritarian political process.[40]

Conclusion

Bricolage is the process of creating something, not as a product of calculated choice, using materials most suitable for a particular purpose, but by mere assembly of whatever material is available.[41] Mark Tushnet, a prominent scholar, extends this concept to law:

> *Constitution-makers and interpreters find themselves in an intellectual and political world that provides them with a bag of concepts "at hand," not all of which are linked to each other in some coherent way. As engineers, they would sort through the concepts and assemble them into a constitutional design that made sense according to some overarching conceptual scheme. As bricoleurs, though, they reach into the bag and use the first thing that happens to fit the immediate problem they are facing.*[42]

The haphazard application of strict scrutiny in *Subhash Chandra* seems illustrative of bricolage in judicial decision-making. While bricolage in constitution-making may have its uses[43], similar practice in judicial decision-making as part of the judge's justificatory process must be questioned, as it raises concerns of the import of foreign law being too personal, random and unprincipled.[44]

The exercise of caution is necessary in the use of comparative constitutional law in domestic constitutional interpretation.[45] Various methods[46] of approaching comparative constitutional law have *"different implications for the analysis of whether and how constitutional ideas migrate from*

40. *Massachusetts Board. of Retirement v. Murgia,* 427 U.S. 307, 313-314, where strict scrutiny was not applied as the group did not constitute a "discrete and insular minority" that was historically subject to discrimination, there arising no question of requiring protection from the majoritarian political process.

41. Claude Lévi-Strauss, *The Savage Mind*, 17 (University of Chicago Press 1966) (1962) *as cited in* Mark Tushnet, *The Possibilities of Comparative Constitutional Law,* 108 Yale L.J. 1225, 1286.

42. Ibid.

43. Id.

44. Basil Markesinis & Jorg Fedtke, *Judicial Recourse to Foreign Law, A New Source of Inspiration*, 167 (UCL Press, London, 1st ed. 2006).

45. Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes with Reference to Affirmative Action,* 36 Conn. L. Rev. 649.

46. Mark Tushnet suggests that *normative universalism* and *functionalism* involve efforts to see how constitutional ideas developed in one system might be related to those in another, in capturing the same normative value or in organising a government to carry out the same tasks. *Expressivism* requires an understanding that constitutional ideas to be expressions of a particular nation's self-understanding.

one constitutional system to another".[47] One such method, *contextualism,* recognises that constitutional law is embedded within the institutional, doctrinal, social and cultural contexts of a country[48]; a full appreciation and understanding of constitutional ideas can only be achieved by according due deference to the context within which they exist.

Adopting a contextualist approach to the import of 'strict scrutiny' into Indian law demands that 'strict scrutiny' review in the context of infringement of fundamental rights be understood as distinct from that in the context of 'suspect classifications'. The Supreme Court of the United States engages itself in deciding if a right is constitutionally 'fundamental', even if not mentioned in the text of the Constitution.[49] Thus, heightened standards of scrutiny are employed only on the finding that a **fundamental** right is infringed.[50] In India, given that fundamental rights have been expressly enumerated under Part III of the Constitution, whether the Supreme Court can decide if a right is fundamental **enough**[51] to warrant the application of strict scrutiny in respect of its infringement is a moot question. Thus, as argued earlier, the context of infringement of a 'fundamental' as distinct from an otherwise important right does not even arise in India, thus precluding the application of strict scrutiny for such infringements.

As regards the constitutionality of 'suspect classification', any classification based on suspect criteria that is rooted in "*a characteristic that relates to personal autonomy*[52]", except in cases of affirmative action, may be subject to strict scrutiny.[53] Thus, due caution in the import and subsequent application of foreign constitutional ideas into Indian law must be exercised by the judiciary, the absence of which is conspicuous in this decision.

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47. Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law* in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas*, 67, 68 (Cambridge University Press, London, 1st ed. 2006).
48. Ibid, at para 76.
49. The Ninth Amendment is used as textual justification for the protection of rights that are not expressly guaranteed in the Constitution. *See* Erwin Chemerinsky (ed.), *Constitutional Law, Principles and Policies*, 762-765 (Aspen Law and Business, 2nd ed. 2002).
50. *Bowers v. Hardwick,* 478 U.S. 186: The Court found that there was no fundamental right to engage in consensual homosexual activity among adults; rational basis review was thus applied, as opposed to strict scrutiny.
51. In the Indian context, it has been argued that the assumption that some fundamental rights within Part III are more fundamental than others is a necessary one in order to justify different standards of review for different violations. *See* Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement,* 50 (II) JILI (2008), 177 at 178-179.
52. Viz. 'immutable status' and 'fundamental choice'.
53. *See Naz Foundation v. Government of NCT*, 160 (2009) DLT 277, ¶¶107-111, in which the seemingly contradictory verdicts of *Anuj Garg* and *Ashoka Thakur v. Union of India,* (2008) 6 SCC 1 were reconciled.

Thus, in this paper, it is submitted that the standard of strict judicial review has been employed acontextually in *Subhash Chandra,* keeping in mind the absence of both contexts that traditionally have warranted the use of this exacting standard of review. Thus, *Subhash Chandra* fails on an analysis on 'contextualism' and indulges in 'bricolage', on a comparative constitutional law analysis, thus exhibiting a lack of methodological rigour in cross-constitutional borrowing.

The ramifications of such haphazard application of this stringent standard of review are grave, considering that it entails the reversal of the presumption of constitutionality, an exercise that ought to be undertaken with sufficient circumspection. Furthermore, the precedentiary value of such judgments on the lower courts cannot be understated, as an uncertain and haphazard importation of such a doctrine into Indian law can be further entrenched by the lower courts with even less methodological rigour.

State of West Bengal v. Committee for Protection of Democratic Rights: Is Judicial Review the Indian Judiciary's Trump Card?

*Raadhika Gupta**

I. Introduction

The case of *State of West Bengal v. The Committee for Protection of Democratic Rights*,[1] presents challenging questions to Indian Constitutional law jurisprudence with regard to the power of the judiciary *vis-à-vis* other organs of the state. It is a landmark judgment where the Supreme Court held that a High Court can direct the Central Bureau of Investigation (hereinafter, CBI) to investigate an offence without the consent of the state government within whose territorial jurisdiction the offence is alleged to have taken place. This power is clearly an executive one, and is one that has been expressly denied to the Parliament. Thus, while the petitioner argued relying on the doctrine of separation of powers and the federal setup envisaged under the Indian Constitution, the Court rebutted the petitioner by using its power of judicial review. Thus, the case presents an interesting battle between the legislature, executive and judiciary, bringing the scope of judicial power under examination.

This case comment argues that while the conclusion of the Supreme Court is correct, the Court has failed to give cogent reasoning to support its decision. The Court in its judgment basically placed one basic feature of the Constitution - judicial review -against the other two which had been put forth by the petitioner. The comment argues that instead of using the power of judicial review as a trump card, the Court should have addressed the Constitutional and legal issues arising in the matter to objectively analyse the scope of its powers.

The critique firstly describes the background of the case, giving in brief its facts and judgment. Next, it examines whether the basic structure doctrine has been correctly applied by the court. Thirdly, it examines the scope of the powers of the High Court in the light of the federal setup of the Indian Constitution and the doctrine of separation of powers. On the basis of the analysis, this critique highlights the flaws and implications of the Court's reasoning and suggests the approach that it should have adopted instead.

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1 2010 (2) S.C.A.L.E. 467.

II. Background

In *State of West Bengal v. The Committee for Protection of Democratic Rights*,[2] a five-judge Bench of the Apex Court was called upon to decide whether the High Court, under Article 226 of the Constitution of India, can direct the CBI, established under the Delhi Special Police Establishment Act, 1946 to investigate an offence alleged to have taken place within the territorial jurisdiction of a state, without the consent of the state government. The question arose when the Calcutta High Court directed the CBI to take up investigation in a case where eleven members of a political party in West Bengal were killed and grave allegations were made against the ruling party. After discovering serious lapses and inadequacies in the investigation even after more than three months from the date of the incident, the High Court concluded that a strong suspicion might arise as to the fairness of investigation by the state police and hence, handed over the investigation to the CBI.[3] To challenge this direction, the petitioner approached the Supreme Court where the matter was eventually placed before a Constitutional Bench.

The petitioner put forth an argument based on two basic features of the Indian Constitution - federal setup and separation of powers. As per Constitutional[4] and statutory[5] provisions, the State Legislature has jurisdiction over police matters and the Parliament cannot encroach upon it without the consent of the concerned State government. It was argued that these restrictions over the powers of the Parliament, reflective of our federal setup, extend also to the judiciary, barring the courts from directing the police of one state to investigate an offence in another state without its consent, as such a direction would be in breach of the federal setup envisaged by the Constitution. It was further argued that the separation of powers doctrine prevents the courts from exercising the executive power of directing the police force of one State to carry out investigations in another without the latter's consent. Even in situations where the investigations are not carried out impartially, the judiciary should leave the matter to the wisdom of the Parliament to enact an appropriate legislation. In short, the petitioner argued that the impugned direction of the High Court is violative of the federal structure and separation of powers doctrine, both of which are basic features of the Constitution.

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2 2010 (2) S.C.A.L.E. 467.
3 *Committee for Protection of Democratic Rights v. State of West Bengal*, 2001 Cri.L.J. 2307.
4 Entry 2A of List I and Entry 2 of List II, Seventh Schedule, Constitution of India.
5 Section 6, Delhi Special Police Establishment Act, 1946.

The Supreme Court rejected the petitioner's arguments and concluded that a direction by the High Court under Article 226 of the Constitution to the CBI to investigate an offence committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of powers and shall be valid in law. The Court held that judicial review itself being a basic feature, while exercising powers under Articles 32 and 226, the courts are merely discharging their duties and not violating the federal setup or the separation of powers doctrine.

III. Application of the Basic Structure Doctrine

To justify the judiciary's power of directing the CBI to investigate offences in other States without its consent, the Court ended up pitting one basic feature of the Constitution (judicial review) against two others (federal structure and separation of powers) put forward by the petitioner. However, the question of the violation of basic structure of the Constitution does not even come into the picture in this case as the basic structure doctrine is used only when a challenge has been made to a Constitutional amendment.[6] This case does not deal with any Constitutional amendment, but with the action of the *judiciary* itself. Extending the basic structure doctrine to judicial actions is taking it far beyond the limits within which it was intended to apply.

To complicate matters further, the Court concluded that "*any law that abrogates or abridges [fundamental] rights would be violative of the basic structure doctrine*". This can have two far-reaching implications: first, that the fundamental rights are part of the basic structure; and second, that even ordinary legislations are now subject to the basic structure doctrine. The applicability of basic structure doctrine to ordinary legislation has been debated before. In *Indira Gandhi v. Raj Narain,*[7] the majority, refuting the contrary arguments of Beg, J., held that the Constitution already imposes restrictions on ordinary law-making power, and to subject such statutes to basic structure would mean rewriting the Constitution and robbing the legislature of acting within the Constitutional framework. This view was accepted in later cases.[8]

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6 *See, e.g., Kesavanada Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461; *Indira Gandhi v. Raj Narain*, A.I.R. 1975 S.C. 2299; *Minerva Mills v. Union of India*, A.I.R. 1980 S.C. 1789; *Waman Rao v. Union of India*, () 2 S.C.C. 362; *I.R. Coelho v. State of Tamil Nadu*, A.I.R. 2007 S.C. 861.

7 A.I.R. 1975 S.C. 2299.

8 *State of Karnataka v. Union of India*, [1978] 2 S.C.R. 1; *V.C. Shukla v. Delhi Administration*, (1980) 2 S.C.C. 665; *Minerva Mills (II) v. Union of India*, (1986) 4 S.C.C. 222; *Kuldip Nayar v. Union of India*, (2006) 7 S.C.C. 1. However, after *Waman Rao v. Union of India*, (1981) 2 S.C.C. 362, followed by *I.R. Coelho v. State of Tamil Nadu*, I.R. 2007 S.C. 861, position has changed with regard to statutes enjoying the immunity of Ninth Schedule of the Constitution.

The Court has unreasonably expanded the scope of the basic structure doctrine by bringing within its ambit legislative and judicial actions, without even examining these earlier decisions or discussing the implications of such an expansion. Any further expansion of the doctrine, by including even executive actions within its purview, would virtually replace or equate the fundamental rights with the basic structure doctrine, subjecting any state action, legislative, executive or judicial, to the basic structure.

IV. Powers of the High Court

Article 226 gives High Courts the power to issue directions, orders or writs for the enforcement of fundamental rights and for any other purpose. In the present case, the Court expanded the scope of Article 21 and held that Article 21 protects not only the "*rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence*". In certain situations, even a witness to the crime may seek such protection. This is a significant step in the jurisprudence of Article 21 in relation to criminal law which till now has focused much more on the rights of the accused than of the victim.[9]

Hence, the judgment implies that if the right of a victim to a fair and impartial investigation is being violated, the High Court can issue directions to the CBI by exercising powers of judicial review under Article 226. What needs to be examined is whether this power gets whittled down by any of the arguments put forth by the petitioner in relation to the federal setup and separation of powers. Instead of examining these arguments under the basic structure doctrine, it needs to be seen whether any such restriction has been provided by the Constitution on the High Court's power of judicial review.

A. Federal Setup

The petitioner argued that if the Parliament passes a law authorizing the police of one State to investigate in another without its consent, such law would be invalid. Hence, even the judiciary, being subservient to the Constitution, cannot pass any such direction disturbing the federal setup provided under the Constitution. In the context of the federal setup, the

9 E.g., various aspects of rights of prisoners and arrestees have been read under Article 21 in *State of Maharashtra v. Prabhakar Pandurang,* A.I.R. 1966 S.C. 424; *Sunil Batra v. Delhi Administration,* A.I.R. 1978 S.C. 1675; *D.K. Basu v. State of West Bengal,* A.I.R. 1997 S.C. 610; *PUCL v. Union of India,* A.I.R. 1997 S.C. 1203; right to legal aid to an accused has been recognized in *Hoskot v. State of Maharashtra,* A.I.R. 1978 S.C. 1548; *Hussainara Khatoon v. State of Bihar,* A.I.R. 1979 S.C. 1369; *Khatri v. State of Bihar,* A.I.R. 1981 S.C. 928; *Suk Das v. Union Territory of Arunachal Pradesh,* A.I.R. 1986 S.C. 991.

Court concluded that since the judiciary itself is the protector of the federal structure of the Constitution, a direction under Article 226 to uphold the Constitution cannot be termed as violating the federal structure.

The Court has not adequately analyzed the power of the High Courts under Article 226. While the petitioner is correct in asserting that such a law, if passed by the Parliament would be invalid, it needs to be understood that this illegality is not because of violation of a basic feature, but because the Parliament lacks *legislative competency* to enact such a law as per Article 246. The issue has to be examined within the framework of the Constitution, which itself provides for the federal setup. It provides for distribution of legislative and executive powers between the Centre and the States.[10] But it provides for an integrated judiciary wherein both the High Courts and the Supreme Court interpret State and Union laws, having jurisdiction and providing remedies in all Constitutional law cases.[11] With the insertion of clause (2) in Article 226, a High Court within the territorial jurisdiction of which the cause of action arises, can issue directions to any government or authority situated even beyond its territorial jurisdiction.[12] Hence, where an explicit restriction has been placed on the Parliament's powers under Article 246 read with Seventh Schedule, and in the absence of any such restriction over the powers of the High Court, the analogy drawn by the petitioner is flawed. It is by reason of such a Constitutional setup that the High Court's direction under Article 226 is valid and not merely because the judiciary itself is the protector of the federal setup, as held by the Court.

B. Separation of Powers

One of the questions involved in the case is whether the judiciary can exercise the executive power of directing the police force of another State to carry out investigations without the consent of that State, and can the doctrine of separation of powers curtail the power of judicial review. The Court once again used its trump card of judicial review and held that the exercise of the power of judicial review by the High Court would not amount to an infringement of the separation of powers principle.

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10 *State of Karnataka v. Union of India*, A.I.R. 1978 S.C. 68; *State of West Bengal v. Union of India,* A.I.R. 1963 S.C. 1241; *Ramanaiah v. Superintendent of Central Jail*, A.I.R. 1974 S.C. 31; *S.R. Bommai v. Union of India*, A.I.R. 1994 S.C. 1918.

11 *State of West Bengal v. Union of India*, A.I.R. 1963 S.C. 1241; *S.P. Gupta v. President of India*, A.I.R. 1982 S.C. 149; *State of Bihar v. Bal Mukund Sah*, A.I.R. 2000 S.C. 1296; Constituent Assembly Debates, Vol. 7 (1948-49) at 34, 36-37.

12 *See O.N.G.C. v. Utpal Kumar Basu*, (1994) 4 S.C.C. 711; *Navinchandra Majithia v. State of Maharasthra*, (2000) 7 S.C.C. 640; *Kusum Ingots and Alloys Ltd. v. Union of India*, A.I.R. 2004 S.C. 2321.

The trump card has been correctly used here as judicial review can be seen as an exception to the separation of powers principle.[13] The Court examined that in the modern times, this doctrine no longer restricts itself to a rigid separation of powers between the three organs. It ensures a limit on active jurisdiction of each organ, check and balance over the activities of other organs, and is also meant to check government inaction.[14] According to retired Supreme Court Judge Ruma Pal, the Constitution allows for parallelism of power,[15] with hierarchies between the three organs in particular fields which must be maintained and balanced by each organ subject to checks by the other two.[16] Where there is inaction by the executive for whatever reason, in exercise of its Constitutional obligations the judiciary can provide a solution till such time as the legislature or the executive act to perform their roles.[17] The judiciary has not only issued directions to the executive to perform its functions,[18] but has also exercised executive power often, an example being the judiciary's active role in environmental matters.[19] Hence, the judgment of the Court is in tune with the Constitutional interpretation and modern understanding of separation of powers doctrine.

C. Limits on the Powers of the High Court

This judgment may raise concerns about the limits of the power of the High Courts to give directions to CBI and about the flooding of courts and CBI from cases seeking investigation by the CBI. Realizing this, the Court cautioned that this power should be exercised sparingly, "*where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights*". It has been alleged that this disclaimer has been couched in too wide terms to be of any purpose.[20] However, where an individual is in principle or by right entitled to relief, it would be wrong for the judiciary to deny relief on

13 B.N. Srikrishna, *Skinning a Cat,* (2005) 8 S.C.C. (J.) 3.

14 *State of Uttar Pradesh v. Jeet S. Bisht*, (2007) 6 S.C.C. 586.

15 *See* S.P. Sathe, Administrative Law, 22 (7th ed. 2006), who argues that each organ is required for all three functions.

16 Ruma Pal, Judicial Oversight or Overreach: The Role of the Judiciary in Modern India (Centre for the Advanced Study of India, Case Working Paper No. 03/2008).

17 *Vineet Narain. v. Union of India*, (1998) 1 S.C.C. 226.

18 *See, e.g., B.L. Wadehra v. Union of India*, A.I.R. 1996 S.C. 2969; *M.C. Mehta v. Union of India*, (1998) 6 S.C.C. 60.

19 *See, e.g*., *Litigation and Entitlement Kendra v. State of Uttar Pradesh*, A.I.R. 1985 S.C. 652 ; *Law Society of India v. FACT*, A.I.R. 1994 Ker. 308; *Vijay Singh Punia v. RSPCB*, A.I.R. 2003 Raj. 286.

20 Rajeev Dhawan, "SC Errs on CBI Verdict", Mail Today, Feb. 22, 2010, available at http://epaper.mailtoday.in/2222010/epaperpdf/2222010-md-hr-10.pdf (last visited: April 10, 2010).

such grounds of policy like preventing excessive litigation.[21] Hence, the Supreme Court's approach rightly allows the courts from granting relief where a right has been violated, while also expecting some extent of self-discipline from them.

V. Conclusion

There is no doubt that judicial review is one of the most important aspects of the Indian Constitution and must be actively used by courts to ensure the protection of the rights of the people. However, the courts should not rely only on the principle of judicial review to trump any argument that may be presented before it. In this case, the Court emphasized and relied a little too much on the concept of judicial review in order to justify its powers of giving directions to the CBI. For example, it quoted the opinion of Y.K. Sabharwal, C.J, expressed in *I.R. Coelho v. State of Tamil Nadu*[22] stating that "*Courts may be forced to modify the principle of parliamentary sovereignty...in cases where judicial review is sought to be abolished"*. The Court also concluded that "*judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between the Parliament and the State Legislatures, it is also necessary to show any transgression by each entity*". Such overemphasis on judicial review was not only unnecessary in the circumstances of the case, but may also invite criticisms of over-activism by giving an implication of usurpation of powers and self-declared supremacy over the other organs.

The application of the basic structure doctrine by the Court without adequate debate on the established jurisprudence on the same, and declaring the law through various propositions mentioned only in the conclusion without backing them with any reasoning in the main judgment can have far-reaching implications. With due respect to the Supreme Court, it is submitted that the Court should have rather addressed the arguments directly, seeking answers from within the framework of the Constitution and its provisions. On the contrary, while the Court discussed celebrated doctrines of judicial review, basic structure, independence of judiciary, the expanding scope of Article 21, etc.; it barely touched upon how the right of a victim to a fair investigation falls within Article 21 and mentioned it only in the conclusion. The Court declared that the High Court's direction under Article 226 is valid even without examining whether this right had actually been violated in the present facts.

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21 Ronald Dworkin, Law's Empire 154 (1986).
22 A.I.R. 2007 S.C. 86.

Even though the final decision of the Court is correct, the flawed reasoning poses various questions which are not merely academic in nature, but can have serious practical implications. A higher reliance on legal and Constitutional provisions than on broad doctrines to reach the same conclusion might have resuted in greater acceptance of the judgment.

Amartya Sen's Idea of Justice: A Just Idea But an Unjust Application to Persons with Disabilities

*Amita Dhanda**

Introduction

It is an oft repeated credo in scholastic circles that scholarship is a community exercise. For thinking to even occur, let alone flourish, you need other minds. It is this need for engagement which is largely forgotten in most proposals for promotion of research and writing in the Indian Academy. This point needs to be especially made in relation to legal scholarship because the most major effort to promote teaching and research in law has been undertaken in the exclusive portals of National Law Schools. It may well be asked whether such a disengaged existence can be the progenitor of excellence in either teaching or research. These foundational questions around legal scholarship have possibly been triggered by the fact that this piece seeks to review Amartya Sen's Idea of Justice.

Even as questions of justice are larger than law, there is an inextricable relationship between law and justice. In order to address questions of justice, Sen holds that there needs to be active engagement with the lived realities of people and the inadequacies of one set of lives can be demonstrated by comparing them with other lives. Sen proceeds on the premise that social choice is a community exercise. For informed choices to be made there needs to be engagement with other minds, other ways of living. These comparative exercises have been rendered more difficult for National Law Schools, which have been conceptualized as isolated islands of excellence. In current times when the crisis of legal education is being addressed in various ways by several forums[1] Amartya Sen's Idea of Justice provides a unique ideational opportunity to the legal community to acknowledge the widening gap between law and justice and to devise appropriate structural reforms and scholastic strategies to close this divide.

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1. National Knowledge Commission http://www.knowledgecommission.gov.in/focus/legal.asp; http://www.knowledgecommission.gov.in/downloads/documents/wg_legal.pdf (last visited June 20, 2010) Committee on Renovation and Rejuvenation of Higher Education (Yash Pal Committee) http: / www.academics-india.com/Yashpal-committee-report.pdf (last visited June 20,2010); http: www.barcouncilofindia.org/about/vision-statement-2010-2012.

Sen's Idea of Justice

My other reason for referring to scholastic communities in the introduction to this review stems from the nature of Sen's book. This book cannot be read in isolation; it has to be read in tandem with the work of several other scholars, and most notably with John Rawls Theory of Justice. Sen has posited his Idea of Justice in contradistinction to Rawls' Theory, on the reasoning that to address manifest injustice, you do not need a theory, just an idea of justice suffices.[2] According to Sen, Rawls has put forth a transcendental theory of justice which provides vision of a just society without engaging with existing manifest injustice. A person living in miserable circumstances is primarily interested in interventions that would lessen the misery of those circumstances. The most perfect picture of a just society would leave him cold if that misery is not addressed. Rawls' vision, according to Sen, is of little utility in addressing the existing difficulties of people.

Sen's proposition is no doubt provocative whether or not one agrees with it. I have had umpteen classroom discussions on the value of Rawlsian vision and the guidance, albeit utopian, which a theory of justice offers. Since many of these discussions have happened in Poverty Law courses, we were required to ask along with Sen that if justice is thought of in transcendental terms then who pays the cost of such utopian thinking. Evidently, the transcendental sport can be primarily played by people in comfortable positions as people in miserable situations cannot afford such luxury. For people in miserable conditions, any intervention which improves their piteous condition would be welcome. Those persons would thus be in agreement with Sen that to address manifest injustice an idea of justice suffices. It is not like Sen is only seeking a one notch improvement in the lives of people, only in his opinion, in the real world, situations improve notch by notch. More importantly, Sen links his idea of justice to the real lives of people, and it is those lives that he aims to improve. Thus, Sen's idea of justice requires a continuous struggle against real life situations of injustice in order to promote justice.

Sen continues his engagement with Rawls by setting up a major critique of Rawls original position where people entered into the social contract under a veil of ignorance. Sen questions both the utility and the impartiality of the original position. The veil of ignorance may guard against class based advancement of interest; it cannot engender the richness of discourse which engagement with people and situations different from one's own may do.

2. Amartya Sen, Idea of Justice (Allen Lane London 2009) at p. 9.

The veil of ignorance seems to presume upon a unique and singular truth, whereas truth may well have more plural manifestations. Consequently, Sen finds the impartiality of Rawls original position barren in comparison with the device of impartial spectator suggested by Adam Smith. Taking inspiration from Adam Smith, Sen puts in place an elaborate scheme on the people who need to be consulted whilst arriving at any major policy. Justice, he holds, does not need to be blind-folded rather it should have the facility of multiple lenses through which it views reality.

It is difficult to differ with the procedure for informed participation proposed by Sen. It can be said that to put around the table, persons affected and not affected by an issue would be a far from easy exercise. At the same time the richness of the ensuing discourse is undeniable. Further, just the effort of setting up a dialogue between stakeholders and impartial spectators would build the capability to settle contentious questions through reasoned dialogue – a capability which needs to be developed if questions of justice are to be peaceably settled and not violently resolved.

I find both the idea of justice that Sen puts out and the procedure he posits to implement it to be unexceptionable. My difficulty with the book primarily arises when Sen starts to apply his model to specific situations. Sen had the choice to apply this model to those issues that he knows well and on which he has done deep empirical work. Sen uses his methodology to good effect by referring to his studies on famines, child mortality and universal education. He effectively employs the region and gender specific findings of these studies to advance the comparative understanding he promotes in the book.

Where Sen flounders is when he applies his idea of justice to persons with disabilities – a constituency with whose concerns he is not so familiar. Whilst Sen could put forth his own opinion as that of an impartial spectator engaging with the issue, to be true to his own methodology, he also needed to examine the question of disability rights from the stand point of persons with disabilities which is what he fails to do. With this failure Sen does not meet his own standards of deliberation and rationality in making social choices. In what follows, I demonstrate how Sen's failure to follow his own procedures results in injustice to persons with disabilities.

The Preventive Paradigm and Justice for Persons with Disabilities

Sen first refers to disability when he uses disability as an example to demonstrate the limitations of the income based approach to measure

poverty. An income based approach he points out would not take into account the higher amounts persons with disabilities need to expend to convert capabilities into functionings.[3] The veracity of Sen's contention is undeniable. My difficulty is with the static nature of the contention. Sen makes the argument of higher conversion rates as an inflexible perennial truth, whereas the fact of the matter is that the adoption of universal design would bring down the rates of conversion.[4] The necessity of making this additional argument has not been felt by Sen; even as higher conversion rates without more could delay if not deny the just entitlements of persons with disabilities.[5] Sen's failure to refer to the jurisprudence of universal design could well be categorized as a sin of omission which can be easily corrected by persons with disabilities and disability rights activists. The greater difficulty arises from Sen's sin of commission whereby he sets up the case for the rights of persons with disabilities within the paradigm of prevention. According to Sen "it is extremely important to understand that many disabilities are preventable, and much can be done not only to diminish the penalty of disability but also to reduce its incidence. Indeed, only a fairly moderate proportion of the 600 million people living with disabilities were doomed to these conditions at conception, or even at birth".[6] He then goes on to recount the various causes of disabilities which are preventable such as: maternal malnutrition, childhood under nourishment, polio, measles, AIDS, road accidents, injuries at work and land mine disasters.[7]

From here on Sen goes on to contend that "social intervention against disability has to include prevention as well as management and alleviation".

Sen has thus set up his argument for disability rights on the triad of prevention-management-alleviation. A natural consequence of this linkage is that it in no way challenges the devalued existence of a disabled life rather

3. Id. at p. 258 when he specially refers to Wiebke Kuklys Amartya Sen's capability Approach: Theoretical Insights and Empirical Applications (Springer-Verlag New York 2005).
4. A large part of the higher conversion costs emerges from the fact that the world has not been constructed taking into account the existence of persons with disabilities. Hence the infrastructure the non disabled presume upon has to be individually created by persons with disabilities. This quantum of the conversion cost can be effectively reduced by universal design which is a concept that requires the real and the virtual world to be created keeping in view the existence of persons with disabilities.
5. The real nature of this danger is demonstrated by all the crusades that are being fought around social economic rights. The denial of justiciability, the requirement of progressive realization, are all conditionalities which have been attached to socio-economic rights because their realization has been viewed as resource intensive.
6. Supra note 2 at p. 259.
7. Ibid.

it reinforces the diminished value.[8] It perceives disability as deficit, contends that this deficit has been caused by social inaction and asks society to compensate for the harm it failed to prevent. Disability rights arising from such an outlook fail to respect the dignity of persons with disabilities as persons who need to be valued for themselves. Disability Human Rights on the other hand perceives disability as an integral part of human diversity.[9]The difference of disability should not result in persons with disabilities being denied the development of human capabilities. And persons with disabilities have a right to develop their capabilities on an equal basis with others.

The prevention paradigm primarily arose from experts and non-disabled people looking at disability. The discourse of disability human rights has primarily arisen from persons with disabilities. The Convention on the Rights of Persons with Disabilities (hereinafter CRPD) is a binding international articulation of disability human rights. Significantly this Convention does not speak of preventing primary disability, but the prevention of secondary disability is an integral part of the right to health of persons with disabilities.[10] All efforts to include a primary prevention provision in the CRPD were shot down by persons with disabilities during the negotiations for the Convention on the reasoning that disability prevention is a common concern of human development but could not be viewed as a part of disability rights. A prevention provision in a disability rights convention is almost contending that persons with disabilities are unwelcome members of the human community. Persons with disabilities along with the rest of humanity desire that all human beings should have access to safe drinking water, nutritious diets, safe work environments, and a war free world. These objectives need to be fought for by all of humanity for their own sake. It is unfair and inequitous that persons with disabilities should be required to lead these campaigns on the reasoning that if these rightful activities are not undertaken then persons with disabilities could be the undesired result.

8. An effect which Sen magnifies by the verbs and adjectives he uses to describe disability. Thus, disability is "impairing feature of humanity", "tragic consequences of disability." Such like use of words is all the more problematic when it comes from Sen because Sen is both conscious of the power of language and observant of its everyday use. For example the distinction he makes at p. 31 between "being well" and being good is a case in point.
9. It is this sentiment which has found recognition in Para m of the Convention on the Rights of Persons with Disabilities which recognizes "the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities...".
10. See Article 25 (b) of the CRPD which mandates states to "provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons".

Amartya Sen could have distinguished between the need for prevention and the case for disability rights, if he had consulted the writings of disabled people and their organizations[11], or even looked at the negotiations surrounding the CRPD[12] or looked at Nussbaum's exposition on disability rights.[13] However, Sen contrary to his own dictum of consulting the stakeholder decided to preach on disability rather than listen to persons with disabilities. Thus, the humility he seeks from public policy makers whilst arriving at social choices goes missing in his own exposition on disability.

Conclusion

It has often been found that small incremental changes that can improve the real lives of people are blocked by arguments for comprehensive reforms. Since comprehensive reforms are time consuming and difficult to obtain, the diehard radical often inadvertently or otherwise lands up supporting the status quo. Amartya Sen in his Idea of Justice is asking each one of us to test our recommendations for social change on the touchstone of the practical and possible. This practical should be an evolving standard. Yet in specifying this possible for persons with disabilities, Sen has reduced the issue of disability to a statistic, which could easily have been lower if societies had been more vigilant. The impact of this argument on the self hood, dignity and personality of persons with disabilities escapes Sen. The Idea of Justice provides useful ideas for blueprinting justice agendas, even as it slips up whilst setting up arguments for the justice rights of persons with disabilities.

11. See for example http://www.inclusion-international.org/self-advocacy/my-voice/ (last visited June 20, 2010), The declaration of the Disabled People International http://v1.dpi.org/lang-en/index?page=18 (last visited June 20, 2010).
12. http://www.un.org/disabilities/default.asp?id=1423 (last visited June 20, 2010).
13. Martha Nussbaum, Frontiers of Justice Disability Nationality and Species Membership (Oxford University Press New Delhi 2006).

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