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# NALSAR UNIVERSITY OF LAW ◆ HYDERABAD



Prof. (Dr.) Veer Singh

Vice-Chancellor

# Vice Chancellor's Message

It gives me great pleasure to present the fifth 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 fifth 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, third, fourth and fifth volumes in 2008, 2009, 2010 and 2011.

I have no doubt that the fifth 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

#### **E**DITORIAL

The importance of comparative constitutional law cannot be overstated, given the constant and inevitable migration of constitutional ideas across jurisdictions and their influence on domestic constitutional law. Legal scholarship in this area has, over the years, emerged from its narrow preoccupation with jurisdictions like the United States and the United Kingdom to attain a wider focus, with increasing comparativist analyses of the constitutional activity in the European Union and SAARC nations. In fact, constitutional courts of developed nations are increasingly recognising constitutional principles from newer democracies and attributing them through their judgments as such. The impact of such a migration of ideas, specifically in areas such as rights jurisprudence, is so significant that modern post-war constitutions have in some cases expressly permitted crossconstitutional borrowing. Scholarship on the issue of migration of ideas was one of the primary aims that The Indian Journal of Constitutional Law accorded to itself.

The four editions of the journal released so far have strived to serve as a platform for encouraging debate and discourse on developments in the field of comparative constitutional law and jurisprudence; the fifth volume endeavours to continue this trend with a special focus on developments in the South Asian jurisdictions. This edition attempts to speak to not only the conventional rights jurisprudence but also other questions of modern constitutionalism, both of intrinsic and instrumental value, ranging from the institutional to the doctrinal aspects of constitutional law.

#### Contributions

In keeping with the tradition paved by the past four volumes, the fifth volume of the IJCL aims to present research and analyses in the conversation between comparative constitutional theory and practice. As always, the individual citation styles of various authors have been retained in order to reflect the diversity of writing styles of authors from various backgrounds.

#### In Retrospect

The volume opens with a tribute to Justice Vivian Bose (June 9, 1891 - November 29, 1983), former judge of the Supreme Court of India in

Vivian Bose and the Living Constitution written by Mr. Suchindran B. N., advocate at the Madras High Court. In arguing that Justice Bose was the first 'activist' judge of the apex court, the author traverses several of Justice Bose's judgments to exemplify Justice Bose's predisposition towards reading the constitution "with a liberal spirit" as a living document, while simultaneously respecting the constitutional text in discouraging the import of foreign doctrines such as "police power" into Indian constitutional jurisprudence.

#### Articles

In *Empirical Legal Studies and Constitutional Courts*, Prof. Nuno Garoupa, Professor of Law at the University of Illinois College of Law, argues that the function of the Kelsenian constitutional court, while theoretically limited to the rejection of legislation as a "negative legislator", has inevitably assumed a larger ambit in conformity with local conditions in various countries. Prof. Garoupa has examined the politicization of the constitutional courts by examining the empirical evidence in the cases of Germany, France, Italy, Spain and Portugal, to conclude that these wider competences of the constitutional court have rendered it inevitably political and yet not politicised, as "judicial politics" inevitably curtails the effects of "partisan politics".

Gautam Swarup, in Why Indian Judges Would Rather be Originalist, presents arguments against the trend of constitutional comparativism that Indian courts are engaging in. He argues that such a practice in India is not just constitutionally impermissible, but also seriously distorts the role of a constitutional court judge. He demonstrates constitutional impermissibility using theories of constitutional interpretation, illustrating how comparativism by the court in rights adjudication may be a fraud upon the Constitution. On the other hand, Gautam exposes the role of the judge in constitutional interpretation and elaboarates on how the distinction between what the judge ought to do and what he actually does in practice is widening, the former being confused with what ought to be done.

David Pimentel, Fulbright Scholar, University of Sarajevo, Bosnia and Herzegovina in *Judicial Independence at the Crossroads: Grappling with Ideology and History in the New Nepali Constitution*, demonstrates how universal concepts like 'separation of powers' and 'independence of the judiciary' can be differently understood when viewed in the

background of alternate ideology and political context, creating a lack of political consensus, as evidenced by the problems encountered by the Nepal Constituent Assembly as they seek to establish a judicial governance model within their Constitution. Premised on the debate between judicial accountability and judicial independence, given the historical and ideological forces at play, the author proposes a less independent but more accountable judiciary for Nepal.

Arghya Sengupta in his piece Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry, offers to conceptualise an enquiry into judicial independence in India, and outlining its precise relevance to judicial appointments. He does this through a narrative on judicial appointments in India, and through such a narrative exposes the theoretical and constitutional underpinnings of judicial independence in such context. In doing so, Arghya seeks to develop arguments in favour of the collegiums system of appointments, since it is one that best balances the interests of judicial independence and preserves the constitutional scheme of separation of powers analogous to India.

Manmeet Singh Rai, draws on international conventions, customary international law and Indian precedent in *Tracing a Meaningful Right to Vote* while arguing in favour of according the right to vote the status of a constitutional right along with the concomitant right to information, as it forms the essence of a democracy which is part of the basic structure of our Constitution.

In her piece Right to Have Rights: Supreme Court as the Guarantor of Rights of Persons with Mental/Intellectual Disability, Prof. Archana Parashar, Associate Professor, Macquarie Law School, talks about the Indian constitutional court's attempt at crystallizing jurisprudence on the rights of persons with disabilities, through an analysis of the court's decision in a case concerning the right to bodily integrity of a mentally retarded person and the jurisprudence in this regard emerging from Article 21 of the Constitution. She uses this framework to then explore the links between 'legal capacity' and fundamental rights, with the ultimate aim of exploring concepts of 'legal reasoning' and the role of the judge in the context of disability jurisprudence. Her argument then is that legal reasoning and the judicial task in such cases should not follow strict constructionalism of legislative provisions, but should

rather be justice oriented, so as to favour a fair outcome with deference to the rights of the disabled at stake.

In Claiming a 'Fundamental Right to Basic Necessities of Life': Problems and Prospects of Adjudication in Bangladesh, Jashim Ali Chaudhary, Lecturer, Department of Law, University of Chittagong, Bangladesh, provides a comparative perspective on the enforceability of socioeconomic rights in the context of the Bangladeshi experience. He attempts to dispel the notion that the Bangladeshi judiciary is institutionally incapable of enforcing socio-economic rights, without doing violence to the principle of 'separation of powers'. Instead of being curtailed by the non-justiciability of socio-economic rights in the Bangladeshi Constitution, the author argues that there are several creative remedies that courts can employ in enforcing socio-economic rights.

#### Case comments

Karishma Dodeja in her comment on *Indian Medical Association v. Union of India*<sup>1</sup> presents a two pronged critique, *first* on the Court's approach in proceeding on the assumption that the right under Article 19 can be extended to juristic persons, without engaging in debate to resolve this question and *second*, on the horizontal applicability of Article 15(5) to private educational institutions, which, she concludes rightly leaves the prerogative of recognising and creating classifications only to the State.

Finally, in a detailed comment on the *Union of India v. R Gandhi*<sup>2</sup>, Rishabh Shah and C. Nageshwaran critique the judicial process exemplified in the judgment wherein the Supreme Court in ruling on the unconstitutionality of the procedure of selection of Tribunal members in Parts IB and IC of the Companies Act 1956 employed grounds such as the violation of 'separation of powers', 'independence of the judiciary' and the 'rule of law'. The authors argue that in doing so, the Court implicitly applied the inchoate 'due process' doctrine, whereas it ought to have ideally used the 'basic structure' doctrine to review the legislation, especially given that all other established tests for equality protection in Indian constitutional jurisprudence would

<sup>1 2011 (6)</sup> SCALE 86 2 2010 (5) SCALE 514.

have been futile in addressing the challenge to the law. In advocating such an approach, the authors draw heavily on the works of Dworkin, Kelsen and even originalism as well as Indian precedent to establish both the applicability as well as the viability of the basic structure doctrine to the review of the legislation in question.

#### Acknowledgments

We sincerely thank Prof. Veer Singh, former Vice-Chancellor, as well as Prof. Faizan Mustafa, Vice-Chancellor, NALSAR University of Law for their support and encouragement in bringing out this volume of the Journal. Our heartfelt gratitude is extended to Mr. K.K. Venugopal and the M.K. Nambyaar SAARC Law Charitable Trust whose support has been indispensable to the flourishing of this journal. The Advisory Board, as always, has been a source of guidance and encouragement. We would also like to place on record, our gratitude to Prof. David Pimentel as well the Indiana International and Comparative Law Review for permitting us to re-publish "Judicial independence at the Crossroads: Grappling with Ideology and History in the New Nepali Constitution" in this volume, given its contemporary and geographic significance. Mr. Sudhir Krishnaswamy, although of recent association with the IJCL, has notwithstanding acted as a beacon to the Board and its functioning. We are thankful for his guidance and help. We also owe many thanks to Mr. Kamalesh and The Printhouse for working with us tirelessly on the drafts of the journal in the run up to publication.

Finally, we extend a sincere thank you to Prof. N. Vasanthi, Prof. Amita Dhanda, Mr. Rajeev Kadambi, Mr. Alok Prasanna, Mr. Parameshwar, Mr. Prasan Dhar, Mr. Mohsin Alam, Ms. Ruchira Goel, Mr. Aditya Swarup and Ms. Subhadra Banda for their untiring support and dedication towards the journal without whose assistance this edition of the Journal would not have seen the light of day.

## VIVIAN BOSE AND THE LIVING CONSTITUTION: A TRIBUTE

Suchindran B.N.\*

Blackstone memorably defined a judge as a 'living oracle of the law'. What he referred to was the onerous and sacred charge given to every judge- to ensure the timelessness of the law; to make sure that the law is able to adapt and meet the varied requirements of a changing society. Under our constitutional scheme, a High Court or Supreme Court judge is the Constitution's voice against any arbitrary, illegal and hasty actions of the legislature or the executive. Come to think of it, a judge is that rare employee whose duty it is to circumscribe her employer's powers, duties, and rights. That charge cannot be fulfilled by obedience or subservience, but by them being true to themselves and the document to which they are oath bound to protect. To them, the government and citizen are alike - parties with a dispute to be resolved with the even and equal hand of dispassionate justice. In our little over 60 years of history as a republic, there are many who have served the office of a judge with distinction and fearlessness. But, even amongst this gathering of the august, some names stand out. Vivian Bose is one such.

In the essay that follows, I have tried to analyse Vivian Bose's attitude to constitutional adjudication – his liberalism, and his unique brand of 'activism'. I have quoted extensively from his judicial statements – more than is probably permitted in an analysis of this kind. But for this I make no apology for, apart from his catholicity and clarity of thought, it is in the felicity of his expression that Bose' remains unsurpassed by any other Supreme Court judge – past or present. M.C. Setalvad¹ tells us that Chief Justice Patanjali Sastri had himself told him that whenever the judges wanted to put forward their views in elegant language, the task was entrusted to Justice Bose.² His indelible 'footprints', speaking in dissent or for the majority, adorn the law reports and reflect his precision, intellectual integrity, honesty and unfailing courtesy. His constitutional judgements mark jurisprudential pathways paved with original thought, creativity,

<sup>\*</sup> Advocate, Madras, High Court. The author is indebted to Arvind P. Datar, V. Niranjan, and Malavika Raghavan for their comments and editorial assistance. In this essay, I have in most places, referred to 'Mr. Justice Bose' by name as 'Bose' unless I have wished to place emphasis on his judicial character. I do this not out of disrespect, but for the sake of continuity in the narrative.

<sup>1</sup> First Attorney General of India.

sustainable innovation and an abiding passion for justice.

As a judge and later Chief Justice of the Nagpur High Court, Bose J. had already acquired a reputation for being a 'lover of liberty.' In 1951, he was the first judge to be elevated (along with Chandrashekar Aiyar J.) after the creation of the Supreme Court. He was (as is argued in this article) the first 'activist' judge of the court. But the discerning feature was that he was no knight errant of the law – doing away with strict legalism only when he could forge new ground and lay down sound judicial principles – believing, above all that a judge's highest duty is to do justice through the rule of law.

#### Constitutional Interpretation

Bose viewed the Constitution with great sanctity and would not be a party to any narrow interpretation of the great rights. Time and time again, often unsuccessfully, he exhorted his brothers to view the fundamental document armed with a liberal spirit. He constantly reminded them that they were beginning with a new and blank Constitution into which they were asked to breathe life and energy. He stated his own view of this judicial function thus:

I am not advocating sudden and wild departure from doctrines and precedents that have been finally settled but I do contend that we, the highest Court in the land giving final form and shape to the laws of this country, should administer them with the same breadth of vision and understanding of the needs of the times...The underlying principles of justice have not changed but the complex pattern of life that is never static requires a fresher outlook and a timely and vigorous moulding of old principles to suit new conditions and ideas and ideals. It is true that the Courts do not legislate but it is not true that they do not would (sic) and make the law in their processes of interpretation.<sup>4</sup>

His education in the black letter law tradition did not prevent him from suggesting that our Constitution was a sovereign document which need not follow those that had come before it, and had to be adapted to the unique Indian climate and ethos. In the same judgment, after referring to the law and practice in other countries, he explained:

<sup>2</sup> M.C. Setalvad, My life: Law and Other Things, (1970), at page 165.

<sup>3</sup> M.C. Setalvad, My life: Law and Other Things, (1970), at page 165.

<sup>4</sup> K.S. Srinivasan v. Union of India, AIR 1958 SC 419.

I make no apology for turning to older democracies and drawing inspiration from them, for though our law is an amalgam drawn from many sources, its firmest foundations are rooted in the freedoms of other lands where men are free in the democratic sense of the term. England has no fundamental rights as such and its Parliament is supreme but the liberty of the subject is guarded there as jealously as the supremacy of Parliament.<sup>5</sup>

In *Dwarkadas Shrinivas v. Sholapur Spg. and Wvg. Co.*<sup>6</sup>, a case arising out of a challenge to the Sholapur Spinning & Weaving Company (Emergency Provisions) Ordinance, 1950, Mahajan J., speaking for the Court, held that the majority judgement in *Chiranjit Lal Chowdhuri v. Union of India*<sup>7</sup> was not applicable, with the consequence that the plaintiff could challenge the constitutionality of the Ordinance because the effect of the legislation was that the plaintiff and the company were left with the "mere husk of title." Bose J. had added a valuable word of caution that has been, unfortunately, subsequently ignored by the Courts:

With the utmost respect I deprecate, as I have done in previous cases, the use of doubtful words like "police power", "social control", "eminent domain" and the like. I say doubtful, not because they are devoid of meaning but because they have different shades of meaning in different countries and because they represent powers which spring from widely differing sources. In my opinion, it is wrong to assume that these powers are inherent in the State in India and then to see how far the Constitution regulates and fits in with them. We have to interpret the plain provisions of the Constitution and it is for jurists and students of law, not for Judges, to see whether our Constitution also provides for these powers (emphasis supplied) and it is for them to determine whether the shape which they take in India resemble any of the varying forms which they assume in other countries.<sup>8</sup>

But this was not mere patriotic grandstanding because he never hesitated to take the aid of authorities from those countries where

<sup>5</sup> K.S. Srinivasan v. Union of India, AIR 1958 SC 419.

<sup>6</sup> AIR 1954 SC 119.

<sup>7</sup> AIR 1951 SC 41.

<sup>8</sup> AIR 1954 SC 119.

general principles could be adapted and adopted. He never shirked a precedent, and whether he followed it or distinguished it he always stated his reasons for doing so.<sup>9</sup> Application of mind is as important for a judge of the Supreme Court, as it was for the administrative authorities over whom they exercised supervision under their extraordinary jurisdiction.

#### Liberty - Defined and Liberated

Bose understood the true nature of the Constitution – as a charter of power granted by liberty and the people and not a charter of liberty granted by power. The duty of the Court was to see that the rights maintained their liberal and fundamental outlook, and that fullest scope was given to the rights under Articles 19, 21, and 22. He often reminded the Court that it was the rights that were fundamental and not the fetters and limitations imposed in the necessary guise of 'reasonable restrictions'. Any doubts in the interpretation of these provisions must be resolved, he insisted, in favour of the subject and not the State. His approach to constitutional interpretation is best described in his own words:

Brush aside for a moment the pettifogging of the law and forget for the nonce all the learned disputations about this and that, and "and" or "or", or "may" and "must". Look past the mere verbiage of the words and penetrate deep into the heart and spirit of the Constitution. What sort of State are we intended to be? Have we not here been given a way of life, the right to individual freedom, the utmost the State can confer in that respect consistent with its own safety? Is not the sanctity of the individual recognised and emphasised again and again? Is not our Constitution in violent contrast to those of States where the State is everything and the individual but a slave or a serf to serve the will of those who for the time being wield almost absolute power? I have no doubts on this score. I hold it therefore to be our duty, when there is ambiguity or doubt about the construction of any clause in this chapter on fundamental rights, to resolve it in favour of the freedoms

<sup>9</sup> The length to which he would go can be seen in the instance related by Justice Hidayattullah, when he had cited a French precedent before him, admitting that the all the ones in English went against him. Bose immediately called for a translation and Hidayatullah won the case. Justice Hidayatulluah honestly admits that "No other judge would have looked into those authorities. Vivian's passion for justice was my asset."

which have been so solemnly stressed.....Read the provisions which circumscribe the powers of Parliament and prevent it from being supreme. What does it all add up to? How can it be doubted that the stress throughout is on the freedoms conferred and that the limitations placed on them are but regrettable necessities?<sup>10</sup>

The people of India, as he put it, through their constituent assembly "hammered out solemnly and deliberately after the most mature consideration and with the most anxious care" and fashioned a document that was not a "cold, lifeless, inert mass of malleable clay but created a living organism, breathed life into it and endowed it with purpose and vigour so that it should grow healthily and sturdily in the democratic way of life, which is the free way." To Bose, the Constitution was a:

...frame-work of government written for men of fundamentally differing opinions and written as much for the future as the present. They are not just pages from a text book but form the means of ordering the life of a progressive people. There is consequently grave danger in endeavouring to confine them in watertight compartments made up of ready-made generalisations like classification.<sup>12</sup>

## Sense of History

Bose had a keen sense of the moment and of the past that preceded it. He was acutely aware (more than many of his contemporary colleagues) of the place and time in the history of his nation that he was asked – as one of the judges of the highest Court to exercise the judicial power of the state. He was also deeply aware of the trials and tribulations that had preceded the Constitution from which he derived his power. As he said:

I find it impossible to read these portions of the Constitution without regard to the background out of which they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times. They are not just dull, lifeless words static and hide-bound as in some mummified manuscript, but, living flames intended to give life to a great

<sup>10</sup> S. Krishnan v. State of Madras, AIR 1951 SC 301: 1951 SCR 621.

<sup>11</sup> S. Krishnan v. State of Madras, AIR 1951 SC 301: 1951 SCR 621.

<sup>12</sup> State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.

nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present. The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs. I feel therefore that in each case judges must look straight into the heart of things and regard the facts of each case concretely much as a jury would do; and yet, not quite as a jury, for we are considering here a matter of law and not just one of fact: Do these "laws" which have been called in question offend a still greater law before which even they must bow?<sup>13</sup>

Conscious that a people who forget their history are condemned to repeat it, he recalled and left for future generations of lawyers and judges, in law reports, the real price of our Constitution and why we should jealously guard it against the State (as the enemy within) as much as any other external enemy. As he said in the context of equality clause in Article 14:

They arose out of the fight for freedom in this land and are but the endeavour to compress into a few pregnant phrases some of the main attributes of a sovereign democratic republic as seen through Indian eyes. There was present to the collective mind of the Constituent Assembly, reflecting the mood of the peoples of India, the memory of grim trials by hastily constituted tribunals with novel forms of procedure set forth in ordinances promulgated in haste because of what was then felt to be the urgent necessities of the moment. Without casting the slightest reflection on the judges and the courts so constituted, the fact remains that when these tribunals were declared invalid and the same persons were retried in the ordinary courts, many were acquitted, many who had been sentenced to death were absolved. That was not the fault of the judges but of the imperfect tools with which they were compelled to work. The whole proceedings were repugnant to the peoples of this land and, to my mind, Article 14 is but a reflex of this mood.14

<sup>13</sup> State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.

<sup>14</sup> State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.

No finer tribute to the freedom struggle and the founding fathers exists in any other judicial pronouncement. He recognised a 'structure' in the Constitution of which democracy and the rule of law were the most basic constituents. Recognising that the price of liberty is eternal vigilance, he added in *Bidi Supply Co. v. Union of India*:

In a democracy functioning under the Rule of Law it is not enough to do justice or to do the right thing; justice must be seen to be done and a satisfaction and sense of security engendered in the minds of the people at large in place of a vague uneasiness that Star Chambers are arising in this land... There is no room for complacency, for in the absence of constant vigilance we run the risk of losing it. "It can happen here." 15

And it did happen here. The emergency gave us a glimpse of the price of complacency.

#### Preventive Detention

It was in cases relating to preventive detention that Justice Bose would display his genuine love of liberty and would propound a theory of constitutional interpretation that does credit to the best traditions of constitutionalism. In the Nagpur High Court itself, he had been known as a "grilling judge" in preventive detention cases.<sup>16</sup>

In *A.K. Gopalan v. State of Madras*<sup>17</sup>, the Supreme Court had already by a narrow 3-2 majority delineated the relationship inter se the various rights under Part III and specifically in relation to Article 22 providing for preventive detention. The views of the majority and the 'constitutional status' given to preventive detention were best expressed by Patanjali Sastri J.:

This sinister looking feature, so strangely out of place in a democratic constitution which invest personal liberty with the sacrosanctity of a fundamental right and so incompatible with the premises of its preamble is doubtless designed to prevent an abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant republic.<sup>18</sup>

<sup>15</sup> AIR 1956 SC 479.

<sup>16</sup> M. Hidayatullah's beautiful tribute to Justice Vivian Bose in, M. Hidayatullah, A judge's miscellany (1972), at page 143.

<sup>17</sup> A.K. Gopalan v. Union of India, AIR 1951 SC 27.

<sup>18</sup> Ibid.

If a judge, who writes so well, praises the style and language of Vivian Bose, it is high praise indeed!

In *S. Krishnan v. State of Madras*<sup>19</sup>, Bose would display (as the junior-most judge) his independence of mind, his forensic ability in differentiating *A.K. Gopalan*'s case, and his trademark narrative style of prose. The issue before the Court was whether the Preventive Detention (Amendment) Act, 1951 which authorised detention beyond the expiry of one year was *ultra vires* and inoperative on the touchstone of constitutionality. The majority held that it was not. Bose alone dissented 'ploughing a lonely furrow' holding that Article 22(4) conferred a fundamental right not to be kept beyond 3 months in preventive detention unless certain conditions are fulfilled and that no law can be made authorising detention under either clause 4(a) or (b) unless Parliament has itself exercised its power and prescribed a maximum period of detention under Clause 7(b). As he memorably put it, "Until the road is built, there is no right of way."

Bose believed that the Court must not construe those provisions in a manner that would whittle down those sacred rights, but should be conscious of the bitter struggle that preceded it and not allow them to be "curtailed by some accidental side wind which allows virtual delegation of the responsibility for fixing the maximum limits which Parliament is empowered to fix to some lesser authority, and worse, for fixing them ad hoc in each individual case, for that (in my opinion), is what actually happens, whatever the technical name, when Parliament fixes no maximum limit and lesser authorities are left free to decide in each case how long the individual should be detained." To hold otherwise would not only be a shirking of responsibility by the Parliament but an abdication of the Courts' responsibility to liberty.

On the question of whether these guarantees must be exercised in favour of the detenus who themselves did not harbour any allegiance to the Constitution, he answered memorably quoting Lord Justice Scrutton and Justice Oliver Wendell Homes that the true test of principles is to apply them to cases which would not normally have your sympathy – freedom of thought not for the those we agree with but for the thought we hate:

It is perhaps ironical that I should struggle to uphold these freedoms in favour of a class of persons who if rumour is to be accredited and if the list of their activities furnished to us is a true guide, would be the first to destroy them if they but had the power. But I cannot allow personal predilections to sway my judgment of the Constitution.

The message was this: the constitutional guarantees need not be whittled down in fear of individuals for it is larger than the individuals who attempt to overthrow it. The greatest danger to the Constitution lies from the so called arguments of fear. These were the insecurities from which the guardians of the Constitution must protect insidiously without fear or favour for if they did not, governments slowly but surely would encroach on the fundamental rights – rights that the people had reserved for themselves. This is the inherent nature of power - and the judges of our Supreme Court were expected to understand this.

#### Legislative and Judicial Power: The Pragmatic Radical

Soon after his elevation to the Supreme Court, Justice Bose was part of a 7 judge full Court bench which heard a presidential reference seeking an advisory opinion under Article 143.20 The opinion was sought on the constitutional validity of 3 provisions of laws (specially selected to reflect the three significant stages in India's constitutional development) i.e. legislative power under the Government of India Act, 1915, under the Government of India Act, 1935 as amended by the Indian Independence Act, 1947, and finally Parliament's legislative power under the Constitution. Kania C.J. and Mahajan J. held that all the three provisions were ultra vires. Fazl Ali J., Patanjali Sastri J. and Das J. held that all the provisions were *intra vires* the respective legislations. Mukherjea and Bose IJ. held that the provisions of the Delhi Laws Act, 1912 and the Ajmer-Mewar (Extension of laws) Act, 1947 were valid and constitutional. However, Section 2 of the Part C States (Laws) Act, 1950 was found to be of doubtful validity by both the judges (in separate opinions), finding that the concluding portion of the section empowering the central government to repeal and amend a provincial law in a Part C state, was ultra vires Parliament power.

The judgment of Bose reveals that he was acutely aware of the pragmatic reality of India and the solutions required for the nascent republic. Parliament was free to delegate, except in cases where the

Constitution has expressly provided for and entitled the people of India to "the fruits of Parliament's own mature deliberation, to its patriotism, and to its collective wisdom." Unlike the British Parliament, under the new Indian order, Parliament was not sovereign and was bound by the Constitution which gave it life. His understanding of the importance of unsettling settled law and the importance of judicial discipline can be seen from the following passage:

I see no reason for extending the scope of legislative delegation beyond the confines which have been hallowed for so long. Had it not been for the fact that this sort of practice was blessed by the Privy Council as far back as 1878 and has been endorsed in a series of decisions ever since, and had it not been for the practical necessities of the case, I would have held all three Acts ultra vires.

How much this went against his natural strain can be evidenced from the following excerpt:

I confess I am not enamoured of this kind of legislation. I do not like this shirking of responsibility, for, after all, the main function of a legislature is to legislate and not to leave that to others. Its primary duty is to weigh and consider the desirability or otherwise both of introducing new laws and of abolishing or modifying old ones in essential particulars. But, speaking judicially, I am unable to hold, in view of our past history and in view of the necessities of a modern State, that the matters I have set out above, subject to the limitations I have indicated, are beyond the competence of Parliament. I trust however, that these powers will be used sparingly both on grounds of principle as well as of practical expediency, for the experience of this case and the lessons of the past show only too clearly the risks involved. Legislation of this kind is liable to be called in question at any time and it is always a gamble which way the dice will fall.<sup>23</sup> This is the sort of case

<sup>21</sup> AIR 1951 SC 332, at 437.

<sup>22</sup> AIR 1951 SC 332, at 436.

<sup>23</sup> Seervai took great exception to the last phrase of this sentence, without realizing that this was more a friendly warning to the legislature and manner of speech than an actual statement of judicial philosophy. It is also the prerogative of a final court to change its mind on such political questions faced with a similar law not necessitated with *bona fide* intention. The difference of opinion in the case under discussion itself – necessitating a

in which a stitch in time saves many nines.24

Parliaments, present and future, will do well to pay heed to his angst – for it is the angst of one who understands that all the three great institutions of the modern nation state must essentially be protected from within and cannot always be corrected from without if the essential balance is to be maintained. Like many great judges who preceded him, he busied himself with finding his own limitations and resisting the temptation to transgress.

#### Fair, Just and Legal

Bose was very aware that the season was one of change – when fundamental changes were required to be made in the social and political order. But he realised that his role was not be at the vanguard of that movement but to steer the horses and make sure they did not trample each other. For he realised, that if rules were bent for short term expediency, however laudable the motive in the first instance, power and its corrupting nature would always ensure that the subsequent exercise thereof might not always be as blemishless.

In a statesmanesque judgment in *Virendra Singh v. State of U.P.,* a precursor to the larger dispute that would engage the full court twenty years later in the Privy Purse case<sup>25</sup>, he eloquently expressed the nobility of his station:

We have upon us the whole armour of the Constitution and walk from henceforth in its enlightened ways, wearing the breastplate of its protecting provisions and flashing the flaming sword of its inspiration.<sup>26</sup>

The judgment was a gentle but firm reminder to the framers who manned the legislative and executive branches of the government that they should not, for the purpose of political expediency, act in a manner that will blemish the honour of the State.

separate opinion by every member of the bench – is evidentia of how such cases could be decided in the future. See H.M. Seervai, Commentary on the Constitutional Law of India: A Critical commentary, 4th edition, Vol. 3, page 2267. It is also interesting to note that before criticizing the statement, Seervai displayed his high regard for Bose by beginning the sentence with the words: "It is amazing that a judge of the high ability of Bose J. should knowingly prescribe a test which he likened to gambling by using dice."

<sup>24</sup> AIR 1951 SC 332, at page 440.

<sup>25</sup> Madhav Rao Jivaji Rao Scindia v. Union of India, (1971) 1 SCC 85: AIR 1971 SC 530.

<sup>26</sup> AIR 1954 SC 447.

He was still a strict legalist recognising that it was in the technicalities of the law that his primary tools of rendering justice lay. In *Harla v. State of Rajasthan,* where the legal validity of the Jaipur Opium Act, 1923 passed by a council of ministers (appointed by the British for the period of minority of the Maharaja) was challenged. The impugned Act had not been published in the Official Gazette as was required by law and was sought to be retrospectively validated 14 years after its original enactment, Bose held that:

The Council of Ministers which passed the Jaipur Opium Act was not a sovereign body nor did it function of its own right. It was brought into being by the Crown Representative, and the Jaipur Gazette Notification dated the 11th August, 1923, defined and limited its powers. We are entitled therefore to import into this matter consideration of the principles and notions of natural justice which underlie the British Constitution, for it is inconceivable that a representative of His Britannic Majesty could have contemplated the creation of a body which could wield powers so abhorrent to the fundamental principles of natural justice which all freedom loving peoples share. We hold that, in the absence of some specific law or custom to the contrary, a mere resolution of a Council of Ministers in the Jaipur State without further publication or promulgation would not be sufficient to make a law operative.27

A man must know of the law by which he is sought to be punished and condemned. This proposition was traced not to any specific law but on a 'deeper rule that was founded on natural justice.' It was abhorrent to his sense of justice (derived legally by reference to British practice and also the Code Napoleon) that any person should be convicted on the basis of a law that was retrospectively validated but was not validly enacted in the first place. Similar to how the *ultra vires* doctrine was read into the unwritten British Constitution, he held that a body entrusted with creating laws could not have intended that the executive exercise its powers in the manner in which they were now seeking to do. This is a magnificent tribute from a foreign land to the power of the common law's sense of justice and its adaptability.

In *J.K. Iron & Steel Co. Ltd. v. Mazdoor Union*<sup>28</sup>, he would issue an early warning against the tribunalisation of justice and held that these new tribunals exercising quasi-judicial functions would come under the supervisory jurisdiction of the Supreme Court, stating that the 'heart of the matter' lies in the fact that a 'benevolent despotism is foreign to a democratic Constitution'<sup>29</sup>:

When the Constitution of India converted this country into a great sovereign, democratic, republic, it did not invest it with the mere trappings of democracy and leave it with merely its outward forms of behaviour but invested it with the real thing, the true kernel of which is the ultimate authority of the Courts to restrain all exercise of absolute and arbitrary power, not only by the executive and by officials and lesser tribunals but also by the legislatures and even by Parliament itself. The Constitution established a "Rule of Law" in this land and that carries with it restraints and restrictions that are foreign to despotic power.<sup>30</sup>

His razor sharp mind saw through the subterfuges and attempts at hoodwinking judicial review. His disciplined judicial training allowed him to simplify the facts and the questions at hand, and found expression in clear and understandable language:

The heart and core of a democracy lies in the judicial process, and that means independent and fearless Judges free from executive control brought up in judicial traditions and trained to judicial ways of working and thinking. The main bulwarks of liberty and freedom lie there and it is clear to me that uncontrolled powers of discrimination in matters that seriously affect the lives and properties of people cannot be left to executive or quasi executive bodies even if they exercise quasi judicial functions because they are then invested with an authority that even Parliament does not possess... if under the Constitution, Parliament itself has not uncontrolled freedom of action, it is evident that it cannot invest lesser authorities with that power. If the legislature itself had done here what the Central Board of Revenue has done and had

<sup>28</sup> AIR 1956 SC 231: (1955) 2 SCR 1315.

<sup>29</sup> A phrase that he borrowed from Mahajan J. in *Bharat Bank Ltd. v. Employees, AIR* 1950 SC 188: 1950 SCR 459.

<sup>30</sup> Bidi Supply Co. v. Union of India, AIR 1956 SC 479.

passed an Act in the bald terms of the order made here transferring the case of this petitioner, picked out from others in a like situation, from one State to another, or from one end of India to the other, without specifying any object and without giving any reason, it would, in my judgment, have been bad. I am unable to see how the position is bettered because the Central Board of Revenue has done this and not Parliament.<sup>31</sup>

#### Fairness in Taxation: Is it Possible?

For all his activism, he deplored the Court giving an interpretation that went against the plain words used. He stressed on the importance of clarity, certainty and fairness in the law. And this can be seen most clearly in his interpretation of the power to tax interstate sales. To have expected anything else from governments in constant need of resources would be naive and foolish, but the courts should have checked this tendency within strict boundaries of legality. As he said in *Tata Iron & Steel Co. Ltd. v. State of Bihar*:

But what I do most strongly press is that a Constitution Act cannot be allowed to speak with different voices in different parts of the land and that a mundane business concept well known and well understood cannot be given an ethereal omnipresent quality that enables a horde of hungry hawks to swoop down and devour it simultaneously all over the land: "some sale; some hawks" as Winston Churchill would say.... I would therefore reject the nexus theory in so far as it means that any one sale can have existence and entity simultaneously in many different places. The States may tax the sale but may not disintegrate it and, under the guise of taxing the sale in truth and in fact, tax its various elements, one its head and one its tail, one its entrails and one its limbs by a legislative fiction that deems that the whole is within its claws simply because, after tearing it apart, it finds a hand or a foot or a heart or a liver still quivering in its grasp. Nexus, of course, there must be but nexus of the entire entity that is called a sale, wherever it is deemed to be situate. Fiction again. Of course, it is fiction, but it is a fiction as to situs imposed by the Constitution Act and by the Supreme Court that speaks for it in these matters and only one fiction, not a dozen little ones.<sup>32</sup>

<sup>31</sup> Bidi Supply Co. v. Union of India, AIR 1956 SC 479.

<sup>32</sup> Tata Iron & Steel Co. Ltd. v. State of Bihar, AIR 1958 SC 452.

He concluded not without a sarcastic tinge of permissible humour, which unfortunately has passed legislatures by ever since:

My point is simple. If you are allowed to tax a dog it must be within the territorial limits of your taxable jurisdiction. You cannot tax it if it is born elsewhere and remains there simply because its mother was with you at some point of time during the period of gestation. Equally, after birth, you cannot tax it simply because its tail is cut off (as is often done in the case of certain breeds) and sent back to the fond owner, who lives in your jurisdiction, in a bottle of spirits, or clippings of its hair. There is a nexus of sorts in both cases but the fallacy lies in thinking that the entity is with you just because a part that is quite different from the whole was once there. So with a sale of a motor car started and concluded wholly and exclusively in New York or London or Timbuctoo. You cannot tax that sale just because the vendor lives in Madras, even if the motor car is brought there and even assuming there is no bar on international sales, for the simple reason that what you are entitled to tax is the sale, and neither the owner nor the car, therefore unless the sale is situate in your territory, there is no real nexus. And once it is determined objectively by the Constitution Act or in Supreme Court how and where the sale is situate, its situs is fixed and cannot be changed thereafter by a succession of State legislatures each claiming a different situs by the convenient fiction of deeming.33

He did not want the intent of the framers in making a clear distinction between the taxing powers of the Parliament and the state legislature to be blurred by frequent resort to judicial adjudication. To tax and to be liked is not given to any body of men so empowered, but I cannot help think that if we had heeded these words of Justice Bose, our tax laws might just have been effused with greater clarity, fairness and a definite certainty.

In *Bengal Immunity Co. v. State of Bihar*<sup>34</sup>, Bose would enjoy the opportunity of his minority view expressed earlier in *State of Bombay v. United Motors*<sup>35</sup> validated by a larger bench. Both cases involved interpretation of the power of the State legislatures to tax interstate

<sup>33</sup> Tata Iron & Steel Co. Ltd. v. State of Bihar, AIR 1958 SC 452.

<sup>34</sup> AIR 1955 SC 661.

<sup>35</sup> AIR 1953 SC 252.

sales. It is rare for a sitting judge to see his minority view accepted by a larger bench in his own tenure on the court and this can only be seen as testament to his persuasive ability.<sup>36</sup>

#### Citizen's Judge

Justice Bose recognised the system of government in India required separation not only between the executive, the legislature and the judiciary but also a wall of separation between the ministerial executive and the permanent executive. That is why he chastised an officer of the State of Assam when he 'settled' a lease and then unsettled it, on directions of the government, to grant it to another 'person or body more to its liking', adding sarcastically, in whom it has discovered "fresh virtues hidden from its view in its earlier anxious and mature deliberations." <sup>37</sup>

In *Commissioner of Police v. Gordhandas Bhanji*<sup>38</sup>, he would hold that when law required a public authority to exercise a discretion and pass orders it is that authority alone that is required to act it cannot act on the direction of anybody else not even the State government for public authorities cannot "play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what authority is making the order." When a defence sought to explain and justify the subsequent orders passed by the Commissioner of Police, he firmly added that

public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do.

And when the appellant State argued that the rule merely vested a discretion in the Commissioner but did not require him to exercise it, he cited and agreed with Earl Cairns LC in *Julius v. Lord Bishop of Oxford*, where it was held that power may be coupled with a duty, and make it the duty of the person in whom power is reposed to exercise that power when called upon to do. He held that the

<sup>36</sup> This can best be evidenced in the judgment of Bhagwathi J. who was a part of the majority in the earlier decision but changed his mind. He extensively cites the minority opinion of Bose J. to support his new conclusions.

<sup>37</sup> State of Assam v. Keshab Prasad Singh, AIR 1953 SC 309: 1953 SCR 865.

<sup>38</sup> AIR 1952 SC 16.

Commissioner cannot abdicate this duty to any other authority or act on the directions of another, stating that the discretion vested in the Commissioner of Police

has been conferred upon him for public reasons involving the convenience, safety, morality and welfare of the public at large. An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor can it be evaded; performance of it can be compelled under Section 45 (of the old specific relief act).

This was judicial activism in its finest mould where the citizen was placed at the highest pedestal and could hold public authorities accountable for their action or inaction.

In K.S. Srinivasan v. Union of India,<sup>39</sup> where a wartime post was 'reduced' and the incumbent was transferred to a temporary post and subsequently made quasi permanent, the majority held that the subsequent order was made under a mistake and could not give rise to any rights. Bose sought to give an early start to the doctrine of estoppel against the state and legitimate expectation by stating that though there was a mistake which was discovered later, it was a 'unilateral mistake' of the government and others cannot be made to suffer because of it. The majority judgement went so against his justice oriented approach that he was forced in a chastising tone to state that:

Here is Government straining to temper justice with mercy and we, the Courts, are out Shylocking Shylock in demanding a pound of flesh, and why? because "t'is writ in the bond." I will have none of it. All I can see is a man who has been wronged and I can see a plain way out. I would take it.

The last two sentences sum up his judicial approach: justice oriented but only when the path is available or can be freshly laid as precedent for future travellers. For he was not going beyond the judicial function, as has often been the case in recent times, but finding the means of justice in his creative application of the facts to the legal principles. He never shirked an existing precedent.

Similarly, he would dissent in another case, preventing a constitutional guarantee under Article 311 from being subverted by clever wording and procedure. It was argued that since the order did not specify a time limit it was not a 'punishment' but only a penalty. Knowing the vagaries of the arbitrary state, he plainly stated that the effect of the order was that it would result in the petitioner not being promoted to a like post until some other officer chooses to think he has "made good his previous short-comings." He held that such sentence in the order introduces an arbitrary and 'evil consequence' amounting to punishment attracting the protection of Article 311 which is not merely against "harsh words but against hard blows."<sup>40</sup>

In his characteristic rhetorical style, he said in a magnificent worded passage:

After all, for whose benefit was the Constitution enacted? What was the point of making all this other about fundamental rights? I am clear that the Constitution is not for the exclusive benefit governments and States; it is not only for lawyers and politicians and officials and those highly placed. It also exists for the common man, for the poor and the humble, for those who have businesses at stake, for the "butcher, the baker and the candlestick maker". It lays down for this land "a rule of law" as understood in the free democracies of the world. It constitutes India into a Sovereign Republic and guarantees in every page rights and freedom to the side by side and consistent with the overriding power of the State to act for the common good of all.<sup>41</sup>

According to the radical and respected civil rights lawyer, K.G. Kanabiran, Bose "alone of all the judges past and present understood the Constitution in terms of the people, their struggles, and the necessity of ensuring the rights secured by them in their struggles." It is a fine tribute from a man not in the habit of being in awe of others.

# A 'Common Law' of Equality?

The 'intangible' equal protection clause contained in Article 14 would also receive his searing and razor sharp analysis and his

<sup>40</sup> Parshotam Lal Dhingra v. Union of India, AIR 1958 SC 36.

<sup>41</sup> Bidi Supply Co. v. Union of India, AIR 1956 SC 479.

<sup>42</sup> K. G. Kannabiran, "Personal liberty after Independence" in *The Wages of Impunity: Power, Justice, and Human Rights,* at page 37.

interpretation, as always, tempered with fairness and a deep sense of justice. His thought processes reveal a modern, fearless mind willing to go beyond accepted definitions and beyond existing legal dogmas and rationales:

Article 14 sets out, to my mind, an attitude of mind, a way of life, rather than a precise rule of law. It embodies a general awareness in the consciousness of the people at large of something that exists and which is very real but which cannot be pinned down to any precise analysis of fact save to say in a given case that it falls this side of the line or that, and because of that decisions on the same point will vary as conditions vary, one conclusion in one part of the country and another somewhere else; one decision today and another tomorrow when the basis of society has altered and the structure of current social thinking is different. It is not the law that alters but the changing conditions of the times and Article 14 narrows down to a question of fact which must be determined by the highest Judges in the land as each case arises. Always there is in these cases a clash of conflicting claims and it is the core of the judicial process to arrive at an accommodation between them. Anybody can decide a question if only a single principle is in issue. The heart of the difficulty is that there is hardly any question that comes before the Courts that does not entail more than one so-called principle.43

In a concurring judgement in *State of West Bengal v. Anwar Ali Sarkar* where the Court struck down the Special Court constituted by the West Bengal Special Courts Act, 1950, Bose would go further than the majority and propound a 'common law of equality' holding that the Constitution cannot be interpreted "by simply taking the words in one hand and a dictionary in the other, for the provisions of the Constitution are not mathematical formulae which have their essence in mere form." Since he was not merely applying past precedent but breaking new ground, he explained in detail that what he was concerned with was not merely equality in an academic sense but

whether the collective conscience of a sovereign democratic republic can regard the impugned law, contrasted with the

ordinary law of the land, as the sort of substantially equal treatment which men of resolute minds and unbiassed (sic) views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be. Such views must take into consideration the practical necessities of government, the right to alter the laws and many other facts, but in the forefront must remain the freedom of the individual from unjust and unequal treatment, unequal in the broad sense in which a democracy would view it. In my opinion, 'law' as used in Article 14 does not mean the "legal precepts which are actually recognised and applied in the tribunals of a given time and place" but "the more general body of doctrine and tradition from which those precepts are chiefly drawn, and by which we criticise them." ....But that will not be because the law has changed but because the times have altered and it is no longer necessary for government to wield the powers which were essential in an earlier and more troubled world. That is what I mean by flexibility of interpretation.

This brilliant exposition was more than twenty years before the court would adopt a similar position in the momentous decisions in *E.P. Royappa v. State of Tamil Nadu*<sup>44</sup> and *Maneka Gandhi v. Union of India.*<sup>45</sup> He took this view, as he explained, not with a view to embarrass the legislative or executive wings, but because of his view of the judicial function and the history of the land. As he said:

It is not that these laws are necessarily bad in themselves. It is the differentiation which matters; the singling out of cases or groups of cases, or even of offences or classes of offences, of a kind fraught with the most serious consequences to the individuals concerned, for special, and what some would regard as peculiar, treatment....It may be that justice would be fully done by following the new procedure. It may even be that it would be more truly done. But it would not be satisfactorily done, satisfactory that is to say, not from the point of view of the governments who prosecute, but satisfactory in the view of the ordinary reasonable man, the man in the street. It is not enough that justice should be done. Justice must also be seen to be done and a sense of satisfaction

<sup>44 (1974) 4</sup> SCC 3: AIR 1974 SC 555.

<sup>45. (1978) 1</sup> SCC 248: AIR 1978 SC 597.

and confidence in it engendered. That cannot be when Ramchandra is tried by one procedure and Sakharam, similarly placed, facing equally serious charges, also answering for his life and liberty, by another which differs radically from the first.<sup>46</sup>

But would that not introduce arbitrary subjective standard capable of varying from judge to judge allowing them to decide for themselves without reference to any 'tests' or guidelines? He answered, in what is a classic tribute to the judge as law maker:

I realise that this is a function which is incapable of exact definition but I do not view that with dismay. The common law of England grew up in that way. It was gradually added to as each concrete case arose and a decision was given ad hoc on the facts of that particular case. It is true the judges who thus contributed to its growth were not importing personal predilections into the result and merely stated what the law applicable to that particular case was. But though they did not purport to make the law and merely applied what according to them, had always been the law handed down by custom and tradition, they nevertheless had to draw for their material on a nebulous mass of undefined rules which, though they existed in fact and left a vague awareness in man's minds, nevertheless were neither clearly definable, nor even necessarily identifiable, until crystallised into concrete existence by a judicial decision; nor indeed is it necessary to travel as far afield. Much of the existing Hindu law has grown up in that way from instance to instance, the threads being gathered now from the rishis, now from custom, now from tradition. In the same way, the laws of liberty, of freedom and of protection under the Constitution will also slowly assume recognisable shape as decision is added to decision. They cannot, in my judgment, be enunciated in static form by hide-bound rules and arbitrarily applied standards or tests. 47

Conscious that the Constitution should not be viewed with gilded glasses he read into Article 14, a doctrine of fairness:

The law of the Constitution is not only for those who govern

<sup>46</sup> State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.

<sup>47</sup> State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.

or for the theorist, but also for the bulk of the people, for the common man for whose benefit and pride and safeguard the Constitution has also been written. Unless and until these fundamental provisions are altered by the constituent processes of Parliament they must be interpreted in a sense which the common man, not versed in the niceties of grammar and dialectical logic, can understand and appreciate so that he may have faith and confidence and unshaken trust in that which has been enacted for his benefit and protection.... When the froth and the foam of discussion is cleared away and learned dialectics placed on one side, we reach at last the human element which to my mind is the most important of all. We find men accused of heinous crimes called upon to answer for their lives and liberties. We find them picked out from their fellows, and however much the new procedure may give them a few crumbs of advantage, in the bulk they are deprived of substantial and valuable privileges of defence which others, similarly charged, are able to claim. It matters not to me, nor indeed to them and their families and their friends, whether this be done in good faith, whether it be done for the convenience of government, whether the process can be scientifically classified and labelled, or whether it is an experiment in speedier trials made for the good of society at large. It matters not how lofty and laudable the motives are. The question with which I charge myself is, can fair-minded, reasonable unbiassed (sic) and resolute men, who are not swayed by emotion or prejudice, regard this with equanimity and call it reasonable, just and fair, regard it as that equal treatment and protection in the defence of liberties which is expected of a sovereign democratic republic in the conditions which obtain in India today? I have but one answer to that. On that short and simple ground I would decide this case and hold the Act bad.<sup>48</sup>

Article 14, the Constitution, the judges who administer it, and the law in general have not had a more eloquent spokesperson and standard bearer.

Again, in *Syed Qasim Razvi v. State of Hyderabad*, Bose dissented (along with Ghulam Hasan J. who wrote a separate dissent) from the

majority and held that the Special Courts created by the military governor of Hyderabad State in the aftermath of the 'Police action' was illegal and hit by Article 14.49 According to him there were many infirmities in the proceedings not least of which was the fact that although the proceedings were conducted in English, one of the accused was denied the services of a King 's Counsel stating that Rules required counsel to know Urdu. All this would have been fine, but for the fact that the traditional court language in Hyderabad was Urdu and English was a language alien to the President of the Tribunal and all but one of the accused. There was something 'grotesquely fantastic' in insisting on counsel being proficient in Urdu in a tribunal whose proceedings are to be conducted in English. This was 'discrimination in fact' and sufficient to require a retrial. Bose stated that this was not retrospective application of the Constitution but is its present and immediate mandate since the fundamental rights "breathe a message of hope to those who have not known equality of treatment before, and give a guarantee of security to those who have, a guarantee which came into effective being the moment the Constitution was born." The judges were, in his words, 'the keepers and interpreters of the social conscience of a sovereign democratic republic.' And to the arguments of necessity that a retrial would be a heavy burden on government time and money, he responded, fairly and firmly, that although he was of the opinion that the proceedings were conducted in a proper and fair manner by the prosecution, it was still discriminatory after the commencement of the Constitution:

The money and time which would be wasted were my view to prevail would be unfortunate but all that is part of the price to be paid for the maintenance of the principles which our Constitution guarantees, part of the price of democracy.<sup>50</sup>

In another dissent in a 'special court' case, he expressed his genuine anguish and pain and while submitting to the will of previous majorities, he was unwilling in all conscience to yield a single inch of ground except where compelled to do so. He stated his own position as follows:

I am not concerned here with reasonableness in any abstract sense, nor with the convenience of administration nor even with the fact, which may well be the case here, that this will

<sup>49</sup> AIR 1953 SC 156.

<sup>50</sup> AIR 1953 SC 156.

facilitate the administration of justice. The solemn duty with which I am charged is to see whether this infringes the fundamental provisions of the Constitution; and though I recognise that there is room for divergencies (sic) of view, as indeed there must be in the case of these loosely worded provisions, and deeply though I respect the views of my colleagues, I am nevertheless bound in the conscientious discharge of my duty to set out my own strong views so long as there is, in my opinion, scope still left for a divergence of view.<sup>51</sup>

He never forgot that before a court of law, the all powerful state was just another party and that necessity and expediency are not arguments to be raised in defence of infringement of the constitutional rights of the people. A civilization, and a Constitution, must be judged on how it treats its worst and not it highest, in the trying times of winter and not in the pleasant spring.

#### And Finally...The Man!

[Faramir] is bold, more bold than many deem; for in these days men are slow to believe that a captain can be wise and learned in the scrolls of lore and song, as he is, and yet a man of hardihood and swift judgement in the field. But such is Faramir. Less reckless and eager than Boromir, but not less resolute.

-Gandalf's description of Faramir, in J.R.R. Tolkien's Lord of the Rings

Like Tolkien's Faramir, Vivian Bose was "modest, fair-minded and scrupulously just, and very merciful". This much we can tell from his judgments. But he was also much more than that, for he was essentially a lover of life infused with a natural curiosity and spirit of adventure. A "man of varied humours" as his close friend and colleague, Justice Hidayutallah, put it. Bose was a leader of the scouting movement, a regular trekker, a motoring enthusiast who had driven from India to Europe and the reverse trip in a specially fitted caravan, a photographer, and a dinner table entertainer whose repertoire

<sup>51</sup> Kedar Nath Bajoria v. State of W.B., AIR 1953 SC 404: 1954 SCR 30.

<sup>52</sup> J.R.R. Tolkien; Humphrey Carpenter, Christopher Tolkien (eds.), *The Letters of J.R.R. Tolkien*, Letter 244, (undated, written circa 1963).

included claims to be a water diviner and a magician.<sup>53</sup> His love for making friends<sup>54</sup>, adventure, outdoor life, and rugged existence, only go to confirm my belief that the best judges are as much lovers of life and it is these curious and peculiar interests and experiences that enrich their view of the everyday travails of human existence that they are asked to adjudicate upon.

Vivian Bose belongs to distant memory now, but thankfully, he is not forgotten. Even in these cynical times, one cannot read his judgements without being moved by the thoughts and its elegant expression. Like all great artists and unlike many of his successors, he did not lose sight of his canvas when painting his masterpieces. We could no better than turning back to him, to aid us in reviving our threatened constitution.

<sup>53</sup> M. Hidayatullah's beautiful tribute to Justice Vivian Bose in, M. Hidayatullah, A judge's miscellany (1972), at page 143.

<sup>54</sup> *Ibid.* According to Justice Hidayatullah, in A judge's miscellany (1972), Bose had a "larger circle of friends than any man I know and this circle is all around the world." This would also explain his popularity in the International Commission of Jurists, an organization that he served as its President.

# EMPIRICAL LEGAL STUDIES AND CONSTITUTIONAL COURTS

Nuno Garoupa\*

#### I. INTRODUCTION

Empirical legal studies have emerged lately as an important area in legal scholarship. Notwithstanding, courts have been the focus of empirical work by political scientists and economists for more than twenty years. The U.S. Supreme Court has been the focus of much attention by empirical scholars. Different theories have been developed to explain judicial decision-making in the U.S. Supreme Court. Formalists take the view that constitutional judges simply interpret and apply the Constitution in a conformist view of precedents. In a completely different perspective, the attitudinal model sees judicial preferences, with special emphasis on ideology, as the main explanatory model. Finally, agency theorists recognize the importance of judicial preferences but argue that they are implemented taking into account political and institutional realities.

We probably know more about the U.S. Supreme Court than any other court in the world. Empirical studies about courts outside of the United States are growing but still limited.<sup>4</sup> Concerning the

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- 1 A good introduction is provided by Robert M. Lawless, Jennifer K. Robbennolt and Thomas S. Ulen, *Empirical Methods in Law*, Aspen Publishers (2009).
- 2 See, among others, Barry Friedman, The Politics of Judicial Review, *Texas Law Review* 84, 256 (2005), and Matthew D. McCubbins and Daniel B. Rodriguez, "The Judiciary and the Role of Law: A Positive Political Theory Perspective", in B. Weingast and D. Wittman (eds.), *Handbook of Political Economy*, Oxford University Press, (2006).
- 3 See, among others, Saul Brenner and Harold J. Spaeth, Ideological Position as a Variable in the Authoring of Dissenting Opinions on the Warren and Burger Courts, American Politics Quarterly 16, 317 (1988); J. A. Segal and A. D. Cover, Ideological Values and the Votes of U.S. Supreme Court Justices, American Political Science Review, 83, 557 (1989); Lee Epstein and Jack Knight, The Choices Justices Make, Congressional Quarterly Inc. (1998); Jeffrey A. Segal and Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited, Cambridge University Press (2002); Thomas G. Hansford and James F. Springgs II, The Politics of Precedent on the US Supreme Court, Princeton University Press (2006).
- 4 For example, on Canada, see C. Neal Tate and Panu Sittiwong, Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations, *Journal of Politics* 51, 916 (1989); Benjamin Alarie and Andrew J. Green, Should They All

particular case of constitutional courts, the empirical literature is recent, with emphasis on Germany<sup>5</sup>, France<sup>6</sup> and Italy.<sup>7</sup> The slow start of empirical scholarship about courts outside of the United States, and particularly constitutional courts, can be explained by the difficulty in accessing data. However, most constitutional courts now report online their decisions. Many courts have invested seriously in new information technologies and allow online access to decisions back to the early 1980s. Technology has made access to information easier, therefore reducing the costs to produce serious empirical studies in constitutional law.

There are still significant language barriers, mainly due to the fact that decisions are in the native language. A short summary in English is usually inappropriate and incomplete for purposes of coding and statistical testing. Not surprisingly, the development of empirical constitutional law studies follows closely the influence of econometrics on local legal communities. Unfortunately empirical legal studies have been received harshly by traditional formalist legal scholarship, much

Just Get Along? Judicial Ideology, Collegiality, and Appointments to the Supreme Court of Canada, University of New Brunswick Law Journal (2008) and Andrew J. Green and Benjamin Alarie, Policy Preference Change and Appointments to the Supreme Court of Canada, Osgoode Hall Law Journal 47, 1 (2009). On Germany, see Martin R. Schneider, Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal, European Journal of Law and Economics 20, 127 (2005). On Japan, see J. Mark Ramseyer and Eric B. Rasmusen, Measuring Judicial Independence: The Political Economy of Judging in Japan, University of Chicago Press, (2003), and on the particular case of the Japanese Supreme Court, see J. Mark Ramseyer and Eric B. Rasmusen, The Case for Managed Judges: Learning from Japan after the Political Upheaval of 1993, University of Pennsylvania Law Review 154, 1879 (2006). On Taiwan, Korea and Mongolia, see Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases, Cambridge University Press (2003). On Argentina, see Rebecca Bill Chávez, The Rule of Law in Nascent Democracies: Judicial Politics in Argentina, Stanford University Press (2004) and G. Helmke, Courts under Constraints: Judges, Generals, and Presidents in Argentina, Cambridge University Press (2004). On Chile, see Lisa Hilbink, Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile, Cambridge University Press (2007). More generally, see Diana Kapiszewski and Matthew M. Taylor, Doing Courts Justice? Studying Judicial Politics in Latin America, 64 Perspectives in Politics 741 (2008).

- 5 See Georg Vanberg, The Politics of Constitutional Review in Germany, Cambridge University Press, (2005).
- 6 See Raphael Franck, Judicial Independence under a Divided Polity: A Study of the Rulings of the French Constitutional Court, 1959-2006, Journal of Law, Economics and Organization
- See A. Breton and A. Fraschini, The Independence of the Italian Constitutional Court, Constitutional Political Economy 14, 319 (2003); Nadia Fiorino, Fabio Padovano and Grazia Sgarra, The Determinants of Judicial Independence: Evidence from the Italian Constitutional Court (1956-2002), Journal of Institutional and Theoretical Economics 163, 683 (2007); and Fabio Padovano, The Time-Varying Independence of Italian Peak Judicial Institutions, Constitutional Political Economy 20, 239 (2009).

the same way as law and economics and other legal scholarly innovations.<sup>8</sup> Consequently, the production of empirical studies in constitutional law has been much slower than we would desire and almost entirely the work of political scientists.

The constitutional courts have attracted considerable attention from theoretical perspectives in political science and economics well before the movement for empirical legal studies started. There is a consensus among political scientists and lawyers that the appropriate design of judicial review plays an important role in assessing and analyzing constitutional frameworks. Constitutional adjudication is a central element in determining the various dimensions of political and legal reform. Long-run interests usually conflict with political short-run opportunism. Therefore, the precise mechanism by which constitutional adjudication responds to these conflicting goals determines political and economic stability.

Macro empirical economic analysis seems to show that independent courts and constitutional review are factors that should be taken into account not only if the goal is to guarantee political freedom, but also to protect economic liberties and foster economic growth.<sup>10</sup> In that light, empirical studies in constitutional law provide for more detailed evidence that should help scholars to understand how local institutions promote economic growth and political development.

Clearly we cannot understand the role of a given constitutional court without paying attention to the political process underlying the production of the Constitution.<sup>11</sup> In that respect, generalizations and uniform solutions are likely to be incorrect because the design of a

<sup>8</sup> See, for example, Nuno Garoupa and Thomas S. Ulen, The Market for Legal Innovation: Law and Economics in Europe and the United States, *Alabama Law Review* 59, 1555 (2008).

<sup>9</sup> A good introduction is provided by Tom Ginsburg, Economic Analysis and Design of Constitutional Courts, *Theoretical Inquiries in Law* 3 (2002).

<sup>10</sup> See, among others, Rafael La Porta, Florencio Lopes-de-Silanes, Christian Pop-Eleches, Andrei Shleifer, Judicial Checks and Balances, Journal of Political Economy 111, 445 (2004) and Lars P. Feld and Stefan Voigt, "Judicial Independence and Economic Growth: Some Proposals Regarding the Judiciary," in Roger D. Congleton and Brigitta Swedenborg (eds.), Democratic Constitutional Design and Public Policy. Analysis and Evidence, MIT Press (2005), although one of their findings is that constitutional review powers vested in the highest judicial instance reduce economic growth.

<sup>11</sup> See Donald Lutz, Toward a Theory of Constitutional Amendment, American Political Science Review 88, 355 (1994); Robert Cooter, The Minimax Constitution as Democracy, International Review of Law and Economics 12, 292 (1992); Francisco Ramos, The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions, Review of Law and Economics 2, 103 (2006).

constitutional court corresponds to specific trade-offs as projected by the constitutional legislators.<sup>12</sup> It seems to us that empirical studies in constitutional law are more appropriate for the understanding of local conditions than macro empirical analyses.

Whatever model prevails, judicial decision-making in a constitutional court, as in any court, is the result of personal attributes, <sup>13</sup> attitudes (including policy or ideological preferences), peer pressure, intra-court interaction (a natural pressure for consensus and court reputation; a common objective to achieve supremacy of the constitutional court), and party politics (loyalty to the appointer) within a given constitutional and doctrinal environment. <sup>14</sup> Constitutional judges are appointed by heavily politicized bodies, and could be heavily influenced by political parties when these play an active role in the appointment process. Therefore, judicial independence becomes an issue. However, judges are also somehow interested in maintaining a certain *status quo* that does not hurt the prestige of the court, thereby, keeping some distance from active party politics.

Conformity between constitutional judges and party interests can be explained by two different phenomena. First, given the political choice of constitutional judges, they exhibit the same preferences as the party that selects them (i.e., there is an ideological consensus). Second, when the constitutional judges do not have lifetime appointments, they might want to keep a good relation with the party

<sup>12</sup> In fact, a point already mentioned by Hans Kelsen in his own comparative work, see Lech Garlicki, Constitutional Courts versus Supreme Courts, *International Journal of Constitutional Law* 5, 44 (2007).

<sup>13</sup> For judicial preferences, see Richard Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else), Supreme Court Economic Review 3, 1 (1993); Richard Posner, Judicial Behavior and Performance: An Economic Approach, Florida State University Law Review 32, 1259 (2005); and Richard Posner, How Judges Think, Harvard University Press (2008). See also Frank H. Easterbrook, What's so Special about Judges?, University of Colorado Law Review 61, 773 (1990); Laurence Baum, What Judges Want: Judges' Goals and Judicial Behavior, Political Research Quarterly 47, 749 (1994), Frederick Schauer, Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior, University of Cincinnati Law Review 68, 615 (2000); and Chris Guthrie, Jeffrey J. Rachlinski and Andrew J. Wistrich, Blinking on the Bench: How Judges Decide Cases, Cornell Law Review 93, 1 (2008).

<sup>14</sup> For example, see the models developed by Tracey E. George and Lee Epstein, On the Nature of Supreme Court Decision Making, American Political Science Review 86, 323 (1992); Andrew D. Martin and Kevin M. Quinn, Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the US Supreme Court, Political Analysis 10, 134 (2002); or Jeffrey R. Lax and Charles M. Cameron, Bargaining and Opinion Assignment on the US Supreme Court, Journal of Law, Economics and Organization 23, 276 (2007).

that selected them for future appointments to the court or elsewhere (regardless of whether the terms are renewable or not). In both models, judges have a political bias incentive and are not fully independent, but the underlying reasons are significantly different.

The process of recruitment and the appointment of judges are necessarily major variables in the design of the constitutional courts. Overly party-oriented mechanisms are especially bad for independent judicial review, 15 but are quite likely to smooth conflicts with the other bodies of governance. Cooperative mechanisms that require a supermajority deliver consensual constitutional courts, which are more deliberative than active lawmakers. 16 Representative mechanisms can create *de facto* party quotas, depending on the stability of the party system.

The extent to which constitutional judges respond to party interests is a matter for adequate empirical work. In this paper, we discuss the growing empirical evidence on constitutional courts, in particular those of the so-called Kelsenian or German-type. We start by looking at the design of these courts, and argue that their politicization is inevitable (section 2). However, there are important aspects that limit the extent to which ideology plays an overwhelming role in constitutional adjudication. We then discuss several constitutional courts to assess the balance between party influence and other goals (section 3). Conclusions are addressed in the final section.

## II. CONSTITUTIONAL COURTS: THEORY

The design of most constitutional courts in the Western world has been influenced by the original ideas and legal theories of Hans Kelsen.<sup>17</sup> Under this legal theory, ordinary judges are mandated to apply law as legislated or decided by the parliament (the legislative branch of government). Consequently there is subordination of the

<sup>15</sup> Theories of judicial independence include William Landes and Richard Posner, The Independent Judiciary in an Interest-Group Perspective, *Journal of Law and Economics* 18, 875 (1975); R. Epstein, The Independence of Judges: The Uses and Limitations of Public Choice, *Brigham Young University Law Review* 827 (1990); J. Mark Ramseyer, The Puzzling (In)dependence of Courts, *Journal of Legal Studies* 23, 721 (1994).

<sup>16</sup> See Ginsburg, supra 4, and references therein.

<sup>17</sup> For a general discussion, see A. Stone Sweet, Governing with Judges: Constitutional Politics in Europe, Oxford University Press (2000). Also see Hans Kelsen, Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution, Journal of Politics 4, 183 (1942).

ordinary judges to the legislator. However, due to a strict hierarchy of laws, judicial review is incompatible with the work of an ordinary court. Hence, only an extrajudicial organ can effectively restrain the legislature and act as the guarantor of the will of the constitutional legislator. The Kelsenian model proposes a centralized body outside of the structure of the conventional judiciary to exercise constitutional review. This body, conventionally called the constitutional court, operates as a negative legislator because it has the power to reject legislation (but not propose legislation).<sup>18</sup>

In fact, the centralization of constitutional review in a body outside of the conventional judiciary has been important to secure independence and the commitment to democratization after a period of an authoritarian government in many countries. The judiciary is usually suspected of allegiance to the former regime, and hence, a new court is expected to be more responsive to the democratic ideals contemplated in the new constitution.<sup>19</sup>

The application of the Kelsenian model in each country has conformed to local conditions, and therefore, the competences and organization of constitutional courts are usually much broader than a simple "negative legislator." *Ex ante* review of legislation (i.e., before promulgation) has been extended to *ex post* review (i.e., after promulgation) in many countries. Abstract review (such as traditionally in France) has been conjugated with concrete review (such as in Germany or in Spain). Most constitutional courts have expanded ancillary powers in different, but important, areas such as verifying elections, regulating political parties (illegalizing them or auditing their accounts), and other relevant political and administrative functions, such as performing as judicial council as seen in Taiwan.<sup>20</sup>

The Kelsenian-type courts for constitutional review exist now in most countries of the EU of civil law tradition, with the Netherlands and the Scandinavian countries being the most striking exceptions. Also most former communist Central and Eastern countries have now

<sup>18</sup> The notion of a "negative legislator" is based on the idea that the court expels legislation from the system and therefore shares legislative power with the parliament.

<sup>19</sup> See Ginsburg *supra* 4 on Taiwan, Mongolia and Korea. See more generally Garlicki, *supra* 12.

<sup>20</sup> See Ginsburg supra 4 for discussion of ancillary powers of constitutional courts in Asia. Also Tom Ginsburg, "Beyond Judicial Review: Ancillary Powers of Constitutional Courts," in Tom Ginsburg and Robert A. Kagan (eds.), Institutions and Public Law, (2005).

developed a similar institutional structure. France has embraced a much narrower judicial review of legislation in accordance with their traditions, but now expanded to include a form of concrete review.<sup>21</sup> Clearly, the institutional design followed in Germany and in Spain broadens the initial Kelsenian model, whereas the original French model, with narrower competences and almost exclusively preventive review, offers less than what is expected from a Kelsenian-type court. Indeed, the Austrian model of the early 1920s limited constitutional review to abstract review of the legislation, but incidental referrals that effectively provided for concrete review were introduced not much later, in the 1930s.

Clearly, concrete review blurs the separation between the constitutional court and the rest of the judiciary either in the form of incidental referrals or of direct constitutional complaints. It induces the constitutional court to interfere with judicial decisions and participate in the resolution of individual cases, which was not intended by the original Kelsenian model. The consequence is a less transparent delimitation of jurisdictions, and consequently the emergence of conflicts of competence between the constitutional court and other higher courts.<sup>22</sup> Preventive review by its very nature provides a weak position for a constitutional court to try to condition other courts because there is no obvious relation between the review of legislation in abstract and concrete adjudication. However, given the importance of the constitutional court, creative techniques can be developed to achieve such goals. For example, the French's idea of "conforming interpretation," although dependent on the voluntary compliance by other courts, is still conceptually influential.<sup>23</sup> Yet, where abstract review is very limited (such as in Italy or in South Korea), the ability to shape legislative outcomes is reduced and constrains the political influence of the court.24

<sup>21</sup> See Alec Stone Sweet, The Politics of Constitutional Review in France and Europe, International Journal of Constitutional Review 5, 69 (2007). See also Alec Stone Sweet, The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective, Oxford University Press, (1992) and Henry J. Abraham, The Judicial Process, Oxford University Press, (1998) [discussing the French constitutional court in chapter 7]. The introduction of concrete review after the 2008 constitutional reform will increase the similarities between the French Conseil Constitutionnel and the other Kelsenian courts in Europe.

<sup>22</sup> See Garlicki, supra 12.

<sup>23</sup> See Garlicki, supra 12.

<sup>24</sup> See Sweet, supra 17.

The possibility of a conflict between the major courts has substantive legal and political implications.<sup>25</sup> First, it puts pressure on constitutional judges to achieve a coherent and prestigious body of constitutional jurisprudence or doctrines.<sup>26</sup> Therefore, it transforms the nature and scope of constitutional review by empowering the court and putting pressure for a façade of apolitical decision-making. Second, it increases the political value of constitutional review because these conflicts might provide an indirect mechanism for influencing the judiciary. The natural inclination for the constitutional court is to expand competences (the progressive constitutionalization of private law in several jurisdictions is just an example) that make it politically more relevant. Third, the balance of power is shaped by the constitution itself, that is, the extent to which a constitutional court is not conceived as a negative legislator, but as a positive legislator with formidable powers of statutory interpretation.<sup>27</sup> However, once a positive legislator, a constitutional court can act either as a counterweight against the parliamentary majority or as a substitute if no stable parliamentary majority exists.<sup>28</sup>

Whereas, concrete review "judicializes" constitutional courts, preventive review has the opposite effect. Mere preventive review makes a constitutional court less judicial and more political in nature.<sup>29</sup> Constitutional law cannot be apolitical. Inevitably constitutional courts as idealized by Kelsen are political in nature.<sup>30</sup>

Having established that a constitutional court is political, we should recognize that being political in nature is not the same as being politicized. We can expect partisan politics to exert some influence, either by common ideological goals (filtered through the appointment mechanism) or by direct pressure. However, politics inside the court could differ from straight partisan agendas. The difference between partisan politics and judicial politics can be explained by the court

<sup>25</sup> See discussion by Nuno Garoupa and Tim Ginsburg, Building Reputation in Constitutional Courts: Party and Judicial Politics, mimeograph (2010) (presenting a complete theory of judicial politics in the context of the Kelsenian courts).

<sup>26</sup> In the limit, developing a court-made consistent and coherent constitution that supplements or even replaces the original text. See, for example, Garlicki, *supra* 12.

<sup>27</sup> See the Spanish case, for example, in Leslie Turano, Spain: Quis Custodiet Ipsos Custodes?: The Struggle for jurisdiction between the *Tribunal Constitucional* and the *Tribunal Supremo*, International Journal of Constitutional Law 4, 151 (2006).

<sup>28</sup> See Sweet, supra 17.

<sup>29</sup> Id.

<sup>30</sup> Id.

exposure to diverse audiences.<sup>31</sup> For example, differences in the professional background are usually presented as an explanation for the different propensities to judicial activism.<sup>32</sup> Certainly the particular nature of the institution and the political process determine the extent to which partisan agendas prevail.

The double role as a political and a judicial institution (not supported by the original "negative legislator" model but now pursued by all existing constitutional courts in Europe) creates an inevitable "judicialization" of politics for three reasons. First, as a consequence of the particular position of the constitutional court, the goal of selfexpanding institutional power affects the delicate balance between the judicial and the political structures (at the expense of the higher courts and the other powers of government). Second, naturally most of the expansion of institutional power and influence generates conflict. Third, political diffusion makes the role of a constitutional court more important. The constitutional court provides the institutional body for the judiciary to interplay with the politics. The inevitable "judicialization" of politics necessarily politicizes the court. Hence, politics inside the constitutional court becomes unavoidably contaminated by party politics and ideological agendas. The stakes are simply too relevant and important for political parties not to interfere.

We can conclude that each constitutional court will therefore exhibit two important political dimensions: judicial politics (in an effort to expand competences, enhance prestige, and achieve supremacy over the higher courts) and partisan politics (in the sense of advancing ideological goals). In democratic regimes, judicial politics necessarily creates peer-pressure within the court to comply with an apolitical façade and provide a coherent body of case law. Advancing ideological goals divides the court, and politicizes the court's decisions. Hence, the tension between judicial and partisan politics is inevitable.<sup>33</sup>

Judicial activism can be regarded as a court strategy from several perspectives. The most immediate and standard interpretation of judicial activism is to give content to particular ideological agendas.<sup>34</sup> However, judicial activism could also be a response of the court to

<sup>31</sup> See Garoupa and Ginsburg, supra 25.

<sup>32</sup> See Garlicki, supra 12.

<sup>33</sup> See Garoupa and Ginsburg, *supra* 25 (also making the point that, in authoritarian regimes, unanimity in the court could be perceived as lack of independence from the government).

unwelcomed intromissions by the other powers of government, thus providing the needed legal doctrines. Finally, judicial activism can also help the court in establishing or enhancing prestige with the higher courts if focused on promoting coherent case law. As a consequence, judicial activism is consistent with different degrees of politicization.<sup>35</sup>

From an empirical perspective, the relevant question is the extent to which the behavior of constitutional judges can be systematically explained by ideology or partisan alignment. There is plenty of anecdotal evidence of politicization on constitutional courts. The media and other sources of information provide abundant accounts of particular decisions or significant controversies. The advantage of a serious empirical study is to detect if there is a pattern on judicial behavior, or if the anecdotal evidence is just that, anecdotal.

At the same time, as easily derived from our discussion, even the most ideologically driven judges will occasionally engage in commitment or consensus building given the multiplicity of goals. Observing patterns of unanimity versus fragmentation is not enough to prove or disprove the influence of ideology in judicial behavior. Only empirical work that controls for all the appropriate variables and recognizes the particular determinants in a specific jurisdiction can provide some serious evidence in this respect.

For practical reasons we have noted before (mostly referring to traditional limitations on available data), that there are not many consistent and coherent empirical studies about the Kelsenian courts. In the next section, we discuss the existing empirical studies.

#### III. CONSTITUTIONAL COURTS: EMPIRICAL EVIDENCE

The precise characteristics of Kelsenian-type constitutional courts around the world vary widely, namely in composition (they go from seven judges in Latvia to sixteen judges in Germany), appointment

<sup>34</sup> For a general discussion see Barry Friedman, The Politics of Judicial Review, *Texas Law Review* 84, 256 (2005), and Matthew D. McCubbins and Daniel B. Rodriguez, "The Judiciary and the Role of Law: A Positive Political Theory Perspective," in B. Weingast and D. Wittman (eds.), *Handbook of Political Economy*, Oxford University Press, (2006).

<sup>35</sup> For a discussion of judicial activism by a Continental constitutional court, see Donald Kommers, The Federal Constitution Court in the German Political System, *Comparative Political Studies* 26, 470 (1994). There is also evidence of judicial activism by the French constitutional court since the early 1980s. See, for example, Michael H. Davis, The Law/ Politics Distinction, the French Conseil Constitutionnel and the US Supreme Court, *American Journal of Comparative Law* 34, 45 (1986) and John Bell, Principles and Methods of Judicial Selection in France, *Southern California Law Review* 61, 1757 (1988).

mechanism, term duration (from four years in Turkey to life in Austria and Belgium), the possibility of renewal, the minimum number of career judges (frequently the actual number will be higher), the different possible types of review, and procedural rules (reporting votes and publication of concurring and dissenting opinions). Clearly, the conclusion can only be that there is significant diversity of institutional arrangements within the Kelsenian constitutional courts.

Diversity of institutional arrangement compromises easy generalizations from empirical work based solely on data from one particular country. However, as we argue in this section, the current empirical evidence for several countries suggests common aspects that presumably could constitute a set of possible generalizations.

The empirical evidence shows that constitutional courts are politicized in the sense that some appropriate measure of party alignment does predict the behavior of judges. At the same time, the empirical work points out that many other contextual variables also matter. Consistent with our theoretical discussion, ideology or party alignment is not the only relevant explanatory variable of judicial behavior. Finally, the politicization of the court usually follows a more complex framework than a simple left-right division. Such complexity reflects the political importance of constitutional adjudication (for example, federalism, religion, linguistic, or cultural divisions), but also the influence of diverse interests in shaping both the composition and the workload of the court. Finally, most empirical studies are based on the most salient cases (those that are likely to be more politicized), and therefore the importance of party alignment is likely to be overestimated. Many other relevant variables exist to predict judicial behavior. Unlike traditional formalists, we should not downplay party alignment. However, we should not incur in the opposite mistake, and conclude that only party alignment explains judicial behavior.

#### (a) GERMANY

The German constitutional court was designed after WWII following the Kelsenian model and the Austrian experience in the 1930s. It was contemplated by the 1949 Basic Law. The extensive powers of the court were advocated having in mind the need to provide an effective mechanism to exert control over legislation when the career judiciary could not be trusted. Apparently, the provisions about the new constitutional court were among the least controversial issues of

the new Constitution.36

The Federal Constitutional Court Act, 1951 established the court. The sixteen constitutional judges are appointed by the parliament; eight by the lower house (the Bundestag) and eight by the upper house (the Bundesrat). The German constitutional court is usually composed of Supreme Court judges (six as a mandatory minimum), law professors, and former politicians (usually formal regional or federal ministers of justice). As a consequence of the appointment mechanism (supermajority in the federal parliament), there is a need for a consensus between major parties. Constitutional judges are effectively appointed in party tickets.<sup>37</sup> Hence the fact is that the supermajority requirement (a two-thirds majority) has created a *de facto* quota system.<sup>38</sup> Traditionally, the two major parties divide the seats with the occasional appointment of a judge from one of the minor parties to reflect parliamentary composition and ongoing governmental coalitions.<sup>39</sup>

The politicization of the German constitutional court has been observed and studied by constitutional law scholars. Naturally, there have been tensions between the federal government and the court from the early start, in particular, when the parliamentary majority did not coincide with the court majority.<sup>40</sup> Initially, German federal politics were dominated by the Christian-democrats. The social-democrats were confined to a minority status until the 1960s (hence, calling for interventions of the constitutional court was a natural part of the political strategy). The alternation of both parties in government since the 1960s has empowered the court to solve deadlocks and influence policy-making. Specific cases highlighted the political dimension of the court such as *Party Finance* in 1992 or the *crucifix* 

<sup>36</sup> Vanberg, supra 5.

<sup>37</sup> See discussion by Rainer Nickel, "The German Federal Constitutional Court: Present State, Future Challenges," in Andrew Le Sueur (ed.), *Building the UK's New Supreme Court: National and Comparative Perspectives*, Oxford University Press (2004).

<sup>38</sup> See Kommers, supra 35, and Vanberg, supra 5.

<sup>39</sup> As a result, the social-democrats (SPD) and the Christian-democrats (CDU/CSU) usually have seven or eight judges, whereas the minor parties such as the liberals (FDP) or the Green Party might have one judge. From 1983 to 2003, there were fifty constitutional judges: twenty-four affiliated or associated to the Christian-democrats (two of them with the Bavarian wing of the party), twenty-two with the social democrats, three with the liberals, and one with the ecologists. See Vanberg, *supra* 5.

<sup>40</sup> See Vanberg, supra 5.

decision in 1995.<sup>41</sup> Other cases have reflected the delicate balance between the political and judicial spheres of influence from the German constitutional court. Some authors argue that because the court is effectively unaccountable, this has contributed to the growing "judicialization of legislation" because laws are passed with an eye on the court reaction.<sup>42</sup> If the role of the German constitutional court has contributed to the judicialization of politics in Germany, naturally, it has further developed the politicization of the court.<sup>43</sup>

The most comprehensive empirical study on the German constitutional court thus far does not look in detail into the voting patterns of the constitutional judges (the possibility of separating opinions was introduced in the early 1970s).44 It looks at the decision for unconstitutionality in the aggregate (court decision, not individual vote) for all 329 decisions on the constitutional review of legislation from 1983 to 1995. The regression analysis shows that they are explained by oral arguments being held, 45 political support for unconstitutionality,46 and affected government claims unconstitutionality. Constitutionality seems more likely in complex policy areas (presumably more politicized or ideologically driven as seen in economic regulation, social insurance, federal budget issues, party finance, and civil servant compensation). Judicial support for unconstitutionality<sup>47</sup> does not seem to be statistically significant. One possible conclusion seems to be that the German constitutional court is more sensitive to political than judicial controversies. In fact, the underlying hypothesis that we should expect the German constitutional court to be more deferent when the legislative majority has a particular strong interest does not seem to find strong support (there seems to be no distinction between state and federal law in this respect). One possibility is that transparency and public opinion accountability dominates decision-making. 48 Alternatively, if political

<sup>41</sup> Id.

<sup>42</sup> See Donald P. Kommers, "Autonomy versus Accountability: The German Judiciary," in Peter H. Russell and David M. O'Brien (eds.), *Judicial Independence in the Age of Democracy, Critical Perspectives around the World*, University of Virginia Press, (2001)

<sup>43</sup> Christine Landfried, The Judicialization of Politics in Germany, *International Political Science Review* 15, 113 (1994).

<sup>44</sup> See Vanberg, supra 29.

<sup>45</sup> Usually the cases with great political significance, 44 of the 329 cases.

<sup>46</sup> Measured by briefs being filed by other political actors or governments other than the government in question.

<sup>47</sup> Measured by briefs filed by lower courts.

<sup>48</sup> See Vanberg, supra 29.

ideology plays a role and a *de facto* quota system prevails, we should not expect a strong correlation between the decision of the court and the particular interests of a given legislative majority.

These general results seem to be confirmed by a more recent study.<sup>49</sup> This empirical work tests the correlation between the party affiliation of the pivotal judge and oppositional success empirically for all abstract reviews filed between 1974 and 2002. It concludes that the likelihood of an oppositional victory or defeat varies with the ideological position of the pivotal judge. The author concludes that German constitutional judges decide on the basis of their political preferences.

#### (b) FRANCE

The Conseil Constitutionnel is the highest constitutional authority in France.<sup>50</sup> The French constitutional court was conceived as a political body that progressively evolved in its judicial competences. Not surprisingly, politics has been part of the court from its early stages. During the Fifth Republic, in an effort to facilitate the centralization of the executive branch, and to limit the power of the parliament, the Constitution of 1958 established the French Constitutional Council. The founders of the Conseil saw it as a referee established to settle the conflicts of legislation between the executive and the parliament. The Conseil was a natural reaction against the political situation of the Fourth Republic (De Gaulle intended a significant power shift from the parliament to the government).<sup>51</sup>

The *Conseil* is not formally a part of the French judiciary. For example, the impact from the decisions of the *Conseil* is traditionally concentrated exclusively on the legislature (it is a form of abstract and preventive constitutional review with no formal access procedure for individuals other than specific political actors).<sup>52</sup> The *Conseil* is

<sup>49</sup> See Christoph Hönnige, The Electoral Connection: How the Pivotal Judge affects Oppositional Success at European Constitutional Courts, West European Politics 35, 963 (2009).

<sup>50</sup> See Davis, supra 35, and Michael H. Davis, A Government of Judges: An Historical Re-View, American Journal of Comparative Law 35, 559 (1987). Also see Tallon, The Constitution and the Courts in France, American Journal of Comparative Law 27, 567 (1979). See also discussion by Sylvain Brouard, 2009, The Politics of Constitutional Veto in France: Constitutional Council, Legislative Majority and Electoral Competition, West European Politics 32, 384.

<sup>51</sup> Sweet, supra 21.

<sup>52</sup> Concrete review has been introduced recently (July 2008). Under the terms of the new article 61-1, the *Cour de Cassation* and the *Conseil d'Etat* can refer to the *Conseil Constitutionnel* in matters of law, a mechanism to be developed by statute soon. At the same time, the

composed of nine members who serve a nine-year, non-renewable term. The council is renewed in thirds every three years. Three of its members are named by the President of the Republic, three by the President of the National Assembly, three by the President of the Senate. In addition to the nine members, former Presidents of the Republic are members of the constitutional council for life.<sup>53</sup> The appointments to the *Conseil* are not always judges, in a few rare cases they are not even legally trained,<sup>54</sup> but rather are predominantly professional politicians.<sup>55</sup> Therefore, the most important criterion for appointment to the council is political affiliation and membership.<sup>56</sup>

Individual behavior cannot be monitored due to the collegiality of the *Conseil*. The secret nature of judicial deliberations, the façade of unanimity, the lack of dissenting opinions, the lack of methods for detecting division, the lack of public discussion or hearings are impediments to provide the ideal framework for empirical analysis.<sup>57</sup> However, the politicization of the council at later stages became clear.<sup>58</sup>

An extraordinary departure from the conformist approach was illustrated by the decision to find unconstitutional an important amendment to the law governing private associations in 1971 (after the death of General De Gaulle), marking what many scholars call the "birth of judicial politics in France." However, the 1980s would see further changes. In 1983 and 1986, the socialists, in power for the first time since the creation of the Fifth Republic, sought to ensure greater representation on the council, particularly, in anticipation of the

minutes verbatim of the plenary meetings and decisions will become public after twenty-five years, now available up to 1983 [Loi Organique sur le Conseil Constitutionnel, July 2008, Loi Organique 2008-695].

<sup>53</sup> Article 56 of the French Constitution of 1958.

<sup>54</sup> See Bell, *supra* 35. He argues that the goals of selection aim at achieving competence, legitimacy, and participation. In his view, this naturally results in procedural elitism in selection where legal competences and judicial self-participation are purely instrumental.

<sup>55</sup> Sweet, supra 21.

<sup>56</sup> Sweet, supra 21, and Davis, supra 35 and 49.

<sup>57</sup> See related discussion by Jean Louis Goutal, Characteristics of Judicial Style in France, Britain and the USA, *American Journal of Comparative Law* 24, 43 (1976). Notice that procedure is very different between the constitutional court and the regular courts in France since in the latter the statement must be offered in the context of a particular case; regular courts hear cases, the *Conseil* does not. It solves cases by legislative empowerment of different affected interests rather than particular situations.

<sup>58</sup> See Sweet, supra 21.

<sup>59</sup> See Peter L. Lindseth, Law, History and Memory: "Republican Moments" and the Legitimacy of Constitutional Review in France, Columbia Journal of European Law 3, 49 (1997), and Sweet, supra 19.

electoral defeat in March 1986 and the "cohabitation" between a socialist president and a conservative prime minister that followed. The transfers of power in 1981 and 1986 created a gap between the council's interpretation of the republican tradition and the contemporary partisan political concerns of its nominators. The hostility of a conservative court against a socialist executive branch departed from the traditional spirit of the 1958 Constitution, where the court was an ally of the government. This trend was further pursued in the 1990s due to both the character of the people nominated and the nature of the tasks. The court became a battleground for socialists and Gaullists.

The alternation between right and left after the 1980s is at the heart of the empowerment of the council. For example, referrals by the opposition have increased from the early 1980s.<sup>62</sup> The political parties tried to use the constitutional court to block action by the executive, which was dominated by the other party. The court responded by developing a kind of judicial activism alien to French legal culture. Furthermore, the incorporation of rights into the Constitution through constitutional review since the early 1970s has contributed to the empowerment of the court as well as to the politicization of the court.

Given the way procedural rules were designed and due to the fact that there is no published concurring or dissenting opinions, the façade of unanimous decisions prevails. However, many legal scholars have tried to explain the degree of politicization in the court. For example, the accusation that the members of the council decide on the basis of ideology or political formations, and not according to the law, has been rejected by the observation that case law is coherent and consistent. However, not only is this the natural outcome of secret voting, but clearly makes sense in the setting of what we have designated as judicial politics dimension. The weak position of the constitutional court vis-à-vis the judiciary makes the achievement of a coherent body of law as the priority and main goal. Furthermore, a stable median voter in the court can easily explain such observation. Clearly, since the 1980s, the balance between right and left has been stable, reinforcing the view that a political court can produce a coherent and consistent body of law.

<sup>60</sup> See Sweet, supra 21.

<sup>61</sup> Id.

<sup>62</sup> Id.

<sup>63</sup> See Sweet, supra 21.

Recently one important article has looked empirically at the French case in detail.<sup>64</sup> It studies the 526 decisions provided by the court between 1959 and 2006, distinguishing the laws adopted by right-wing governments (1958 to 1981, 1986 to 1988, 1992 to 1997, and from 2002 to the end of the sample) and left-wing governments (1981 to 1986, 1998 to 1992, and 1997 from 2002). The dependent variable is a decision for unconstitutionality. The explanatory variables include the content or type of law, the composition of the court (in terms of ideology and background), the political actor who requested the constitutional review, and the political situation (for example, "cohabitation"). The main conclusion seems to be that a more divided polity (in the period 1997 to 2002 while "cohabitation" took place) increases the likelihood of unconstitutionality. Some particular laws, such as those related to the budget, are also more likely to be declared unconstitutional. This article clearly shows that the French Constitutional Court is politicized. However, constitutional judges seem to respond to certain political situations such as "cohabitation" which could indicate that the role played by ideological agendas varies according to particular political circumstances.65

# (c) ITALY

The Italian constitutional court was established in 1955, although, contemplated since 1948 by the Italian Constitution after WWII. The political nature of the court was clear from the beginning because it was favored by the Christian-democrats (DCI) as a constraint on a left-dominated parliament. In fact, while the Christian-democrats enjoyed an overall majority, the establishment of the court was delayed. Earlier decisions by the court were not turbulent. However, this changed during the 1980s. The court became more active with respect to executive decrees that resulted in a considerable increase in the caseload. During the 1990s, with the political crisis, the court moved into a more reluctant intervention mode. However, with respect to regional conflicts, the court has emerged as an important political actor, particularly in the preventive control of regional laws.

There are fifteen judges appointed by three different actors, which appoint five judges each. All of them are selected among active or retired judges, professors of law, or lawyers with more than twenty

<sup>64</sup> See Franck, supra 6.

<sup>65</sup> A result largely confirmed by Hönnige, supra 49.

<sup>66</sup> See Mary L. Volcansek, Constitutional Politics in Italy, MacMillan Press, (2000).

years of professional experience, for nonrenewable terms of nine years.

The judges appointed by the Parliament require a supermajority (in a joint vote of the two chambers; by a two-thirds majority for the first three rounds, and thereafter, a three-fifths majority). As expected, this has resulted in a structural arrangement that corresponds to a *de facto* quota system. Until 1994, two judges would be allocated to the Christian-democrats, one to the socialists (PSI), one to the communists (PCI), and the last one to a minor party depending on governmental coalitions (republicans, PRI; liberals, PLI; or social-democrats, PSDI).<sup>67</sup> The political storm of the early 1990s did not unravel the arrangement. For a while, vacancies were not filled due to the need for coordination between the new parties. However, after 1996, the slots were reallocated much in same way; the right getting two judges, the left (PDS and allies) also getting two judges, and the last one for minor parties.

The five judges appointed by the President of the Republic tend to belong to the majority that supported his election by the Parliament, although occasionally unexpected or symbolic choices happen (such as promoting gender diversity in the court). The five judges elected by the judiciary have always been (although, not mandatory) career magistrates.

Several mechanisms have been implemented to avoid explicit party alignments, which includes the writing of single opinions, secret votes, and opinions which are approved in such a way that make the decision unitary, where no concurring or dissenting opinion is allowed. Not surprisingly, the empirical work cannot rely on individual behavior.<sup>69</sup>

One early study<sup>70</sup> argues that constitutional judges are likely to be independent in Italy because the former Presidents and Vice-Presidents of the court seem to take jobs afterwards that are not political in nature. A more recent study<sup>71</sup> casts doubt on such casual

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> Seventy-seven constitutional judges served from 1956 until 1997, of which thirty were career judges (twenty-five chosen by the judiciary, three by the President, and two by the Parliament). The President usually appoints law professors, which are also favored by the Parliament (twenty-three appointed by the President and fourteen by the Parliament). A few practicing attorneys have been constitutional judges (three chosen by the President and seven chosen by the Parliament). Some scholars suggest that this mixed appointment mechanism has resulted in ideological factions (left, center, and right), which are not associated with political parties, but rather with personal allegiances.

<sup>70</sup> See Breton and Fraschini, supra 7.

<sup>71</sup> See Fiorino et. al, supra 7.

observations. For example, they show that a share of constitutional judges elected by the magistracy (and present when the court votes) and the age of the President of the court (a relevant indicator of independence when tenure is limited) are positively correlated with unconstitutionality. However, they do not consider how the decision of the court responds to particular ideological or political trends in the composition of the college of voting judges for each individual case. In an ongoing study, we show that, in the context of reviewing regional laws, the court responds to political interests.<sup>72</sup> The correlation between the political affiliation of pivotal judges (President and Reporter) as well as the majority of the court and the legislative majority in the central government is strong. This conclusion seems to confirm that party interests matter in explaining judicial behavior in the Italian constitutional court, at least when assigning federal competences.

# (d) SPAIN

The Spanish constitutional court was established by the 1978 Constitution.<sup>73</sup> It is composed of twelve judges who elect a President among themselves; four judges are chosen by each of the parliamentary chambers (Congress and Senate) with a three-fifths majority, two are nominated by the Government, and the remaining two are selected by the judicial council (*Consejo General del Poder Judicial*). They serve for a nine-year nonrenewable term.<sup>74</sup>

This mixed appointment mechanism has diluted the possibility of a *de facto* stable quota system as the one in Germany, in Italy, or in Portugal (except in the parliamentary appointment, where the majority elects three and the minority elects one judge). However, the ideological identification is easily provided by political appointment or membership of a judicial association (for career magistrates).<sup>75</sup>

<sup>72</sup> See Lucia Dalla Pellegrina and Nuno Garoupa, Choosing between the Government and the Regions: An Empirical Analysis of the Italian Constitutional Court Decisions, mimeograph (2010).

<sup>73</sup> A good introduction to the Spanish constitutional court is provided by Ignacio Borrajo Iniesta, "Adjudicating in Divisions of Powers: The Experience of the Spanish Constitutional Court," in Andrew Le Sueur (ed.), Building the UK's New Supreme Court: National and Comparative Perspectives, Oxford University Press (2004). See also Elena Merino Blanco, Spanish Law and Legal System, Thomson (2nd edition, 2006) [discussing the Spanish constitutional court in chapter 7].

<sup>74</sup> There have been forty-six judges in the period 1980-2010, of which sixteen were career magistrates and twenty-seven were law professors.

<sup>75</sup> Spanish judicial associations are usually associated to a given political party. Twenty-five constitutional judges have been closely identified with the socialists and twenty-one with the conservatives.

The powers of the court include *ex post* abstract review of national and regional laws, to remedy violations of fundamental rights committed by public bodies or courts against individual citizens, and to resolve conflicts of competence or authority between the central government and the regions, and between regions.

The area of constitutional review that has deserved empirical analysis is the case of plea for constitutional review initiated by political actors, such as the prime minister; a number (fifty) of congressmen or senators; the regional governments, or a majority of a regional parliament – in this case, only against laws approved by the state; and the state ombudsman (*Defensor del Pueblo*). Not surprisingly, a major fraction of the court's docket is in matters of constitutional review (apart from individual claims against violation of rights and liberties that vastly outnumber other sources of workload), which focuses on regional competence issues because the Spanish constitution is subject to different interpretations regionally.<sup>76</sup> Furthermore, the balance of power between the regional governments and the central government is ideologically controversial, with the right being usually less favorable to reading extensive competences to the regional governments in the 1978 Constitution than the left.

An early empirical study<sup>77</sup> showed, using basic cluster analysis, how the judges who sided in favor and against the government (a socialist government with a solid parliamentary majority), in the two most contested issues decided in the 1980-1985 period by the constitutional court<sup>78</sup> actually formed two clusters (socialist and conservative) in the sense of concurring significantly more often with judges of the same cluster than with those of the other. However, the paper does not investigate political dependence, as a powerful explanatory factor in the actual (observed and recorded) voting by the members of the court.

<sup>76</sup> See Borrajo Iniesta, *supra* 73. He argues that the court plays a vital role in achieving the appropriate balance of decentralized public power and allocating power between central and regional governments. According to him, there have been too many cases because the Senate has failed to act as a chamber of territorial interests that filter this work. In turn this has enhanced regional interests in constitutional appointments.

<sup>77</sup> Pilar del Castillo Vera, Notas para el Estudio del Comportamiento Judicial. El Caso del Tribunal Constitucional, *Revista Española de Derecho Constitucional* 20, 177 (1987), in Spanish.

<sup>78</sup> STC 11/83, on the legislative expropriation of a failing industrial holding controlled by an entrepreneur (allegedly) opposed to the socialist government, and STC 53/85, on the de-criminalization of abortion.

A more comprehensive empirical study<sup>79</sup> however, seems to question the validity of such analysis. Using all the constitutional review decisions (without separating court-initiated and politically-initiated cases) during the period of 1980 until 2001, the study argues that the level of unanimous decisions and the institutional constraints that individual judges face in the court (non-renewable terms, shorter post-court careers due to late entry into the court) suggest that individual accountability of the judges *vis-à-vis* the appointing political parties is relatively weak.

In a more recent paper, 80 we argue that there is strong evidence of political influence, both in terms of findings of unconstitutionality and on the alignment of the vote with the interest of the appointing party. However, the regional dimension seems to play an important role in explaining behavior in the Spanish constitutional court. Judicial politics is relevant and easily detected by the fact that unanimous decisions for constitutional review initiated by political actors represent around two-thirds of the cases in the period 1980-2006 (of which 64% were unanimous decisions for constitutionality and 36% were unanimous decisions against constitutionality). As for the political influence, the vote for constitutionality seems essentially dominated by judicial review sought by the judge's party at the national level. The involvement of nationalist parties (which represent regional interests) seems to play a role, although in differential ways; strengthening the incentive to behave according to the interests of the appointing party when the nationalist parties seek constitutional review, and decreasing the incentive when the law that is challenged was passed under a regional government in which the nationalist parties were involved (usually in coalition with the socialists). Furthermore, in voting according to party interest, the national party interest seems to be significant in explaining judicial behavior, whereas, the regional interest of the party does not come out as statistically significant.

Another recent paper analyzes non-unanimous decisions in 2000-2009 and shows that there is a majority-minority pattern easily

<sup>79</sup> Pedro C. Magalhães, Judicial Decision-Making in the Iberian Constitutional Courts: Policy Preferences and Institutional Constraints, PhD Dissertation, Department of Political Science, Ohio State University (2002).

<sup>80</sup> See N. Garoupa, F. Gomez-Pomar and V. Grembi, Judging under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court, mimeograph (2010).

understood in a political perspective. Confirming previous work, the empirical exercise confirms that both left-right and regional interests shape these coalitions in the court.<sup>81</sup>

These empirical results seem to indicate a delicate balance between judicial and party politics in the Spanish constitutional court, where not surprisingly the regional dimension plays a relevant part. One could be tempted to argue that the way national politics prevail over regional politics indicates that constitutional judges are more responsive to party interests when the stakes are higher.

# (e) PORTUGAL

The Portuguese constitutional court was inaugurated in 1982 (after the first constitutional reform)<sup>82</sup> and exercises a preventive, concrete, and abstract method of constitutional review, according to the 1976 Constitution.<sup>83</sup> As expected, the method of preventive review (before legislation is enacted and upon request or referral by the President; in the case of supermajority laws, the Prime-Minister, or the request of one fifth of the Parliament) is the one that usually provides more political controversy.<sup>84</sup> However, we should note that the vast majority of the work by the constitutional court is on concrete judicial review.<sup>85</sup> Moreover, the Portuguese constitutional court has very little control over the selection of cases (although, the right of rejecting a plea for lack of merit in the context of concrete judicial review has been exercised on several occasions).<sup>86</sup>

There are thirteen constitutional judges. Ten of the judges are elected by the Parliament, which requires a two-thirds majority (elected judges), and the remaining three are chosen by the elected judges (appointed judges). Six of them must be career magistrates.

<sup>81</sup> See Chris Hanretty, Dissent in Iberia: The Ideal Points of Justices on the Spanish and Portuguese Constitutional Tribunals, mimeograph (2010).

<sup>82</sup> Between 1976 and 1982 there was a constitutional standing committee within the Council of Revolution (the guardians of the military coup that abolished the conservative dictatorship in 1974). This council was abolished in 1982 marking the definitive consolidation of democracy.

<sup>83</sup> There is another peculiar form: unconstitutional by omission. The President can ask the constitutional court to signal omission in certain legislative areas necessary to implement constitutional rights. They do not bind other branches of government. Obviously they are very rare

<sup>84</sup> See António de Araújo and Pedro C. Magalhães, A Justiça Constitucional: Uma Instituição Contra as Maiorias, *Análise Social* 35, 207 (2000), in Portuguese.

<sup>85</sup> More than 85% of the cases heard by the constitutional court in the period 1983-2007.

<sup>86</sup> See discussion by Pedro C. Magalhães, supra 79.

The elected judges, in practice, are extracted from a unique list of names negotiated by the parliamentary leadership of the main parties. Moreover, a *de facto* quota system exists, which allocates party seats to the four major parties. Therefore, the Portuguese constitutional court broadly reflects parliamentary preferences without major bias against either of the two main blocks (left or right). There is apparently an agreement between the main parties that establishes six judges for each block, and it is then, within each ideological block, that the main party negotiates the distribution with minor parties leaving the last judge in a neutral position.<sup>87</sup> Judges are elected for non-renewable terms of nine years (the mandate was for six years and renewable for a second period in office before the 1997 reform).<sup>88</sup>

The Portuguese constitutional court has been studied empirically because individual votes are easily observable and recorded. Early studies showed that the higher the proportion of judges within the court that are affiliated with the party or parties that support a piece of legislation, the lower the probability that the court will declare the legislation unconstitutional. With respect to preventive review, there is a high correlation between party affiliation and voting. Moreover, judges appointed by the same party or belonging to the same block (left-right) exhibit above-average inter-agreement scores. Furthermore, being a career magistrate, or being appointed, does not seem to be a good indication of how judges vote.

In a more recent piece, we have tested for party conformity.<sup>90</sup> We find that almost 80% of right-wing votes were in favor of

<sup>87</sup> As a consequence of this deal, any given court has six left-wing judges (zero to two communists, four to six socialists) and six right-wing judges (zero to two Christian-democrats, four to six conservatives). Details of this informal agreement are explained by António de Araújo, O Tribunal Constitucional (1989-1996), Um Estudo de Comportamento Judicial, Coimbra Editora (1997), in Portuguese.

<sup>88</sup> In the period 1982-2007, there have been thirty-five judges, of which seventeen were career judges. In particular, thirteen socialists, thirteen conservatives, three communists, three Christian-democrats and three neutral.

<sup>89</sup> Pedro Coutinho Magalhães and António Araújo, A Justiça Constitucional entre o Direito e a Política: o Comportamento Judicial no Tribunal Constitucional Português, Análise Social 33, 7 (1998) and Araújo and Magalhães, supra 84, both in Portuguese; Pedro C. Magalhães, Judicial Behavior in Constitutional Courts: The Case of Portugal, Paper presented at the 1998 Annual Conference of the Scientific Study of Judicial Politics (1998); Magalhães, supra 79.

<sup>90</sup> See S. Amaral Garcia, N. Garoupa and V. Grembi, Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal, *Journal of Empirical Legal Studies* 6, 381 (2009), and S. Amaral Garcia, N. Garoupa and V. Grembi, Explaining Dissent in the Kelsenian Constitutional Courts: The Case of Portugal, mimeograph (2010).

constitutionality, as compared to well under 50% of left-wing votes. These results are even more striking when unanimous decisions are excluded. More than 85% of right-wing votes were in favor of constitutionality as compared to 35% of left-wing votes. A reasonable proportion of decisions taken by the court are voted unanimously (around a third). We argue that a high proportion of unanimous decisions certainly restrains an ideological bias, but the evidence still suggests that it plays an important role (evidenced by the fact that judges appointed by right-wing parties are much more prone to vote for constitutionality than judges appointed by left-wing parties, whereas, the neutral judges are somewhere in the middle).

The regression analysis confirms that constitutional judges are politicized when voting and when dissenting from the President of the court. However, the fact that the judge's political party is in government also indicates some opportunism. From our study, the econometric results suggest that party politics, as well as peer pressure or judicial politics, matter in the Portuguese constitutional court. Furthermore, these results suggest that party politics matter at two different levels. Constitutional judges have their preferences aligned with the parties that appoint them, and naturally, they vote frequently in the same manner. However, the robustness of the marginal effect of the party in power indicates some opportunistic behavior by political parties (party alignment is stronger when the interests of the party are more significant).

Another recent paper analyzes non-unanimous decisions in 1989-2009 and confirms that there is a majority-minority pattern easily understood in a partisan perspective. It shows that these coalitions in the court are usually consistent with left and right clusters. 92

#### f. OTHER EUROPEAN COURTS

There is virtually no empirical work about judicial behavior in other European courts, in particular the cases of Austria, Belgium and Turkey.

<sup>91</sup> The explanation that legislation approved by a left-wing parliamentary majority is of a different nature of legislation approved by a right-wing parliamentary majority does not seem plausible because the legislation reviewed by the court is filtered by the President, who was center-left from 1982 to 2006. In fact, if one takes a public choice perspective that a center-left President is more likely to favor center-left legislation, then the legislation reviewed by the court when a left-wing majority prevails should be clearly more unconstitutional than when a right-wing majority prevails.

<sup>92</sup> See Hanretty, supra 81.

The Constitutional Court of Austria was established in 1920 following the ideas of Kelsen. The court was suspended from 1934 to 1945. After the reinstatement of the 1920 Constitution in 1945, the Constitutional Court resumed its competences over constitutional review. It consists of fourteen members (including a President and a Vice-President) plus six substitute members. It operates *en banc*. The appointment mechanism involves the federal government (President, Vice-President and six members) and both chambers of the parliament (three members each), although all appointments are technically made by the President of Austria. Not surprisingly, the appointment mechanism has resulted in a *de facto* quota system allocation of seats.<sup>93</sup> Judges are appointed for life (subject to a mandatory retirement age).

Although a matter of discussion since Germany changed its policy in 1971, separating opinions are not allowed in the Austrian Constitutional Court. Until the late 1970s, the Court tended to follow more closely the "negative legislator" model without expanding scope of review. Such trend apparently changed in the early 1980s. Inevitably this has created occasional frictions with the Austrian federal government and regional governments (some governors such as the late Jörg Haider blatantly ignored the Constitutional Court's decisions) in important areas of basic rights. Nevertheless, no regression analysis of the decisions taken by the Court has been presented so far.

The Constitutional Court of Belgium was created in 1984 under the name of *Cour d'Arbitrage* after the 1980 constitutional amendment that created a federal state. The powers of the court have been expanded quite significantly in the following decades and it was renamed *Cour Constitutionelle* in 2007. There are twelve judges elected by the parliament with a two-thirds majority (from a list of two names proposed alternatively by the lower chamber and the higher chamber), six Flemish speaking and six French speaking. Also, six are politicians (with a minimum of five years experience in parliament) and six are law professors or career judges. Belgian constitutional judges have life tenure (subject to a mandatory retirement age). Each linguist group

<sup>93</sup> The seats have been traditionally divided by the two main parties, social-democrats and conservatives. The rising of the liberals at the end of the 1990s has produced a reallocation of quotas which now includes an occasional judge for the junior partner in the federal government coalition.

<sup>94</sup> See discussion by Alexander Somek, Constitutional Theory as a Problem of Constitutional Law: On the Constitutional Court's Total Revision of Austrian Constitutional Law, 32 Israel Law Review 568 (1998).

elects their own President, and they alternate as President of the Court for a period of one year. Given the complexities of the appointment mechanism and the linguist arrangements, a *de facto* quota system allocation of seats has been developed. Although the constitutional judges are asked to hear controversial cases concerning the balance of powers within the Belgium federal arrangements, no systematic empirical analysis has been performed of the court decisions (there are no separating opinions and the deliberations are secret).

The Constitutional Court of Turkey was established in 1962 and currently exercises constitutional review under the 1982 Constitution. It is composed of eleven regular judges and four substitute members. They are appointed by the President of Turkey from a list of three names for each vacancy chosen by the career judiciary (five judges), the military courts (two judges), the high education council (one judge) and the senior administrative staff (three judges). The political role of the court in Turkey has been noted. It has entertained controversial political cases and skirmishes with political actors have taken place. Although separating opinions are allowed and, to some extent, not uncommon, there has been no comprehensive empirical analysis of judicial behavior.

# g. ASIAN COURTS

The Taiwanese Constitution is one of the oldest currently in force, dating from its adoption on the mainland in 1947. Similarly, the Taiwanese Constitutional Court (known as the Grand Justices of the Judicial Yuan) predates almost all the other specialized Kelsenian constitutional courts. Although composition and competences have been reformed in the last fifty years, the Taiwanese Constitutional Court is not a new product as its counterparts in many third-wave democracies (for example, Spain, Portugal, Eastern European countries, and Chile), but an institution that has prevailed throughout the authoritarian period and the more recent emerging democracy. The duration and the role of the Taiwanese Constitutional Court make it quite different from other constitutional courts around the world.

Prior to 2003, the court was composed of seventeen judges who were appointed by the President with approval of the Control Yuan (1948-1992) or the National Assembly (1992-2000), and served for renewable terms of nine years.<sup>95</sup> Since 2003, the number of

<sup>95</sup> See Nuno Garoupa, Veronica Grembi, and Shirley Lin, Explaining Constitutional Review in New Democracies: The Case of Taiwan, Pacific Rim Law & Policy Review (2011).

constitutional judges has been reduced to fifteen. They are now appointed by the President with the majority consent of the Legislative Yuan, and serve non-renewable terms of eight years.<sup>96</sup>

The powers of the Taiwanese Constitutional Court can be described largely as abstract review, including the interpretation of the Constitution, the unification of statutory interpretation, and addressing political cases (the impeachment of the President and Vice-President and dissolution of unconstitutional political parties). The court also has other ancillary powers, in particular operating as judicial council although formally distinct from its constitutional jurisdiction. Only the Judicial Yuan can exercise constitutional review.

From the transition to democracy in the late 1980s to today there have been three Presidents, two affiliated with the traditional KMT (Chinese Nationalist Party; Kuomintang) and one supported by the opposition (DPP).<sup>99</sup> The disproportional influence of the KMT appointed judges is evident.

In a new article, we study ninety-seven decisions issued by the Taiwanese constitutional court in the period 1988-2008. Our econometric analysis does not provide strong evidence for a strong partisan alignment in the court. Faced with a transition from a one-party political regime to a democracy, the Taiwanese Grand Justices needed to assert their independence from the other branches of government and gain credibility, thus dissenting more often, periodically and individually voting against the interests of the dominant party.

In fact, dissent rates increase during the political transition and seem to go down once democracy has taken root. Our interpretation is that politics matter in the Taiwanese constitutional court, but not in the straightforward government-opposition or left-right conventional dimensions. During the political transition from authoritarian to democratic regime, the Judicial Yuan had to liberate itself from the KMT tutelage and establish a solid reputation for judicial

<sup>96</sup> *Id.* (From the lifting of martial law in 1987 to 2008, forty-five constitutional judges have served on the bench. A large proportion of the constitutional judges in Taiwan have been career magistrates, namely twenty-three).

<sup>97</sup> Id.

<sup>98</sup> See discussion by Ginsburg, supra 4.

<sup>99</sup> In particular, Lee Teng-hui (1988-2000, KMT); Chen Shui-bian (2000-2008, DPP); Ma Ying-jeou (since 2008, KMT).

independence. As a consequence, Grand Justices appointed by KMT Presidents were willing to disfavor the KMT in a more systematic way. Dissent rates went up to signal independence from the KMT. As democracy emerges, dissent rates go down. Now, as in many other "Kelsenian" constitutional courts, the Grand Justices need to assert their independence from the other branches of government by establishing consensus and sound legal doctrines. Dissent rates no longer serve the purpose of signaling independence.

The process of appointment and term in office of the Taiwanese constitutional court also does not generate solid party quotas or majority versus minority coalitions as seen in other similar courts. This might reduce the likelihood of political allegiance to the President emerging as a solid predictor of Justices' voting behavior. Nevertheless, at the end of a political transition and faced with a consolidated liberal democracy, we might observe more party politics in the Judicial Yuan in the future.

Other Asian constitutional courts that have been carefully studied are Korea,<sup>100</sup> Thailand, and Mongolia. However, the empirical analysis of the functioning of these courts is in preliminary stages.<sup>101</sup> It tends to confirm that political and ideological divisions matter, but it is unclear the extent to which they play a significant role in explaining judicial behavior.

#### IV. SOME CONCLUSIONS

Constitutional review in the Kelsenian model is politicized by nature. Some degree of alignment between constitutional judges and the appointers is to be expected. Not surprisingly ideology plays an important role in constitutional interpretation. However, constitutional judges face a multiplicity of additional goals that dilute party alignment. The goal of achieving supremacy and expanding influence introduces peer-pressure for coordination and conformity inside the constitutional

<sup>100</sup> It has served as a model to other courts such as the Indonesian Constitutional Courtestablished in 2001. In the case of Indonesia it is of particular relevance the interaction between the Indonesian Constitutional Court and specialized Human Rights Court. See general discussion by Hendrianto, Institutional Choice and the New Indonesian Constitutional Court, and Mark Cammack, "The Indonesian Human Rights Court," in Andrew Harding and Penelope Nicholson eds., New Courts in Asia (2010).

<sup>101</sup> See Ginsburg, *supra* 4, James M. West and Dae-Kyu Yoon, The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence at the Vortex, *American Journal of Comparative Law* 40, 73 (1992), Andrew Harding and Peter Leyland, The Constitutional Courts of Thailand and Indonesia: Two Case Studies from Southeast Asia, *Journal of* 

court. The production of a coherent body of constitutional case law is significantly important in this respect. Inevitably judicial politics operate as a constraint to partisan politics.

Current consistent empirical work seems to confirm such a theory. The empirical evidence shows that constitutional courts are politicized in the sense that some appropriate measure of ideology does predict the behavior of judges. At the same time, the empirical work points out that many other contextual variables also matter. Finally, the politicization of the court usually follows a more complex framework than a simple left-right division. Such complexity reflects the political importance of constitutional adjudication (for example, federalism, religion, linguistic or cultural divisions), but also the influence of diverse interests in shaping both the composition and the workload of the court.

Clearly, more empirical work has to be done before we can provide a more comprehensive mapping of the balance between judicial and party politics within constitutional review. It seems too hasty to conclude that party politics play a very limited role, whereas judicial politics overwhelm the production of constitutional case law. It is also quite likely that such balance varies across cases depending on institutional arrangements, stability of the party system, and empowerment of the career judiciary.

Given the current available empirical information, it is difficult to use econometric work to inform the comparative analysis of institutional design differences, for example, the balance between concrete and abstract review or variations in appointment mechanisms. All these questions require empirical testing that constitutes a fruitful and challenging research project for the coming years. Hopefully, such a research agenda will contribute to reducing the current existing gap between what we know about the U.S. Supreme Court and the Kelsenian-type constitutional courts.

Comparative Law (2009), Tom Ginsburg, Constitutional Afterlife? The Continuing Impact of Thailand's Post-political Constitution, Int'l J. Const. L. (2009), and Tom Ginsburg, "The Constitutional Court of Korea," in Andrew Harding and Penelope Nicholson (eds.) New Courts in Asia (2010).

# WHY INDIAN JUDGES WOULD RATHER BE ORIGINALIST: DEBUNKING PRACTICES OF COMPARATIVE CONSTITUTIONAL LAW IN INDIA

Gautam Swarup\*

Lorraine Weinrib had written of a post-war paradigm of domestic constitutional law predicting its adoption by nations around the world.<sup>1</sup> This paradigm consisted of two components, institutional and doctrinal, that according to him were so fundamentally entrenched in the post-war modern<sup>2</sup> world that escaping this convergence (of domestic constitutions around the world) would require nothing less than a firm adherence to authoritarianism and principles against the rule of law. Institutionally, this paradigm insisted on the importance of judicial review by an independent constitutional court, rejecting parliamentary supremacy in its strongest forms. Doctrinally, it presented itself through national commitments to the protection of basic human rights<sup>3</sup> through proportionality tests licensed by explicit limitations of State power; additionally it included a separate commitment to 'rule of law'4 principles regarding procedural regularity, legal transparency and legal reform in order to avoid defeating reasonable expectations of legal stability. One would sense that this paradigm has acquired considerable momentum over the decades after the war, given the emergence of international institutions and organizations of States that have constantly enunciated their commitment to such values.<sup>5</sup> Convergence here does not merely refer

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<sup>1</sup> Lorraine E Weinrib, *The Postwar Paradigm of American Exceptionalism*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 84, Sujith Choudhry (Ed., 2006).

<sup>2</sup> On a general description of how written constitutions after the World War II have been influenced by liberal ideologies, See Ran Hirschl, The Rise of Comparative Constitutional Law: Thoughts on Substance and Method, 2 Indian J. Const. L. 11, 15 (2008).

<sup>3</sup> See Mark Tushnet, The Inevitable Globalisation of Constitutional Law,

<sup>4</sup> See Weinrib, supra n.1 at 93-98.

<sup>5</sup> See Mark Tushnet, Some Skepticism About Normative Con-stitutional Advice, 49 WM. & MARY L. REV. 1473 (2008). The trend I refer to here is demonstrated by the prominence of many international human rights treaties and conventions. Such instruments have been both global and regional and regardless of geographic specificity, have been critical in

to a universal commitment to international legal human rights norms<sup>6</sup> but encompasses also our understanding of comparative constitutional law as a matter of judicial process- which is the migration of constitutional values, ideas and principles across jurisdictions and their adoption by constitutional courts. Unlike the former,<sup>7</sup> the later lacks authority and legitimacy, and is invariably a product of judicial discretion.<sup>8</sup>

Such a practice, where domestic constitutional courts increasingly rely on comparative references to frame and articulate their own position on a given constitutional issue has come to acquire a central position amongst the leading democracies in the world. For instance, the South African Constitutional Court in its landmark ruling determining the unconstitutionality of the 'death penalty' examined pertinent jurisprudence from more than a dozen jurisdictions, including the European Court of Human Rights and the United Nations Committee on Human Rights. Similarly, the United States Supreme Court, which has the most deeply entrenched traditions of constitutional exceptionalism to the most deeply entrenched traditions of constitutional exceptionalism, in two very recent cases in Lawrence v. Texas and in Roper v. Simmons did not just refer to comparative law sources, but also heavily relied on them while overturning its own precedent. Such a trend is also rampant in Canada and in other

- the spread of human rights awareness throughout the world. Also relevant is the rise of trans-national governmental organisations that have provided another institutional avenue in pushing towards the globalisation of constitutional law.
- 6 Tushnet *supra* n.3 argues that while ratification of international instruments might be the primary bases of the spread of human rights amongst States, in recent decades it is attributable more to the coming together of judges and lawyers of constitutional courts all over the world.
- 7 Notably, as a matter of stated international law, the fact that a nation may be unable to comply with international obligations it has undertaken because of its internal federal structure does not in general relieve the nation of its duty to comply and its vulnerability to sanctions for noncompliance. See Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").
- 8 This point has been extensively dealt with later in the essay. However, for a brief overview, see generally Shylashri Shankar, The Substance Of The Constitution: Engaging With Foreign Judgments In India, Sri Lanka, And South Africa, 2 Drexel L. Rev. 373.
- 9 Ran Hirschl, The Rise of Comparative Constitutional Law: Thoughts on Substance and Method, 2 Indian J. Const. L. 11 (2008).
- 10 S v. Makwanyane, 1995 [3] SA 391 [CC].
- 11 David C. Gray, Why Justice Scalia Should be A Constitutional Comparativist... Sometimes, 59 Stan. L.Rev. 1249 (2007).
- 12 123 S. Ct. 2472 (2003).
- 13 543 U.S. 551, 627 (2005).
- 14 On the Canadian experience with constitutional comparativism, See Laskin, The Supreme Court of Canada: A Final Court of and for Canadians, 29 CAN. B. REV. 1038(1951). See Also, P.K. Tripathi, Foreign Precedents and Constitutional Law, 57 Colum. L. Rev. 319 at 327.

nations spread across Asia<sup>15</sup> and South America<sup>16</sup> indicating 'geographic neutrality' in this practice of citing foreign precedent. Our present endeavour is to examine the nature of cross-constitutional borrowing in India, debates over which have been sparked by the Delhi High Court's recent ruling in *Naz Foundation v. Government of NCT of Delhi*,<sup>17</sup> where it relied on foreign sources while striking down India's sodomy law in S.377 of the Indian Penal Code, 1860.

Literature on the relevance of foreign law post-Naz is abundant, 18 with the majority of scholars arguing in favour of according legitimacy to the use of foreign law in domestic constitutional adjudication. The major arguments in this regard are based on the geographical neutrality of certain values- that human rights are universal<sup>19</sup>- and that regardless of the lack of binding authority foreign citations may possess, they are dialogically instrumental in resolving interpretative conflicts, reflecting the distinctive functioning of one's own constitution, and are a means of engaging with foreign nations thereby fostering mutual respect and extending cultural influence.<sup>20</sup> However these arguments merely posit foreign law, at best, as relevant but non-binding sources. Notwithstanding their considerable merit, this paper seeks to present the alternative view on the use of foreign precedent in Indian constitutional adjudication, arguing that such a practice inflicts significant damage to the text of the Constitution, raising critical questions over the scope of judicial discretion in constitutional adjudication and the role of a higher court judge as an 'interpreter of the constitution'.

Accordingly, in the first section, I will examine the theoretical foundations of comparative constitutional adjudication. In doing so, the underlying bases of both permissible and impermissible

<sup>15</sup> See Christopher McCrudden's analyses of the use of foreign citations in a wide array of countries across Asia, South Africa and other continents. Christopher McCrudden, A Common Law of Human Rights, 20(4) Oxf. J. Leg. Studies, 499-532 (2000).

<sup>16</sup> *Ibid*.

<sup>17 160</sup> DLT 277 (2009).

<sup>18</sup> See, e.g., Sujit Choudhry, Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation, 74 IND. L. J. 819 (1999); Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 YALE L.J. 1225 (1999); Eric A. Posner & Cass R. Sunstein, The Law of Other States, 59 STAN. L. REV. 131 (2006); Jeremy Waldron, Foreign Law and the Modern Ius Gentium, 119 HARV. L. REV. 129 (2005); Rosalind Dixon, A Democratic Theory of Constitutional Comparison, 56 AM. J. COMP. L. 947

<sup>19</sup> See Anne-Marie Slaughter, A Brave New Judicial World, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 277, 277-278.

<sup>20</sup> Sujit Choudhry, Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation, 74 IND. L. J. 819 (1999).

constitutional comparison will be illustrated. In the subsequent section, an extensive examination of the flaws of comparative constitutionalism will be undertaken, and it will be demonstrated that such practice has no legitimacy, not just because it is not constitutionally permissible, but also because it distorts the nature of judicial process in constitutional adjudication. In the last section, concluding remarks will be made by proposing an alternative model in the form of originalism. The aim here will be to provide a framework for judicial decision making in constitutional adjudication, while at the same time demarcating the permissible extent of comparative borrowing in constitutional interpretation.

# THEORETICAL FOUNDATIONS OF CROSS-CONSTITUTIONAL BORROWING

In human rights cases, courts may feel a particular common bond with each other, because such cases engage core judicial function in many countries around the world. They ask Courts to protect themselves against abuse of State power, requiring them to determine the appropriate level of protection in light of a complex matrix of historical, cultural and political needs and expectations.<sup>21</sup>

Constitutional adjudication of civil liberties is by far one of the most active areas as regards the international migration of ideas. This phenomenon is principally a consequence of the emergence of 'constitutionalism' as the normative backbone of governance<sup>22</sup>, and the transition to 'democracy' made by nation-States across the postwar world. The resultant effect has been the abdication of authoritarian regimes for rule-of-law constitutionalism (or constitutional supremacy) and the establishment of strong traditions of judicial review through an independent judiciary.<sup>23</sup> Strong traditions of judicial review have however often transformed into even stronger traditions of 'judicial activism',<sup>24</sup> with an enhanced role of the judiciary in the State, and the emergence of what Prof.Ran Hirschl has called 'juristocracies'.<sup>25</sup>

<sup>21</sup> Anne Marie Slaughter, Judicial Globalisation, 40 Va. J. Intl. Law 1103, 1111 (2000).

<sup>22</sup> Vicki Jackson and Mark V Tushnet, COMPARATIVE CONSTITUTIONAL LAW, 2nd Edition (2006).

<sup>23</sup> Weinrib, supra n.1.

<sup>24</sup> See Ran Hirsch, The Rise of Comparative Constitutional Law: Thoughts on Substance and Method, 2 Indian J. Const. L. 11, 16 (2008).

<sup>25</sup> See generally Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitu-tionalism (2004) as cited in Shylashri Shankar, The Substance Of The Constitution: Engaging With Foreign Judgments In India, Sri Lanka, And South Africa, 2 Drexel L. Rev. 373.

This was a truly global phenomenon, and while some might claim that its roots lay in western countries<sup>26</sup> - since most modern democracies have adopted institutional and doctrinal setups that originated in western States - that was not the case. The phenomenon was global owing more to its inevitability consequent to the abdication of authoritarianism.<sup>27</sup> So even while most modern States have borrowed heavily from western nations while drafting their constitutions - by adopting features that might suit their own culture - civil liberties and the spread of democracy as such do not owe their existence to the west.

Historical association in the form described above may however be a very strong factor determining the weight and acceptability of foreign precedent in a country.<sup>28</sup> The fact that features of a country's Constitution are borrowed from another's, endorses the view that it may continue to learn from such other country's constitutional experience. This factor explains how precedent from English Courts have found their way into the law of the United States, almost all commonwealth nations, and even Israel.<sup>29</sup> While in the United States, most Statutes formally incorporated English common law (as of the year 1607) as far as applicable,<sup>30</sup> countries like Australia and Canada may be said to have never even completely severed themselves from the British judicial framework.<sup>31</sup> The case with India is not too different, albeit significantly more complex. While we are certainly a former British colony, our Constitution did not adopt British traditions in their purest form. Unlike the British, our political structure for instance,

<sup>26</sup> See Sujith Choudhry, THE MIGRATION OF CONSTITUTIONAL IDEAS, 1st Ed. (2006).

<sup>27</sup> Mark Tushnet, *The Inevitable Globalisation of Constitutional Law,* Prepared for presentation at a workshop on separation of powers at "The Changing Role of Highest Courts in an Inter-nationalizing World," sponsored by the Hague Institute on International Law, October 23–24, 2008, *As Accessed at http://scs.student.virginia.edu/~vjil/PDF/49\_985-1006.pdf.* A different version of this essay has appeared in THE CHANGING ROLE OF HIGHEST COURTS IN AN INTERNATIONALISING WORLD (Sam Muller ed., 2010).

<sup>28</sup> P.K. Tripathi, Foreign Precedents and Constitutional Law, 57 Colum. L. Rev. 319 at 322.

<sup>29</sup> Ibid.

<sup>30</sup> See Patterson, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 205, 1st Ed. (1953) as referred in Tripathi, ibid. at p. 322.

<sup>31</sup> In Australia, the Judicial Committee of the Privy Council was never recognized as the highest court in matters involving the federal division of power, and the High Court refused to be bound by the decisions of the Committee in such matters. In Canada, criminal appeals to the Committee were abolished by Criminal Code § 1024(4), 23-24 GEO. 5, c. 17, § 17(4) (1933); and the Supreme Court Act Amendment of 1949, 13 GEO. 6, c. 37, §§ 354(1)-(2), established the Supreme Court of Canada as the final court in all matters.

was not entrenched in the same deep commitment to parliamentary supremacy. Instead, our system is characterized by cross-institutional concurrence of a very unique kind, and if at all, bears similarity with the United States. Similarly, the Constitution provides for 'fundamental rights' and a power of 'judicial review' that cannot be abridged, in a manner that resembles the American system. Therefore while our long historical association with the British factors in significantly while considering English precedent, in constitutional matters, as a matter of practice, <sup>32</sup> American precedent are often accorded with much more weight. <sup>33</sup> Therefore, apart from *historical association*, the incidence of *cognate legal systems* and the *analogous nature of constitutional institutions* play a clinical role on the acceptability of foreign precedent in another country.

Let us consider the Indian case to illustrate the above. In the Indian constitutional court, citing of foreign cases, particularly American, is almost an accepted practice and reference to such precedent, while clearly not binding, is certainly welcomed as a legitimate source. This practice happens most often in matters relating to rights adjudication and affirmative action. Historical association has always been the primary grounds of our acceptance of foreign precedent. This is evidenced by our adoption of substantial rights jurisprudence in matters relating to Articles 14 and 15. Identifying our equality protection clause with that of the United States and the embodiment of the rule of law from English common law, the Supreme Court has not only borrowed heavily from both jurisdictions, but also used them effectively to evolve its own jurisprudence on Article 14 in India. For instance, the Indian Supreme Court borrowed the test of determining the unconstitutionality of State action under Article 14 from the US Sup. Ct. ruling in Snowden v. Hughes<sup>34</sup> in most of our landmark rulings on Article 14 prior to the evolution of the 'old doctrine'.35 It took a considerable amount of time before this position was changed and the Court evolved its own classification tests in R.K.Dalmia and Anwar Ali Sarkar.<sup>36</sup> The change in position and the

<sup>32</sup> Adam A Smith, Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case, 24 Berkely J. Int. Law 218 (2006).

<sup>33</sup> See Tripathi Supra n.28.

<sup>34 321</sup> U.S. 1, 88 L. Ed. 497.

<sup>35</sup> See H.M.Seervai, CONSTITUTIONAL LAW OF INDIA, 4TH Ed 1991 (rep.2010) on p.450.

<sup>36</sup> R.K.Dalmia v. S.R.Tendolkar, (1959) S.C.R. 279; State of West Bengal v. Anwar AliSarkar, (1952) S.C.R. 284.

evolution of our so called 'old doctrine' was inevitable; the position in *Snowden* had for long been obsolete in the Unites States.<sup>37</sup> Interestingly, even in evolving this position, the latter two cases have followed US constitutional experience.<sup>38</sup>

One would appreciate that while we borrowed the scheme of the right under Articles 14 and 21 from the American Constitution, our guarantees as to the freedom of speech and expression are markedly different, and far more detailed than the American guarantee in the First and Fourteenth Amendments.<sup>39</sup> Therefore practically no reference was made to foreign case law on this provision until well after the controversial ruling in Romesh Thapar<sup>40</sup>- where the Court confined itself to the fields under Article 19(2) while examining the validity of a law restricting the freedom of speech. This decision was the subject of a lot of misunderstanding and soon after it, there came up a host of cases urging the Court to borrow the test of 'clear and present danger' from the United States. Unfortunately most of these were settled at the level of the High Court and before they could be appealed in the Apex Court, the Parliament amended Article 19(2) to broaden the grounds of restrictions. Of particular interest, illustrating how the *incidence* of cognate legal systems<sup>41</sup> can merit cross constitutional borrowing is the ruling on the freedom of speech by the Punjab High Court. In Amar Nath v. State<sup>42</sup>, Justice Kapoor provided a very lucid explanation of why the Court in Romesh Thapar should have imported the test of 'clear and present danger', arguing that even though Articles 13(2), 19(1) and 19(2) are not textually similar to the First and Fourteenth Amendments of the American Constitution, the latter was very obviously the main base of our freedom of speech guarantee.

Now while the drafting of Part III of our Constitution relating to 'Fundamental Rights' evidences heavy borrowing from other jurisdictions, the drafters have also made marked departures on many specific issues. The classic instance of this is our rejection of the words

<sup>37</sup> Snowden v. Hughes, supra n. 34 at p.449.

<sup>38</sup> Both these cases borrowed heavily from the position in America after the application of the *Snowden test* was severely limited. *See* The Congressional Edition of the U.S. Constitution (4th Ed.) p.1374. On the manner in which the new 'classification test' has been borrowed from the United States, *see* H.M.Seervai *supra* n.35 at p.453.

<sup>39</sup> See Tripathi, Supra n. 28 at 327.

<sup>40</sup> Romesh Thapar v. Madras, A.I.R. (37) 1950 S.C. 124.

<sup>41</sup> This point is also illustrated by Tripathi supra n. 28.

<sup>42</sup> A.I.R. (38) 1951 Punjab 18.

'except in due process of law' in our liberty guarantee under Article 21, even though the analogous American provision makes such a qualification. It is important to note that our Courts have in the past not indulged in a haphazard application of foreign law without regard to a context. The Court in A.K.Gopalan<sup>43</sup> was called into examine this provision and it ruled on whether 'law' here should be interpreted broadly as natural law, therefore giving the Court much latitude in developing and applying its own standards to the 'Right to Life and Liberty'. The learned judges here however, observe that while the American Courts have been given this latitude through a broadly worded 'due process of law' clause, our Constitution makers deliberately declined to adopt this American doctrine. Instead of leaving it to the Courts to work out procedural standards of this right, the Constitution of India has expressly provided for them in Article 22. The petitioner, being detained under the preventive detention law, could not avail of the protection under Article 22. On these grounds, American precedent on the issue was rejected and his detention was upheld.

I argue therefore that historical association, cognate legal systems and analogous constitutional institutions would constitute legitimate grounds of cross constitutional borrowing by domestic courts. There are yet three other theories, often forwarded by constitutional scholars across the globe, that hold considerably less merit in building a case for comparative borrowing. William Eskridge explained these three very succinctly in a piece he wrote favouring the USSC's comparative approach in *Lawrence*.<sup>44</sup>

The *first*, was examining foreign law tested interpretations to open textured provisions of our own constitution with reference to a normative consensus. The idea behind this was that if interpretative conflicts are present in our own precedent, then resort to foreign law from jurisdictions that have had similar experiences might help resolve our own issues. The theory was evident in *Lawrence* since in striking down the law criminalizing sodomy, the majority relied on precedent of the ECHR<sup>45</sup> even while domestic precedent of the Supreme Court in *Bowers*<sup>46</sup> ran directly against it. The majority's rationale behind

<sup>43</sup> A. K. Gopalan v. Madras, A.I.R. (37) 1950 S.C. 27.

<sup>44</sup> William N. Eskridge, Jr., United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism, 2 INT L J. CONST. L. 555.

<sup>45</sup> Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981).

<sup>46</sup> Bowers v. Hardwick, 478 U.S. 186 (1986). ('Bowers')

preferring three ECHR cases over its own, was that *Bowers* wrongly reflected social and cultural norms of the United States and that the values emphasized by *Bowers* were not universally held. It was also evident for instance in our own evaluation of the right under Article 15 when the conflict was between the right of an individual and the State's interests in affirmative action or protective discrimination laws.<sup>47</sup> In evolving the doctrine of strict scrutiny under Indian law, the Court practically sidestepped all existing jurisprudence governing these rights in India.

Second, citing foreign law helped the court to evaluate claims before it with respect to an empirical assessment rather than a normative study. This is often the case when the court is called in to make normative valuations of a particular claim, where scope of a right is incapable of being determined according to constitutionally prescribed standards. It then helps the court to make such valuations based on an empirical assessment of how the claim has been responded to in other parts of the world. For instance, when the Court in Naz was called into examine the validity of our sodomy law, it sought reliance on a plethora of foreign decisions to demonstrate that several other nations had already struck down their sodomy laws. This view is similar to the 'Condorset Jury Theorem' of evaluation of claims. This theory was evolved by Eric Posner and Cass Sunstein and prescribes that if the collective wisdom of foreign jurisdictions provides a certain answer, then the law of larger numbers provides good reason to regard that answer as correct.48

Third, such reference demonstrates respect for foreign courts and tribunals. Madhav Khosla rather forcefully argues<sup>49</sup> in favour of this role saying this practice presents an image of India to the rest of the world and is critical in bolstering our rise as not just an economic power, but also a global superpower. Given such a context, courts should be aware of the attention their rulings on human rights issues would invite. Therefore, even regardless of whether a law was

<sup>47</sup> Anuj Garg v. Hotel Association of India, AIR 2008 SC 663. Elsewhere I have illustrated how the decision was in blatant disregard for existing jurisprudence on the laws of protective discrimination and affirmative action in India. See Gautam Swarup, Heightened Constitutional Scrutiny of Affirmative Action Measures, NUALS L. J. [5] 19 (2011)

<sup>48</sup> Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 Stan. L. Rev. 131 (2006).

<sup>49</sup> Madhav Khosla, Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision, 59 Am. J. Comp. L. 909 at p.914.

unconstitutional, purely from a foreign policy perspective, being in consonance with the global dialogue on human rights issues would be in India's interest. Not doing so would invite significant international criticism.<sup>50</sup>

In some form or the other, scholars in India and globally have endorsed these theories as legitimate grounds for importing foreign law. This essay will argue that while normatively these three viewpoints might hold some merit, theoretically, and constitutionally speaking, they do not. As the next section will illustrate, such a practice is not just constitutionally impermissible, but even as a matter of judicial process, it seriously distorts the functions of a constitutional court.

# OBJECTIONS TO COMPARATIVE REFERENCES IN CONSTITUTIONAL LAW

In Naz Foundation, comparative law was heavily relied on by the Court to reach two major conclusions. The first, was to expand the scope of the right to life and liberty under Article 21 as encompassing an absolute right to privacy through the use of cases from countries such as the United States, ECHR, South Africa, Fiji and Nepal<sup>51</sup>; such right to privacy further being construed to include the right to intimate sexual relations. The second conclusion, was through an extensive use of comparative case law from the ECHR and the United States Supreme Court to evolve a new concept of constitutional morality<sup>52</sup>, holding that popular disapproval of homosexuality on grounds of morality, no matter how widespread, is not a legitimate reason to limit a constitutionally protected right. Even while comparative law featured prominently in this constitutional court's decision, the Court offered little by way of reasoning to explain this interpretative move.53 This reliance on foreign law to arrive at such conclusions begs a question on the authoritative value of foreign precedent in Indian constitutional adjudication. Conventional wisdom on the idea of authority deems that the force of an authoritative directive

<sup>50</sup> Even though it deals with a legislative measure the reaction to Uganda's recent anti-gay proposals are indicative of this. *See* Uganda criticized over anti-gay proposals, CNN, Dec.10, 2009, *available at* http://edition.cnn.com/2009/WORLD/europe/12/10/uk.uganda.protests/index.html.

<sup>51</sup> Naz Foundation, paras.29-48.

<sup>52</sup> Naz Foundation, paras.75-79.

<sup>53</sup> See Madhav Khosla, Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision, 59 Am. J. Comp. L. 909 at p.914.

comes from its *source* and as such is content independent.<sup>54</sup> Regardless of its personal evaluation of a specific problem, a subject would be bound by a particular source deemed to be an *authority* not by virtue of the substantive merit held by such a source, but owing to content-independent reasons.<sup>55</sup> But *Naz* did not characterise foreign sources with such an attribute. Such value to foreign precedent would make them binding on Indian constitutional courts and there is widespread consensus even among proponents of comparative citation that foreign law can never hold such binding value. It was but the discretion of the judge as to whether he deemed it necessary to rely on a particular source or not- and this was a decision based on *content-dependent* reasons. This is precisely where a primary objection to the use of foreign sources in domestic law would lie.

In constitutional adjudication, as a matter of democratic institutional theory there is a specific role played by a judge, which is to restrict himself to interpretation and application of the Constitution as it stands.<sup>56</sup> While this is seldom the case and judges often go beyond the wording of constitutional text in their over-zealous attempt to be activist, this principle underlies a very important function of restricting 'judicial discretion' in such matters. The idea behind it is that judges should not substitute constitutional values with their own judgment; the power of judicial review demands that they review State action against the touchstone of the Constitution itself.<sup>57</sup> Their independent moral judgment as such, has no role here. If this were not the case, judges would in fact be working backwards and using sources external to the constitution as a means to reach predetermined ends.<sup>58</sup> In this context there are two clinical issues with the use of foreign law in domestic jurisprudence, first that its use is typically prominent in situations characterised by disregard for existing constitutional jurisprudence. Take for instance the Apex Court's ruling in Anuj Garg v. Union of India<sup>59</sup> which demonstrated an outrageously acontextual

<sup>54</sup> H.L.A Hart, ESSAYS ON BENTHAM:JURISPRUDENCE OF POLITICAL THEORY, 1st ed. (1982) pp.243-268.

<sup>55</sup> Frederick Schauer, Authority and Authorities, 94 Va. L. Rev. 1931, 1935 (2008).

<sup>56</sup> A.M. Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS, 2d ed., New Haven: Yale University Press, (1986).

<sup>57</sup> Scalia-Breyer Debates in the Amercial Society of Constitutional Law's Annual Lecture Series, As Accessed At http://www.freerepublic.com/focus/news/1352357/posts.

<sup>58</sup> See Basil Markesinis & Jorg Fedtke, JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION, 167, (UCL Press London, 1st Ed. 2006). See Also Richard A Posner, Foreward: A Political Court, 119 Harv. L. Rev. 31, 88 (2004).

<sup>59</sup> AIR 2008 SC 663.

application of the doctrine of strict scrutiny to the Indian scenario of affirmative action. In doing so, the Court not only disregarded that the degree of rights tests<sup>60</sup> which were already prevalent in India in different form, but also the fact that the Indian Constitution expressly provides for affirmative action measures by the State.<sup>61</sup> As if these were not enough, the Court further complicated equality jurisprudence in India by incorporating this concept in opposition to protective discrimination laws. A nuanced understanding of the case is not necessary here; however it would suffice to say that simply lifting off this doctrine from American jurisprudence and applying it to the Indian scenario of rights adjudication- which is far more complexwas terribly flawed. Similarly in Naz, the Court chose to rely on foreign law to demonstrate the right to privacy even while Indian law in *Kharak* Singh v. State of Uttar Pradesh<sup>62</sup> and Govind v. State of M.P.<sup>63</sup> explicitly recognised this right in Indian constitutional law. While the argument maybe that foreign law cited better demonstrated the position being established by the court, the relevant question to be asked is what is the kind of 'authority' such practice attributes to foreign law. It may very well be that foreign law possesses absolutely no authority at all even in such instances; that foreign law is merely illustrative of a empirical acceptance of such a position. If this were the case, then a point could also be made that such practice helps demonstrate India's respect for foreign constitutional courts and fosters mutual respect amongst foreign democracies. But such an argument can only be made when the Court reaches the same ruling even de hors its aid to foreign law, by relying solely on domestic precedent and constitutional interpretation. Naz cannot therefore stake claim to such a rationale.

The *second* issue with the use of foreign law in the context of *content-dependency* is that it often turns out to be an exercise in endless judicial discretion.<sup>64</sup> If a court is relying on foreign law for content dependent reasons, then there are no rules to determine the law that

<sup>60</sup> It is often argued that the scheme of a degree of rights exists in the Indian equality protections through Articles 14, 15 and 16. This jurisprudence also evolved from the case of *Indira Sawhney v. Union of India*, 1992 Supp (3) SCC 217. See Also Tarunabh Khaitan, Beyond Reasonableness: A rigorous Standard of Review for Article 15 Infringement, 50 (II) JILI (2008), 177.

<sup>61</sup> *Ibid.* This emerges from Articles 15 and 16 of the constitution that provide for affirmative action by the State in the interests of children, women and minorities.

<sup>62</sup> AIR 1963 SC 1295.

<sup>63</sup> AIR 1975 SC 1378.

<sup>64</sup> See Tripathi supra n.28.

ought to be relied on, given the diversity of opinion on a specific matter one may find moving across jurisdictions. In his foreword for the Harvard Law Review, Judge Richard Posner argued that "if foreign decisions are freely available, any judge wanting a supporting citation has only to troll deeply enough in the worlds corpora juris to find it."65 This concern over cherrypicking of foreign citations that best support a position sought by the Court has been the subject of much discourse in comparative law.66 For instance, P.K.Tripathi way back in 1957 illustrated how the constitutional courts of Australia, India, Israel, Canada and the United States have made instrumental use of foreign decisions in order to find justifications for results they sought to achieve in their own judgments.<sup>67</sup> There is no better illustration of cherrypicking than Naz itself. In citing decisions from jurisdictions as varied and culturally diverse as Nepal, Fiji and Hong Kong, the Delhi High Court was rationalising its ruling using authorities (persuasive as they may be) in a manner guided by absolutely no interpretative methodology. Furthermore, even while citing cases from several such jurisdictions, the Court neither justified the reason behind selectively choosing from such jurisdictions, nor did it attempt to distinguish between different sources of foreign law.68 As I argued in the first section, there are certain grounds of permissible comparative borrowing; however the use of foreign law demonstrated by Naz bears no relation to the Indian constitutional conspectus- historical or analogous. Another interesting dimension to concerns over cherrypicking may be exposed by foreign citations in the majority and minority rulings in Bachan Singh v. State of Punjab. 69 While determining the constitutionality of the death penalty, the majority and minority both make references to the same US Supreme Court decisions to arrive at different conclusions. For instance the majority first cites Furman v. Georgia<sup>70</sup> to show that the court's articulation of "contemporary standards of morality among the American people" as the bases of unconstitutionality of the death penalty<sup>71</sup>, saw massive backlash in the form of public referenda, polls and state legislatures. Soon after, the death penalty was reinstated by the legislatures of 32

<sup>65</sup> Richard A.Posner, Foreward: A Political Court, 119 Harv. L. Rev. 31,88 (2004).

<sup>66</sup> See supra n.18.

<sup>67</sup> Tripathi supra n.28.

<sup>68</sup> See Madhav Khosla, supra n. 49.

<sup>69</sup> AIR 1980 SC 898, 1980 Cri.L.J. 636.

<sup>70 408</sup> US 238 - 1972.

<sup>71 8</sup>th Amendment, United States Constitution.

States. It then moves cites the US Apex Court's ruling in *Gregg v. Georgia*<sup>72</sup> to hold that no standards howsoever meticulously drafted can totally exclude the scope for some arbitrariness and hence judicial discretion in sentencing, cannot be the sole basis to hold the death penalty unconstitutional. The minority however held that notwithstanding the legislative and democratic backlash, *Furman v. Georgia* continued to be good law and the *Greg v. Georgia* could not necessarily be taken to rule on the constitutionality of the death penalty. Essentially, the same two rulings have been utilised differently by the minority and majority in *Bachan Singh* and have reached entirely different conclusions.

There are some proponents of the view that non-binding sources such as foreign law may often be chosen for content-independent reasons, thus operating as authoritative sources.<sup>73</sup> This view does not suggest that by operating as authoritative sources, foreign law would in fact be a binding source; the suggestion is merely that while nonbinding, foreign citations are legitimate and permissible sources of law. In fact, Christopher McCrudden while countering Tripathi's argument that 'foreign law possesses absolutely no compelling force of its own', gives several reasons as to why the argument based on 'limitless judicial discretion' is by itself, no longer compelling enough to bar such a practice<sup>74</sup>. His reasons seem to suggest that while there may be no rules per se that govern the use of foreign law, the past few decades and emergence of globalisation have lead to there being of certain 'criteria' of relevance that regulate its use. The point that Schauer's analyses of 'non-binding authorities'75 and McCrudden's reasoning on the permissibility of foreign citations brings out, is essentially that while foreign law does not operate authoritatively as precedent, meaning a judge 'does not have to' rule the same way, they are legitimate sources even for reasons independent of their content.

<sup>72 428</sup> US 153 - 1976

<sup>73</sup> Frederick Schauer, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 71 (2009) ("Although optional authorities are sometimes selected because they are persuasive, more often they are selected as authorities because the selector trusts the authority even if he does not agree with theconclusion or, more likely, believes himself unreliable in reaching a conclusion on which the authority, whether commentator or other court, is though more reliable"). See, e.g., Ernest A. Young, Foreign Law and the Denominator Problem, 119 Harv. L. Rev. 148 (2005).

<sup>74</sup> Christopher McCrudden, A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights, 20 "Oxford J. Legal Stud" 499 (2000).

<sup>75</sup> Frederick Schauer, Authority and Authorities, 94 Va. L. Rev. 1931, 1935 (2008).

Therefore, a judge of a constitutional court may nonetheless rely on foreign precedent in making a particular ruling. Judge Aahron Barak in his book on a judge in a democracy seems to suggest similarly when he says "...I do not advocate adopting the foreign arrangement. It is never binding. I just advocate an open approach, one that recognises that for all our singularity, we are not alone". 76 Many others have suggested the use of foreign law under the 'universalist model'77, whereby constitutional courts would be permitted to make references to foreign law, under the presumption that judges around the world are interpreting the same set of principles and therefore, it is only reasonable that we be open to learning from the experiences of other nations. However while this model may be applicable to a very limited set of rights, such as the equality protection and say, the right to life and liberty, this is definitely not true for others. There is a vast divergence amongst countries around the world - all democracies and owing allegiance to the rule of law- in the way they define and apply even the same set of rights. Take for instance countries that are explicitly secular; while India's outlook to secularism is completely different, granting express protections to the rights of minorities, the Unites States seems to be more *absolute* in its approach to secularism.<sup>78</sup> This is true for a vast number of other rights, such as the freedoms under Article 19 of our Constitution, the rights of backward classes under Article 16 and the protection under Article 20(3) of the Constitutionit is absolutely impossible to apply them in the same manner as they have been in other democracies of the world. The issue is that this model of comparative law omits significant institutional details that are rather unique to systems being compared. In doing so, they assume a high degree of congruence between "constitutional problems and their possible solutions across the spectrum of contemporary constitutional democracy."79

<sup>76</sup> Aharon Barak, THE JUDGE IN A DEMOCRACY 199 (2006). As noted, this point is routinely emphasized by comparative constitutionalists. See, e.g., Anne-Marie Slaughter, A Global Community of Courts, 44 Harv. Intl L. J. 191, 193 (2003); Vicki C. Jackson, Constitutional Comparisons: Convergence, Resistance, Engagement, 119 HARV. L. REV. 109, 111-112 (2005).

<sup>77</sup> See eg. Sujith Chowdhry, How to Do Comparative Constitutional Law in India, Comparative Constitutionalism in South Asia (S. Khilnani, V. Raghavan and A. Thiruvengadam, eds., Oxford University Press: New Delhi, 2010); Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 Yale L.J. 1225 (1999); David Law, Generic Constitutional Law, 89 Minnesota Law. Rev. 652 (2005).

<sup>78</sup> See generally Rajeev Dhavan, Religious Freedom in India, 35 Am. J. Comp. L. 209 (1987).

<sup>79</sup> Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 Yale L.J. 1225, 1239 (1999).

The Indian constitutional court however invariably follows a combination of the 'universalist' and the 'dialogical' models of doing comparative law. On the one hand we refer to decisions from older, more experienced democracies- such as Canada, the United States, the United Kingdom and Australia - while interpreting open-textured provisions such as our equality and liberty guarantees. On the other hand, references to foreign jurisprudence are often an attempt at introspection, enabling distinctions between the two jurisdictions to help lead to a better understanding of our own legal framework.80 Such an approach holds great promise; while it does not disregard that there might in fact be significant differences between jurisdictions, it does not entirely eliminate the possibility of learning from other experiences. However, it would seem that we are entrusting the judges with too complicated a task, one that is capable of being counterproductive if incorrectly approached. Not only does it entail an awareness of our unique social structures and constitutional framework, it also demands the same extent of awareness of the jurisdiction from which we seek to borrow. The objection to such content independent reasons for the use of foreign law therefore lies in the idea of *cultural specificity*. <sup>81</sup> This objection, if I may say so, essentially doubts the very competence of judges with respect to making the requisite cultural translations between two cultures. Constitutions often emerge of a nation's distinctive cultural and political history and to entrust a hyperactive judiciary with the task so enormous, going much beyond just interpreting their own constitution, is against the spirit of a democracy. As Carl Schmidt once observed, a constitution is not based on a norm, whose justness would be the foundation of its validity. "It is based on a political decision concerning the type and form of its own being, which stems from its political being. . . . The people - the nation - remains the origin of all political action."82 Therefore, even if we somehow can find normative virtue in a powerful judiciary, for a judge to be given the discretion to go far beyond the Constitution and interpret it with reference to constitutional experiences of other jurisdictions is a far-fetched proposition. Elsewhere it has been argued that in the past decade or so, the Indian

<sup>80</sup> Madhav Khosla, Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision, 59 Am. J. Comp. L. 909 at p.914.

<sup>81</sup> Shylashri Shankar, supra n.8 at p.3.

<sup>82</sup> Carl Schmitt, CONSTITUTIONAL THEORY, 125, 128 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928).

judiciary has been stretching the bounds of its own Constitution in civil liberties issues. 83 For instance in two very similar rulings in Vineeth Narain v. Union of India<sup>84</sup> and State of West Bengal v. Centre for Protection of Democratic Rights<sup>85</sup>, the Court demonstrated its willingness to not only overstep its limits and enter the executive domain, but also its inclination to sidestep constitutional limitations on its writ jurisdictional power under Article 32 of the Constitution. Also, Vishakha v. State of Rajasthan, 86 determinately laid down the foundations for the Courts' power to make law where it found that the legislature had not. There are several such instances where the constitutional court, instead of restricting itself to interpreting the Constitution, has virtually rewritten the Constitution. The problem with extra-constitutional borrowing adding up to this conundrum, is the complexity of making correct considerations of the cultural and constitutional matrix of other jurisdictions. This problem is specifically highlighted by Prof. Vicki Jackson where she makes references to distinctions in borrowing in rights adjudication cases and others such as 'federalism'. She argues against borrowing in the latter case since constitutional features such as 'federalism' are often a peculiar product of political compromise in historically unique moments, and are designed as a matter of practicality more than a principled accommodation of those features.

The South African Constitution is well known for its aspirations of creating a 'universalist' model, permitting (rather 'requiring') its constitutional court to freely borrow from the experiences of other jurisdictions. As Anne Marie Slaughter puts it, it is a function of the country's desire to be a part of a global legal community and to make explicit, the consistence of its constitutional law, with the law of other leading democratic legal systems. <sup>87</sup> Our Constitution however does not contain any such aspirations. And as long as this is the case, it is only right that our only attempts to be part of a global dialogue must

<sup>83</sup> See generally M. Rao, Judicial Activism, (1997) 8 S.C.C. 1(Jour): A. M. Ahmadi, Judicial Process: Social Legitimacy and Institutional Viability (2000) 4 S.C.C. 1– 10(Jour); Shubankar Dam, "A court of law and not of justice"—is the Indian Supreme Court beyond the Indian Constitution? Public Law, Summer 2005. Available at SSRN: http://ssrn.com/abstract=969976.

<sup>84</sup> AIR 1998 SC 889 (hereafter 'Vineeth Narain').

<sup>85 (2010) 3</sup> SCC 571.

<sup>86 (1997) 6</sup> SCC 241.

<sup>87</sup> See Anne-Marie Slaughter, A Brave New Judicial World, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 277, 277-278 (Michael Ignatieff ed., 2005) as referred in Madhav Khosla, Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision, 59 Am. J. Comp. L. 909.

be through constitutionally permitted ratification of international instruments, not judicial outreach.

# CONCLUSION: AN ALTERNATIVE MODEL OF INTER-PRETATION THAT ALLOWS LIMITED CONSTITUTIONAL COMPARISON

Thus far, this essay probably reads as rather cynical, given that it has come to reject a process that is responsible a great deal for the most landmark and inspirational rulings of our constitutional court in the area of liberties and fundamental rights. Incidentally, it also seems to be the case in many leading democracies that the most revolutionary constitutional law decisions have involved significant cross-border dialogue. This essay however is but an effort to recognize the exclusively interpretative role of our Constitutional Court, and in doing so, prescribes that the Court's *activism* must not go beyond the extent, and in a manner not permitted by, the Constitution.

In India, there is evidence, empirical and otherwise, that the number of constitutional law cases that rely on foreign citations in their rulings has considerably increased after the controversial case of *ADM Jabalpur v. Shivkant Shukla.*<sup>89</sup> Suddenly the scope of the courts' powers of judicial review seemed to expand to include rights not only un-enumerated, but also unfathomed by the framers.<sup>90</sup> In its quest to undo the damage inflicted in this ruling, it assumed a role that defined the course of rights adjudication for many decades. I argue that this very trend and the transformative role that the Court has assumed post emergency has somewhere diluted the distinction between *what* 

<sup>88</sup> Hirschl, supra n.9 at p.13.

<sup>89</sup> In her piece on the comparative nature of the Indian Constitutional Court, Dr.Tania Groppi has empirically analysed how the Courts have increasingly played a comparative role in constitutional interpretation after the emergency decision in *A.D.MJabalpur v. Shivkant Shukla*, (1976) 2 SCC 521. Her conclusions are interesting in so much as the inferences one can draw from them lead us to believe that the Court is in some way attempting to undo the damage to the rights guarantees in that decision. May other authors have similarly opined that the Apex Court turned *reactionary* after the folly of its decision in *A.D.M.Jabalpur. See* Valantina Rita Scotti, *The Supreme Court of India and the use of foreign Courts decisions, As Accessed At http://www.juridicas.unam.mx/wccl/ponencias/12/208.pdf. See Also* H.M.Seervai, CONSTITUTIONAL LAW OF INDIA, Vol.1, p. 235.

<sup>90</sup> There is significant literature on this aspect of the judicial review where constitutional courts in India have taken advantage of this extra ordinary power to evolve rights that were guaranteed no express protection in the Indian constitution. For a broad overview, see S. P. Sathe, JUDICIAL ACTIVISM IN INDIA (Oxford University Press Publishers) 2003.

courts ought to do and what courts in fact are doing, the latter being confused with what ought to happen. The submission here was simply that in an over-zealous role as this guardian of the people, the courts have gone overboard in protecting rights, often circumventing constitutionally prescribed limitations on their own powers. The relevant question to be raised is, whether it was imperative for the Court to use extra-constitutional means to evolve such jurisprudence, or whether the Court could have somehow relied on material internal or ancillary to the Constitution to achieve the same ends.

The *originalist* argument is that in matters of constitutional adjudication, the judiciary of a country should interpret constitutional provisions in a manner that is consistent with the meaning sought to be accorded to them by framers of the Constitution. In many ways therefore, the Constitution would seem 'frozen in time' as regards the purport of those provisions.91 The activist argument against such an interpretation would be that this essentially would make the Constitution a rigid, inflexible set of laws incapable of evolving with societal changes. The problem with such opposition, in my opinion is that it confuses the distinction between the original meaning of the constitution on one hand, and originalist application on the other. Specific to rights adjudication for instance, while the constitutional guarantee to *free speech* would have a limited application in 1951 owing to the limited means of communication, this would not take away from the application of the same guarantee to the internet, or the television. Since the ideals entrenched in 'Fundamental Rights' are essentially objective moral ideals, their application as such need not be historically contingent.92 They are therefore capable of responding to societal changes without references to external material. An originalist interpretation thus looks only at the meaning of the guarantee, not to the extent of its application. Regardless of this our constitutional framers in fact called it *living document*<sup>93</sup>, so that it would

<sup>91</sup> A departure from this rule is denoted by the maxim *lex posterior derogate legi prori* which implies that we may consider evidence that post dates a section of the Constitution if that evidence is contemporary with a constitutional amendment that bears on the meaning or language that appears in the earlier provision.

<sup>92</sup> See Gray, supra n.11 at p.1271.

<sup>93</sup> Shylashri Shankar, *The Substance of the Constitution: Engaging with Foreign Judgments in India, Sri Lanka, and South Africa,* Drexel L. Rev., 2(2), (2010), pp. 373-425. The author here elucidates the purport of what is meant by a *living constitution* and brings out that it is one which should be interpreted in light of experience, that is should be dynamic so that it adapts itself to the changing conditions and accommodates itself in a pragmatic way to the goals of envisaged by the framers of the Constitution.

not be one *frozen in time* and could respond to the aspirations and requirements of a changing society. However, this fluidity that the framers sought to give the Indian Constitution was not in the manner of its application, but through simplicity in the process of amendment of the Constitution. <sup>94</sup> Therefore, notwithstanding that a constitutional provision may not at times be in sync with societal changes, the task of the Courts would yet be limited to interpreting the provision as it stood, and leave it to the legislature to make the necessary changes.

This approach is different from *strict constructionalism* or *textualism*, which is far more rigid in its approach.<sup>95</sup> Let us consider an example elucidated by our Supreme Court involving Chapter 14-A of the Constitution. This chapter lays down the powers of the Parliament to transfer judicial functions in specific areas to specially constituted tribunals. While the strict constructionist would interpret the specific powers of the parliament enshrined therein *strictly*, and therefore exhaustively, the Court took an originalist stand construing the provision as merely specifying a genus, thereby entailing that any other area falling within such genus- even if not specified in such provision- would likewise be within the domain of legislative competence.<sup>96</sup>

Sujit Chowdhury criticises the originalist by arguing in terms of two processes, namely, *globalization* and the *spread of human rights*. According to him the growth of both these processes has made a very strong case for a judiciary to be comparativist. However, this belief, I would argue suffers from disregarding the tradition and historical setting that the Indian Constitution was based in. Given that the Indian Constitution was based in a setting of unprecedented diversity, and

<sup>94</sup> In his concluding speech during the Constituent Assembly Debates, Ambedkar pointed out that compared to the American and Australian constitutions, the process for amendment of the Indian Constitution was much simpler. Indeed, the provisions for amendment is what makes a constitution a living document, and successive governments have not been shy of using it. So far the Indian Constitution has been amended 94 times; and there are plenty more on the way. This is in contrast to the US Constitution, ratified over two centuries ago, which has been amended a mere 27 times; the first 10 – or what is known as the Bill of Rights – happening within a few years of the Constitution coming into effect.

<sup>95</sup> See generally Jamal Greene, On the Origins of Originalism, Columbia Public Law and Legal Theory Working Papers, Columbia Law School, 2009.

<sup>96</sup> Union of India v. R.Gandhi, 2010 (3) CTC 517, 2010 (5) SCALE 514, [2010] 100 SCL 142 (SC).

<sup>97</sup> See Sujith Chowdhry, How to Do Comparative Constitutional Law in India, Comparative Constitutionalism in South Asia (S. Khilnani, V. Raghavan and A. Thiruvengadam, eds., Oxford University Press: New Delhi, 2010).

that our constitution was accordingly framed to suit the Indian context, there is little to learn from the experience from other jurisdictions. Many provisions, specifically the rights guarantees were tailor-made to suit the Indian context, and therefore, even if learning from the experience of other jurisdictions is permissible, it is legitimate only to extent that it allows us to compare it with our own and enhance the understanding of our own Constitution.98 Shared normative commitments may only be a justification to be comparative to the extent that the similarities are even contextually the same. The aim must therefore be to evolve our own constitutional culture, and this is something that may get eroded when judges resort to material beyond the constitution to arrive at findings. Accordingly, the only considerations relevant to constitutional adjudication are text, history, tradition and precedent; while the comparativists argue for 'consequence' to be an additional criterion.99 There is a good reason why 'consequence' is irrelevant to constitutional interpretation. For the consequences of a provision to be relevant to constitutional interpretation seems counterproductive in so much as that would lead to judicial law-making where the judiciary feels the consequences are not desirable. Such is the domain of only the legislature. It is of further importance in the Indian context since our procedure for constitutional amendment is far simpler than most other jurisdictions. This explains how our legislature has in a mere span of 60 years, amended the Constitution more than a hundred times. Therefore while the procedure for constitutional drafting may in fact be deeply comparative, the role of the courts is not. 100

One would then observe that the 'mischief rule' or the 'purpose rule' as relevant tools of constitutional interpretation.<sup>101</sup> It would seem rather pertinent given the application of rights guarantees in the Indian context. Looking at the purpose behind a guarantee is far more fruitful in examining its applicability than looking at its consequences. For instance, if one would take the *mischief* sought to be removed by the equality guarantee against *discrimination*, then it seems rather simple

<sup>98</sup> Ibid. on the dialogical model of comparative interpretation on p.27.

<sup>99</sup> See Vicki C.Jackson, Constitutional Comparisons: Convergence, Resistance, Engagement, Harvard Law Review, Vol.119, No.1 (Nov.2005) p.109 at 111.

<sup>100</sup> Scalia-Breyer Debates in the Amercial Society of Constitutional Law's Annual Lecture Series, As Accessed At http://www.freerepublic.com/focus/news/1352357/posts.

<sup>101</sup> David C. Gray, Why Justice Scalia Should be a Constitutional Comparativist... Sometimes, 59 Stan. L.Rev. 1249 (2007).

to assume that the Constitution proscribes any sort of discrimination by virtue of the equality guarantee subject to the express limitations therein. The function of the Courts, is limited to just this. Stretching constitutional guarantees to serve ends that are determined by the judge as being 'just', and in 'interests of the society' could not have been envisaged by the framers to be a function of the courts. That continues to be the exclusive domain of the Parliament. Given therefore, that Courts are a creation of the Constitution, their legitimate role is to remain within the limits prescribed to it within the Constitution. In any case, a failure to have protected the sanctity of the Constitution in the Emergency Case<sup>102</sup> cannot under any circumstances justify judicial overreach as a response.<sup>103</sup>

As I argued in the first section, historical association, the incidence of cognate legal systems and the analogous nature of constitutional institutions are yet legitimate grounds for constitutional comparison. Applied religiously, these grounds not only stand against criticisms levied against other comparative models, but are also relevant considerations to the originalist in constitutional interpretation. 104 The advantages of this theory of interpretation lie in the fact that it provides judges with a suitable framework within which to operate. Demarcating the domain of adjudication provides an answer to the question 'what the judge ought to do?' and thus makes the constitutional adjudication more about testing State action against the Constitution, rather than moulding the Constitution to attain desired ends. Objectivity and stability are thus critical to this exercise. Given that the Constitution is after all the supreme document of the country, often adopted by a democratic process, such a model of constitutional interpretation would be a far more legitimate process of interpretation than activism.

<sup>102</sup> A.D.M.Jabalpur v. Shivkant Shukla, (1976) 2 SCC 521.

<sup>103</sup> See Shylashri Shankar, supra n.8.

<sup>104</sup> Gray, supra n.11.

# JUDICIAL INDEPENDENCE AT THE CROSSROADS: GRAPPLING WITH IDEOLOGY AND HISTORY IN THE NEW NEPALI CONSTITUTION

David Pimentel\*

#### I. INTRODUCTION

Nepal is struggling to produce a new constitution, the blueprint for a new post-monarchic state. The political and ideological history of Nepal, including a checkered history with constitutionalism, complicates the picture, particularly as it applies to the structure of the new Nepali judiciary. The rhetoric of the various parties seems similar in terms of what each envisions in the new constitution, but the conflicts beneath the rhetoric loom large. While there appears to be consensus among diverse political interests in Nepal that the new state will be secular and have some type of federal structure, the substantive agreement ends there.<sup>1</sup>

The rhetorical similarities are deceiving, as ideology can vest the same words with different, even contradictory meanings. For example, during the Cold War, "democratic" had a profoundly different meaning in West Germany than it did in East Germany, which called itself the "German Democratic Republic" notwithstanding its socialist/communist ideology. Similarly, the rhetoric in the debate over the new judiciary in Nepal consistently calls for a judiciary that is "independent and accountable." But there is no consensus on what these terms mean, or should mean, in Nepal today.

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<sup>1</sup> Damakant Jayshi, *Parties at Odds, Peace at Risk*, INTER-PRESS SERVICE (Jan. 5, 2010), http://ipsnews.net/news.asp?idnews=49886 ("[T]he parties disagree on all major issues to be incorporated in the Constitution–preamble, fundamental rights, federal model, the number and nature of federal states and distribution of natural resources.").

<sup>2</sup> Bureau of European & Eurasian Affairs, *Background Note: Germany*, U.S. DEP'T STATE (Nov. 10, 2010), http://www.state.gov/r/pa/ei/bgn/3997.htm ("The G.D.R. established the structures of a single-party, centralized, communist state.").

These concepts of independence and accountability conflict with each other to some degree, but there is no one-size-fits-all approach to balancing them. Despite talk about international best practices,<sup>3</sup> the appropriate balance between these competing priorities cannot be imported from elsewhere. It must be determined with respect to Nepali culture, history, and politics. Both historical and ideological factors in present day Nepal tip the scales in favor of accountability at the expense of judicial independence. The challenge will be to find or create a judicial governance model that can heighten accountability while minimizing political or other interference with independent decision-making.

Similarly, competing definitions of "separation of powers" point in opposite directions on the issue of judicial review. However, by reaching beyond the deceptive rhetorical similarities and understanding the history and ideologies that inform the debate, it becomes clear that a new constitutional court, separate from the Supreme Court of Nepal, is the best path forward. A new institution, a departure from the status quo, is important for the reinvention of Nepali government.

If the parties can move beyond the rhetoric and appreciate each others' differing ideological stances, as well as the checkered history of Nepal's courts, there is room for consensus. Such a compromise, one that creates new institutions and enhances judicial accountability without infringing too much on judicial independence, is essential to reach an agreement on the new constitution and to establish a fair and effective Nepali judiciary.

#### II. BACKGROUND

# A. Experience with the 1990 Constitution

Everything happening in Nepali politics today is, at some level, a reaction to Nepal's experience with the 1990 constitution (The Constitution of the Kingdom of Nepal) and the regime that existed under it.<sup>4</sup> This includes the drafting of the judiciary provisions of the

<sup>3</sup> Sagar Prasai, Nepal's Constituent Assembly Gets New Lease, but Politics Go Back to Square One, In Asia (June 2, 2010), http://asiafoundation.org/in-asia/2010/06/02/nepals-constituent-assembly-gets-new-lease-but-politics-go-back-to-square-one/.

<sup>4</sup> See generally United Nations Development Programme, The Interim Constitution of Nepal, 2063 (2007) as Amended by the First, Second and Third Amendments (2008), available at http://ccrinepal.org/files/downloads/37ddc770102c2dcf8b25892721729b5e.zip ("Among the shortcomings of the [1990] Constitution in the eyes of many were the insistence that

#### new constitution.5

Although Nepal flirted with constitutionalism for forty years, the first true and meaningful constitution in Nepal came in 1990,6 establishing a constitutional monarchy, formally recognizing royal powers, and declaring Nepal a Hindu state.7 Dissatisfaction with the 1990 constitution fostered the Maoist insurgency,8 which mobilized those disenfranchised by the Hindu caste system, among others, to resist the constitutional regime.9 The Maoists<sup>10</sup> became the primary critics of the regime and the champions of anyone aggrieved by it.<sup>11</sup>

Among the Maoists' complaints were problems with the Nepali judiciary. The 1990 constitution reflected, in large part, the prevailing international best practice of an independent judiciary governed by a judicial council. In theory, this is still the best constitutional structure for the Nepali judiciary. In practice, however, the Nepali judiciary under the 1990 constitution was dysfunctional and corrupt, or at least widely perceived to be. Against this historical backdrop, the

Nepal is a Hindu kingdom; the inclusion of many important economic and social rights as 'directive principles' only, which means they were not able to be used as the basis for legal claims; inadequate provisions for civilian control of the army; excessive power given to the King; and provisions that were not clear enough about the King's powers, thus making it possible for those powers to be abused.").

- 5 Id
- 6 See generally David Pimentel, Constitutional Concepts for the Rule of Law: A Vision for the Post-Monarchy Judiciary in Nepal, 9 Wash. U. Glob. Stud. L. Rev. 283, 285-89 (2010) [hereinafter Constitutional Concepts].
- 7 Enayetur Rahim, Nepal: Government and Politic, The Constitution of 1990, in Nepal & Bhutan: Country Studies (Andrea Matles Savada, ed., 3d ed. 1993), available at http://memory.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+np0101).
- 8 Alastair Lawson, *Who are Nepal's Maoist Rebels?*, BBC News, June 6, 2005, http://news.bbc.co.uk/2/hi/3573402.stm ("The disillusionment of the Maoists with the Nepalese political system began after democracy was re-introduced in 1990.").
- 9 *Id.* ("[The Maoist rebels] have stayed consistent . . . in their demand for an end to Nepal's constitutional monarchy. Another key grievance of the rebels was the resentment felt by lower caste people against the authority wielded by the higher castes.").
- 10 The term "Maoists" is used throughout the article and denotes specifically the Maoist group that is active within Nepali politics.
- 11 Lawson, *supra* note 8 ("[A] substantial number of people in Nepal . . . see the Maoists as the only genuine alternative to the old, repressive social order.")
- 12 See, e.g., Maoists Wrath Against Nepal Judiciary, Telegraph Nepal, Mar. 26, 2009, http://www.telegraphnepal.com/headline/2009-03-26/maoists-wrath-against-nepal-judiciary.
- 13 Constitution of the Kingdom of Nepal, 1990, para. 93, § 1.
- 14 Constitutional Concepts, supra note 6.
- 15 Nepal Country Profile: Judicial System, Bus. Anti-Corruption Portal, http://www.business-anti-corruption.com/country-profiles/south-asia/nepal/corruption-levels/judicial-system/ (last visited Mar. 27, 2011) (citing the Bertelsmann Transformation Index 2010 Nepal Country Report, Bertlersmann Found. (2009) http://www.bertelsmann-transformation-index.de/ 117.0.html?&L=1). "The judiciary is perceived to be among the most corrupt institutions

advantages of an independent judiciary and an autonomous judicial council to govern it are more difficult to defend.

## B. Political and Ideological Climate

The political revolution in Nepal that gave rise to the new constitution-making process is a direct product of the Maoist insurgency and the 2006 settlement of its demands that brought an end to the monarchy. Accordingly, the Maoists claim a right to sit at the table and dictate many of the terms of the government that will be established by the new constitution. If the elections had given them a clear majority, the Maoists would be able to do precisely that. However, the Maoists do not enjoy an outright majority in the present legislature, known as the Constituent Assembly (CA). Therefore, they do not have the power to control the constitution-making process. In fact, as of May 2009, the Maoists are no longer part of the coalition government. But because the Maoists have, by far, the largest bloc of any party in the CA, they remain a powerful political force. The upshot is that they must reach compromises with the other political parties for the constitution-making process to move forward.

Compromises will be difficult, however, given the ideological differences and mindset of the Maoists. Because the Maoists literally fought for change in Nepal, anything that smacks of the status quo is entirely unacceptable to them,<sup>20</sup> including constitutional provisions for a judicial structure. While much of the drafting process appears to be mired in disagreements and political discord, the Maoists have already drafted a proposed constitution, presumably for discussion

in Nepal. According to Bertelsmann Foundation 2010, court officials are perceived as the main facilitators of corruption."  $\mathit{Id}$ .

<sup>16</sup> See Timeline: Nepal, BBC News, http://news.bbc.co.uk/2/hi/south\_asia/country\_profiles/1166516.stm (last updated Feb. 17, 2011, 15:42 GMT).

<sup>17</sup> Prassi, supra note 3.

<sup>18</sup> *Id.* ("The Maoists are the largest party in the Constituent Assembly, but a 22-party coalition has managed to push them to the fringes of national politics.").

<sup>19</sup> Bureau of S. & Cent. Asian Affairs, Background Note: Nepal, U.S. Dep't State (Dec. 20, 2010), http://www.state.gov/r/pa/ei/bgn/5283.htm. In the 2008 elections, the Maoists secured 229 of the 601 seats, which was almost exactly twice as many as the next largest bloc (Nepali Congress Party with 115 seats) but far short of the majority they would need to control the Constituent Assembly outright. *Id.* 

<sup>20</sup> Interview by Ben Peterson with Manushi Bhattarai, Maoist Student Leader, (June 13, 2009), available at http://www.socialistunity.com/?p=4213 (characterizing the other parties in Nepal as "status quo-ist" and highlighting the challenge to fight the "status quo" forces).

purposes.<sup>21</sup> While it is not a polished document, it unambiguously sets forth the Maoists' policies and priorities for the new constitution.<sup>22</sup>

# C. Status of the Constitution Drafting Process

The status of the constitutional drafting process changes daily. The CA, shortly after its creation under the Interim Constitution in 2008, set May 28, 2010, as the deadline to complete the new constitution.<sup>23</sup> Delays, largely due to the political difficulties detailed above, made it impossible to meet that deadline.<sup>24</sup> The CA voted in the closing minutes of its existence to extend its own life for another year, establishing a May 2011 deadline to produce a new constitution.<sup>25</sup> While some have questioned the authority of the CA to take such actions,<sup>26</sup> the practical necessity of these actions has calmed dissenting voices. If the government under the Interim Constitution had been allowed to expire, it would have left a vacuum of leadership and legal authority, a vacuum few wanted.<sup>27</sup>

Accordingly, there is a new deadline and hope for Nepal's constitutional future, although the process has been strained. Under the chairmanship of Nilambar Acharya, the Constitutional Committee (CC)<sup>28</sup> established a roadmap and timetable for the drafting process. In addition to the CC, which oversees the entire process, ten thematic

<sup>21</sup> S. Chandrasekharan, NEPAL: Draft Constitution of Maoists Unveiled, S. ASIA ANALYSIS GROUP (Mar. 18, 2009), http://www.southasiaanalysis.org//notes6/note502.html.

<sup>22</sup> *Id.* ("While this document may not be the ultimate draft of the constitution, it reveals the mind and the intention of the Maoists of the type of configuration they are looking for in the new constitution.").

<sup>23</sup> C. Balaji, Nepal 28 May 2010 Due Date for Nepal Constitution to be Finalized, WORLD NEWS FORECAST (May 28, 2010), http://www.newsahead.com/preview/2010/05/28/nepal-28-may-2010-due-date-for-nepal-constitution-to-be-finalized/index.php.

<sup>24</sup> *Id.* ("Reuters reports that the political deadlock has delayed the preparation of a new constitution.").

<sup>25</sup> By the time this article went to print, the new deadline of May 28, 2011, for the production of a new constitution had also been missed. On May 29, 2011, the political parties averted a crisis (see infra, note 30), reaching an agreement to extend the deadline another three months. Whether that deadline can or will be met is anyone's guess. Kiran Chapagain, Nepal Averts Crisis Over Constitution Deadline, N.Y. Times, May 29, 2011, available at http://www.nytimes.com/2011/05/30/world/asia/30nepal.html.

<sup>26</sup> United Nations Development Programme, *supra* note 4, at 116. Indeed, it seems obvious that the CA had no such authority, as the Interim Constitution specifies a term of two years for the CA. *Id.* But the Interim Constitution doesn't allow for new elections either. *Id.* 

<sup>27</sup> Balaji, *supra* note 23. "There are fears that Prime Minister Madhav Kumar Nepal will declare a state of emergency if the Constituent Assembly fails to deliver [a constitution] by the due date. An unmet deadline for a constitution acceptable to all parties could trigger another civil war, while increasing India's and China's tug-of-war for the Himalayan Kingdom." *Id*.

<sup>28</sup> NC Leader Elected Head of Nepal Constitution-Drafting Body, ZEE News, http://www.zeenews.com/news559032.html (last updated Aug. 28, 2009 4:24 PM).

committees were appointed from the membership of the CA. Each committee had responsibility for certain subject matter in the new constitution and was charged with creating a concept paper detailing provisions on that topic that should be included in the constitution. Most of these committees attempted to arrive at some kind of consensus, with limited success and consequent delay.<sup>29</sup> In contrast, the forty-three member Committee on the Judicial System took an up-or-down vote on each proposed revision<sup>30</sup> and was therefore able to complete its Report Preliminary Draft with the Concept Paper (CJS Concept Paper) promptly, by the fall of 2009.31 The problem with the Committee on the Judicial System's approach was that the end product did not reflect consensus and engendered a great deal of opposition even within the committee. Seven dissenting opinions are appended to the CIS Concept Paper, six of them signed by a bloc of nineteen committee members detailing their objections to the paper's recommendations.32

Committee reports and concept papers are not the definitive word on each subject. They must go through the CC, which draws from them but is not bound by them in drafting the constitution. Indeed, the CC will *have* to make changes, as some elements of the concept papers are in direct conflict. For example, the Report and Concept Paper of the Committee on State Restructuring specifically calls for the creation of a "Constitutional Court" to resolve questions of constitutional interpretation.<sup>33</sup> It even specifies the composition of that court.<sup>34</sup> On the other hand, the CJS Concept Paper did not provide for the creation or existence of such a court.<sup>35</sup> Accordingly, the Reports

<sup>29</sup> Whither Constitution Writing?, Nepali Times, May 28, 2010, http://www.nepalitimes.com.np/issue/2010/05/28/ConstitutionSupplement/17125. As of May 28, 2010, which was the original deadline for completion of the constitution, "only three committees' draft papers ha[d] been passed unanimously." Id.

<sup>30</sup> Interview with Kumar Regmi, Constitutional Lawyer, in Kathmandu, Nepal (July 18, 2010), (notes on file with the author). The Maoists' proposals prevailed in the Committee on the Justice System, for the most part, because the Madhesi party representatives chose to vote with the Maoists on most issues. *Id.*; see Comm. on Judicial Sys. to the Constituent Assembly, A Report Preliminary Draft with the Concept Paper (2009), available at http://www.ccd.org.np/new/resources/concept\_paper\_Judiciary\_System\_ENG.pdf [hereinafter CJS Concept Paper].

<sup>31</sup> Id

<sup>32</sup> Id. at 68-84. Eighteen committee members signed the seventh dissenting opinion. Id. at 68.

<sup>33</sup> CONSTITUENT ASSEMBLY, RESTRUCTURING OF THE STATE AND DISTRIBUTION OF STATE POWER COMMITTEE, REPORT ON CONCEPT PAPER AND PRELIMINARY DRAFT art. 11, § 11 (2010), available at http://www.ccd.org.np/new/resources/Concept\_Paper\_Restructuring\_State\_GTZ\_ENG.pdf.

<sup>34</sup> Id. at 38

<sup>35</sup> CJS CONCEPT PAPER, supra note 30.

need to be harmonized, and until then, the underlying issues remain open for negotiation and resolution through ongoing dialogue. These issues are considered by the powerful "Gaps and Overlaps Committee," which is already appointed for the purpose of reconciling inconsistencies, before going to the CC for final resolution.<sup>36</sup> Whether there will be a Constitutional Court, separate from the Supreme Court, and what jurisdiction it may have, remain open questions.

#### III. COMPETING CONCEPTS FOR THE NEPALI JUDICIARY

## A. Ideology and the Role of the Judiciary

The vision of the Maoists, who represent the political left in Nepal, differs significantly from the Marxist-Socialist views of Chairman Mao Zedong or of the Soviet-era Warsaw Pact nations. The International Crisis Group described them as follows:

Despite having an authoritarian outlook, the Maoists maintained a culture of debate within their party; key issues have been widely discussed and hotly contested. From the end of the 1990s, they have moved gradually toward a more moderate stance. They changed positions in acknowledging the 1990 democracy movement as a success (they had earlier characterised it as a "betrayal"), in abandoning the immediate goal of a Mao-style "new democracy" and, in November 2005, by aligning themselves with the mainstream parties in favour of multiparty democracy.<sup>37</sup>

While the Maoists do not advocate for a traditional communist regime, their perspective and rhetoric are inevitably infused with Marxist ideology, which, in turn, informs their perception of the role of the judiciary. On Nepal's political right is the Nepali Congress Party, which controlled the government during most of the period that the country was operating under the 1990 constitution. The Unified Marxist–Leninists, popularly viewed as moderates, have been in the middle as the third largest party,<sup>38</sup> but there are as many as twenty

<sup>36</sup> See Constitution Building e-Bulletin: What's Happening at the Constituent Assembly (CA), CENTER FOR CONST. DIALOGUE, at para. 6 (May 1, 2010), http://ccd.org.np/new/index.php?newsletter\_detail\_id=16 (referencing the role of the Gaps and Overlaps Committee).

<sup>37</sup> Int'l Crisis Grp., Nepal's Maoists: Purists or Pragmatists?: Asia Report No. 132, at i (2007), available at http://www.crisisgroup.org/~/media/Files/asia/south-asia/nepal/132\_nepal\_s \_maoists\_\_purists\_or\_pragmatists.ashx.

<sup>38</sup> See Kiran Chapagain & Jim Yardley, Nepal's Parliament Fails in 5th Try to Select Prime Minister, N.Y. Times Aug. 23, 2010, http://www.nytimes.com/2010/08/24/world/asia/24nepal.html.

other parties operating in Nepal.39

In common law regimes, the judiciary historically has protected the people from the abuses of government.<sup>40</sup> This Western perspective defines justice on the micro level. Any attempt to subvert individual justice in pursuit of higher societal goals is roundly condemned as evil.

From the Marxist point of view, however, it is not the courts that protect the people (individually) from government, but rather the government that protects the people (collectively) from exploitation by capitalists.<sup>41</sup> Government is not a threat to justice or to the rights of the people; government is the source of social justice and the protector of the people.<sup>42</sup> From this perspective, there is no reason to expect the judicial branch to be independent from the political branches of government. Rather, the judicial branch is perceived as another arm of the government, similarly committed to carrying out the government's agenda.<sup>43</sup>

Indeed, the Soviet Union and other communist-bloc nations shared this concept of the judicial branch. Dallin Oaks, former justice of the Utah Supreme Court, recently recounted his experience with Soviet-style justice.

- 39 See Prasai, supra note 3 (referencing a twenty-two party coalition in the CA, excluding the Maoists).
- 40 John Henry Merryman & Rogelio Pérez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America 17 (3d ed. 2007) ("In the United States and England . . . there was a . . . judicial tradition . . . in which judges had often been a progressive force on the side of the individual against the abuse of power by the ruler.").
- 41 See generally Karl Marx & Fredrich Engels, The Communist Manifesto (1848).
- 42 Nikolai Bukharin & Yevgeni Preobrazhensky, The ABC of Communism § 23 (1920) ("For the realization of the communist system the proletariat must have all authority and all power in its hands. The proletariat cannot overthrow the old world unless it has power in its hands, unless for a time it becomes the ruling class. Manifestly the bourgeoisie will not abandon its position without a fight. For the bourgeoisie, communism signifies the loss of its former power, the loss of its 'freedom' to extort blood and sweat from the workers; the loss of its right to rent, interest, and profit. Consequently the communist revolution of the proletariat, the communist transformation of society, is fiercely resisted by the exploiters. It follows that the principal task of the workers' government is to crush this opposition ruthlessly.").
- 43 *Id.* at § 71 ("In fine, in the long succession of civil and criminal affairs, the proceedings of the courts must be conducted in the spirit of the new socialist society which is in course of construction. For these reasons the Soviet Power did not merely destroy all the old machinery of justice which, while serving capital, hypocritically proclaimed itself to be the voice of the people. It went farther, and constituted new courts, making no attempt to conceal their class character. In the old law-courts, the class minority of exploiters passed judgement upon the working majority. The law-courts of the proletarian dictatorship are places where the working majority passes judgement upon the exploiting minority.").

I have thought of how our system contrasts with that of the now defunct Soviet Union. During my years as president of BYU [Brigham Young University] (1971–80), I hosted the chief justice of the Supreme Court of the Soviet Union, who was touring the United States in that Cold War period. In a private one-on-one discussion, I asked him how the Soviet system really worked in a highly visible criminal case, such as where a person was charged with an offense like treason or other crimes against the state. He explained that on those kinds of cases they had what they called "telephone justice." Judges conducted the trial and heard the evidence and then went back to their chambers and had a phone call from a government or party official who told them how to decide the case.

I am grateful that, whatever difficulties we have in our system of justice—and there are many—we are still far away from what he called "telephone justice." What stands between us and that corruption of the judicial system . . . is the independence of our state and federal judges.<sup>44</sup>

Particularly shocking to Western sensibilities is the fact that the Soviet Chief Justice explained the telephone justice system openly and without apparent embarrassment. Most Westerners would unhesitatingly join in Oaks' assessment of that practice as an indicator of a corrupt judicial system.

But again, from the Marxist perspective, the government, or perhaps more specifically the party, is the guardian of the people's rights and interests; no one else should make the decision in sensitive cases. According to this view, entrusting such decisions to individual judges may result in decisions that are in conflict with the best interests of the people overall. In the post-communist state, telephone justice is still talked about.<sup>45</sup> Although it is generally decried in post-communist retrospect, it was accepted as a fact of life, perhaps even a necessary one, under communist regimes.<sup>46</sup> The Marxist will not allow

<sup>44</sup> Elder Dallin H. Oaks, Church of Jesus Christ of Latter-Day Saints, Constitution Day Speech at the Salt Lake Tabernacle: Fundamentals of our Constitutions (Sept. 17, 2010), available at http://newsroom.lds.org/article/fundamentals-of-our-constitutions-elder-dallin-h-oaks.

<sup>45</sup> Alena Ledeneva, Behind the Façade: "Telephone Justice" in Putin's Russia, in Dictatorship or Reform? The Rule of Law in Russia 2436 (2006), available at http://se2.isn.ch/serviceengine/Files/ESDP/26627/ichaptersection\_singledocument/036BC437-221A-4FC3-9EC3-E82BDECA7084/en/Chap\_3\_Ledeneva.pdf.

<sup>46</sup> Id. (citing Peter Solomon, Jr., Soviet Politicians and Criminal Prosecutions: The Logic of Intervention, in Cracks in the Monolith (James Millar ed., 1992)). "Communist governance

the decision of an individual judge to frustrate the government's pursuit of the best interests of the people. By ideological contrast, the Western capitalist will not let the government's political agenda frustrate justice in an individual case.

The differences may be characterized in terms of trust. Judicial independence places enormous trust in judges, expecting them to do the right thing and to do justice even when there are compelling political or personal reasons to do otherwise. Western society's embrace of judicial independence reflects a distrust of government, even of majoritarian government. The belief is that such governments will exploit and victimize unpopular minorities unless they are subject to the checks and balances that come from an independent judiciary.

This idea is reflected in Alexis de Tocqueville's *Democracy in America*, which recognizes the role of the judiciary in protecting the minority from the "tyranny of the majority." This statement is foundational to the American ideological concept of the judiciary: because of their independence from majoritarian politics, only judges can be effective guardians of the rights of unpopular minorities.

In contrast, meetings with prominent Maoists involved in the constitution drafting process revealed that they have much greater trust in the government than in "independent" judges.<sup>48</sup> In Nepal, unlike Soviet-era socialist governments, this trust is not a blind faith in the Communist Party. Whatever else may appear in the new Nepali constitution, it will certainly provide for a parliamentary system where the government is a direct product of popular elections.<sup>49</sup> The Maoists trust the legislature more than the judiciary because the legislature is

resulted in what Peter Solomon has called the 'logic of intervention' or the logic of the 'directive from above' where the Communist party had the last word." *Id.* 

<sup>47</sup> See generally Alexis de Tocqueville, Democracy in America ch. 15 (1835). The term "tyranny of the majority" was further popularized by John Stuart Mill, who used it in his essay "On Liberty" (1859). See John Stuart Mill, On Liberty (Bartleby 1999).

<sup>48</sup> Interview with Ek Raj Bhandari, CA Member and Member of the Gaps and Overlaps Committee, in Kathmandu, Nepal (July 14, 2010) (notes on file with author). Mr. Bhandari gave a passionate explanation of the Maoist perspective on judicial independence; he pitched it in terms of his confidence in the democratic process and advocated entrusting the judiciary to the people and making it accountable to the people by placing it squarely under the power and control of those most responsive to the people: the elected legislature. See also Interview with Khim Lal Devkota, CA Member and Member of the Committee on the Judicial System, in Kathmandu, Nepal (July 16, 2010) (notes on file with author).

<sup>49</sup> See Prasai, supra note 3 (noting that the Maoists have moderated their position and support a multiparty government now).

accountable to the people.<sup>50</sup> Independent judges, unaccountable to anyone, simply cannot command that type of confidence;<sup>51</sup> in the Maoists' view, a judiciary that is independent of parliamentary control is inherently undemocratic and, therefore, not to be trusted.

Summarizing, and perhaps oversimplifying, Western ideology trusts judges to do the right thing as long as they are not pressured by political forces to do otherwise. Maoist ideology in Nepal assumes judges will do the wrong thing unless pressured by political forces otherwise. These conflicting assumptions demand fundamentally different policy prescriptions for Nepal's judicial structure and are not amenable to compromise.

# B. Judicial Independence v. Judicial Accountability

Scholars have paid considerable attention to the tension between judicial independence and judicial accountability, often attempting to strike an appropriate balance between these two competing policies.<sup>52</sup> This tension exists because a fully independent judiciary is accountable to no one and can render controversial or unpopular judgments without fear of repercussions. On the other hand, an accountable judiciary is answerable for its actions and, therefore, can never be truly independent.<sup>53</sup> As has been previously argued,<sup>54</sup> there is no one-size-fits-all balance to strike between judicial independence and judicial accountability. Nepal presents a compelling case.

Consider the two attributes Westerners prize most in the context of judicial independence and accountability: judges who demonstrate (1) *integrity* to recognize their ethical obligations and uphold them, and (2) *courage* to withstand outside pressure in rendering their decisions.<sup>55</sup> Accountability, in the form of disciplinary mechanisms

<sup>50</sup> Interview with Ek Raj Bhandari, supra note 48.

<sup>51</sup> Interview with Khim Lal Devkota, *supra* note 48. (Mr. Devkota argued that the judiciary must be accessible and transparent; citizens must feel like the judiciary belongs to them and that they want to support it and strengthen it because it gives them justice.).

<sup>52</sup> Symposium, Judicial Independence and Judicial Accountability: Searching for the Right Balance, 56 Case W. Res. L. Rev. 899 (2006). In 2006, the Case Western Reserve Law Review conducted a symposium entitled "Judicial Independence and Judicial Accountability: Searching for the Right Balance." Id. The title of the symposium alone betrays the nearly axiomatic understanding that these two principles are in fundamental conflict and that a balance must be struck between them.

<sup>53</sup> David Pimentel, Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity, 57 CLEV. St. L. Rev. 1, 18 (2009) [hereinafter Reframing the Debate].

<sup>54</sup> Id. at 31–32.

<sup>55</sup> Id. at 20-23.

for miscreant judges is important to encourage integrity; independence, in the form of structural protections for judges, insulating them from repercussions for their decisions, is important to bolster judicial courage. <sup>56</sup> Aside from structures to protect their independence or disciplinary regimes to hold them accountable, every judge comes to the job with a personal endowment of both courage and integrity, an endowment that can be represented as a unique point on the figure below:

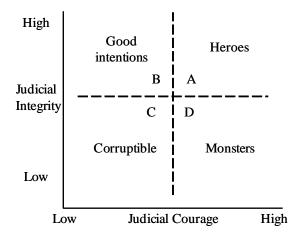


FIG. 1 — PLOTTING JUDICIAL COURAGE AND INTEGRITY ON A GRAPH

[I]n the Northeast quadrant (Quadrant A), we find the judges of the highest integrity and the highest courage. These are our "heroes." In the Northwest quadrant (Quadrant B), we find judges who want to do the right thing, but are vulnerable to outside threats and pressures; their integrity is high, but their courage is lacking. Quadrant C, in the Southwest, includes the "corruptible" judges, whose integrity is dubious, and who, lacking courage, are susceptible to pressure. Here is where you might find judges who pander to the whims of the executive branch or [who might] even be in the pocket of the mob. They are not bent on pursuing their own corrupt agenda (see Quadrant D, *infra*) as they lack the courage for such an enterprise, but are manipulable, and may well end up doing the bidding of others. In the Southeast (Quadrant D) we find the scariest of all, the judges with

low integrity and ample courage; these are what Judge Noonan described as "Monsters" in his book on judicial ethics—judges who boldly pursue their own corrupt objectives.<sup>57</sup>

Using this model, one can see that strengthening structural protections for judicial independence may do more harm than good if the judges are located in the bottom half of the graph. A judge who lacks integrity will only be emboldened in his corruption by a regime that immunizes him from outside pressures. Structural protections for judicial independence are helpful only if the judges have already demonstrated a reasonable degree of integrity. The Western system that trusts judges assumes this threshold level of integrity; the Maoist ideology does not.

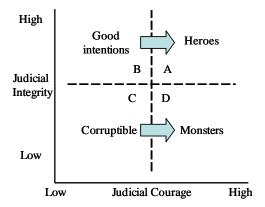


Fig. 2: Impact of strengthened structural protections for judges<sup>58</sup>

# C. Historical Baggage in the Nepali Judiciary

History complements ideology as a critical and perhaps controlling factor in the future of the Nepali judiciary. The 1990 constitution *did* afford the judges a high degree of independence. That independence was strengthened further by the fact that the disciplinary body, the judicial council, rarely exercised its power to police the judiciary.<sup>59</sup> The result was, according to popular perception,

<sup>57</sup> Reframing the Debate, supra note 53, at 27–28 (citing The Responsible Judge: Readings in Judicial Ethics 35–47 (John T. Noonan, Jr. & Kenneth I. Winston eds., 1993)).

<sup>58</sup> Id. at 29-30.

<sup>59</sup> Interview with Khim Lal Devkota, *supra* note 48. Mr. Devkota cited the failures of the Judicial Council, which, he said, despite obvious corruption throughout the system has

a judiciary that earned the confidence of no one and a bench that distinguished itself more by its corruption than by anything else. <sup>60</sup> The Western model of trusting judges failed to work. The general perception in Nepal is that the judges were unworthy of such trust. <sup>61</sup>

Unsurprisingly, the popular outcry in Nepal—and not just from the Maoists—is for a judiciary that is *accountable*.<sup>62</sup> Judicial independence advocates cannot effectively argue that the Nepali people should trust their judges and accord them the independence to do the right thing. Trusting the judges too much and giving them too much independence is widely perceived by Nepali citizens as one of the sources of the present problem.

#### IV. THE RHETORICAL GAP

No one in the current Nepali constitutional debate is openly advocating against an independent judiciary. The rhetoric from all sides is consistent that judicial independence is desirable. The CJS Concept Paper contains thirteen separate references to judicial independence, mostly justifying provisions on the grounds that judicial independence requires them, including the following:

"The constitution has to provide functional independency to judges."  $^{63}$ 

"As the judicial independency is an essential condition for the fair justice, the person who is dispensing justice should also be fair, competent, capable, impartial." <sup>64</sup>

never removed a judge in twenty years. This author has not attempted to verify the claim, but it is worth noting that this perception comes from a member of the CA and the Committee on the Judicial System. *See id.* 

<sup>60</sup> See Nepal's Judiciary Is Most Corrupt: TI Report, Nepal Biz News.com (May 25, 2007), http://www.nepalbiznews.com/newsdata/Biz-News/judicial.html (citing Transparency International, Global Corruption Report: Corruption in Judicial Systems (2007)) ("A country report on judicial corruption released . . . by Transparency International Nepal said Nepal's judiciary is one of the most corruption-affected sectors in the country. The Global Corruption Report 2007 prepared by senior advocate Krishna Prasad Bhandary on behalf of Transparency International (TI) said though corruption and irregularities are rife in Nepal's judiciary, initiatives are not being taken to curb such malpractices.").

<sup>61</sup> See generally, Sewanta Kattel, Local Level Perception of Corruption: An Anthropological Inquiry, 3 Dhaulagiri J. Soc. & Anthropology (2009) (analyzing the sources of the public perception of public corruption, including judicial corruption).

<sup>62</sup> Interview with Ek Raj Bhandari, *supra* note 48; interview with Khim Lal Devkota *supra* note 48.

<sup>63</sup> CJS CONCEPT PAPER, supra note 30, at 15.

<sup>64</sup> Id. at 16.

"The meaning of the independence of judiciary refers not only to be free from intervention in the judicial process by any person, authority or bodies other than judiciary, but also free from influence of any level or office-bearer of and within the judiciary itself." <sup>65</sup>

"The judicial independency is an essential condition in order to carry out judicial proceeding according to law." 66

Despite these concessions on the importance of judicial independence, the CJS Concept Paper itself entrusts the governance of the judiciary, including all appointments, oversight, discipline, and removal, to a Special Committee of the Legislature (Special Legislative Committee). This Special Legislative Committee is conceived as an eleven-person body, chaired by the Deputy Speaker of the Legislature and composed of the Minister for Law and Justice and nine additional members of the legislature. The rationale for the Special Legislative Committee is articulated in the CJS Concept Paper in terms of "democratiz[ing]" the courts:

The foundation of Democracy is the Civilian Supremacy. As the legislature is a representative body and also exercises the sovereignty of the people, the voice of people should only be reflected via this body. One of the major reasons behind the judiciary in the past that the people never realized ownership over it was lack of judiciary's responsibility to the people. Therefore, it is necessary to democratize the judiciary according to the present context.<sup>69</sup>

As noted, a substantial minority of the Committee on the Judicial System dissented from the CJS Concept Paper on a variety of issues. One of those dissents, which objects to the power of the Special Legislative Committee, strongly invokes the concept of judicial independence:

If judges are recommended by the legislature or any committee at the legislature, and approval or ratification of the appointment by the legislature on the recommendation, the judiciary becomes likely a body under the legislature. In a democratic system under the principle of separation of power, the power of the states is divided in

<sup>65</sup> Id. at 31.

<sup>66</sup> Id. at 27.

<sup>67</sup> Id. at 39.

<sup>68</sup> Id.

<sup>69</sup> Id.

which the legislature makes laws, the executive implements the laws and the judiciary interprets the laws. Provided that, if the legislature holds the sole power of the State to form an organ of the state or holds power to supervise, control and monitor the state organs, the judiciary can not be imagined as an independent and competent. Consequently, the country heads toward dictatorship and anarchism. While writing a written Constitution, if the legislative [sic] is made more powerful than the Constitution itself, there is highly a chance of centralizing the power at the legislature, which we never have wished.<sup>70</sup>

The ideological divide becomes apparent in this debate, even though both sides are invoking principles of democracy, independence, and accountability. Notwithstanding the predictions of doom in the dissenting opinion, the Maoists *do* appear to believe in some degree of parliamentary supremacy. Maoists argue that the check on the legislature's power or abuse thereof rests with the people who can always vote out a legislature that abuses the public trust. Maoists believe that one cannot trust an unaccountable judiciary to play such a responsible role.<sup>71</sup>

The Nepal Bar Association (NBA) has also staked out a strong position against the CJS Concept Paper by publishing its own position paper on judiciary issues. It decries the CJS Concept Paper's approach for its failure to "uphold the principle of independence of judiciary and the separation of powers which is one of the fundamental pillars of democracy." The NBA position paper goes on to "emphasize[] that legislative interference (federal or provincial) with judicial appointments and dismissals is not acceptable."

The President of the NBA has expressed his confidence—based on conversations he has had with the highest level Maoist leaders—that even the Maoists share the NBA's commitment to an independent judiciary.<sup>74</sup> However, the concrete proposals coming from the Maoists suggest that judicial independence to the Maoists means something very different from what it means to the NBA.

<sup>70</sup> Id. at 77.

<sup>71</sup> Interview with Ek Raj Bhandari, supra note 48.

<sup>72</sup> Nepal Bar Ass'n, The Judicial System under Nepal's New Constitution 11 (2010).

<sup>73</sup> Id.

<sup>74</sup> Interview with Mr. Prem Bahadur Khadka, NBA President, in Kathmandu, Nepal (July 13, 2010) (notes on file with author).

#### V. SEPARATION OF POWERS

Both the dissenting opinion and the NBA position paper make specific reference to the concept of separation of powers, the latter identifying it as "one of the fundamental pillars of democracy." While the Maoists speak of independence and accountability, they do not speak of separation of powers, much less tout it as a pillar of democracy. The CJS Concept Paper illustrates that the Maoist concept of democracy militates against separation of powers and favors bringing the judiciary under the control of the legislature as a means of "democratiz[ing]" the judiciary."

The concept of separation of powers, raised first in the discussion of judicial appointments, arises again in the context of constitutional interpretation. The question of *who* should have the power of constitutional interpretation in Nepal is sufficiently controversial and important to deserve mention here. In the United States, constitutional interpretation is entrusted to the Supreme Court. Americans are untroubled by the fact that by making interpretive judgments the Court may actually be making law.<sup>77</sup> In common law jurisdictions, the concept of judge-made law is neither novel nor threatening.<sup>78</sup> This concept follows the traditional role of the common law judiciary articulated above: to protect the public from the government. Indeed, the power of the judiciary was invoked historically in common law England as a check on the power of the king.<sup>79</sup>

The tradition of the civil law is profoundly different. Judges were expected to *apply* the law but not interpret it.<sup>80</sup> From this perspective, ambiguities in the law are to be referred to legislative bodies, not judiciaries, for clarification.<sup>81</sup> The rationale is that such

<sup>75</sup> CJS CONCEPT PAPER, supra note 30, at 77; NEPAL BAR ASS'N, supra note 72, at 11.

<sup>76</sup> CJS CONCEPT PAPER, *supra* note 30, at 39 ("As the legislature is a representative body and also exercises the sovereignty of the people, the voice of people should only be reflected via this body. . . . [I]t is necessary to democratize the judiciary according to the present context.").

<sup>77</sup> Merryman & Pérez-Perdomo, *supra* note 40, at 17 ("The fear of judicial lawmaking [in the United States and England] . . . did not exist. On the contrary, the power of the judges to shape the development of the common law was a familiar and welcome institution.").

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> *Id.* at 30 ("[T]he function of the judge would be limited to selecting the applicable provision of the code and giving it its obvious significance in the context of the case . . ."); *Id.* at 39 ("[Prussian] judges were forbidden to interpret the code.").

<sup>81</sup> *Id.* at 40 ("A new governmental organ was created by the legislature and given the power to quash incorrect interpretations by the courts . . . . [The Tribunal of Cassation] was not

interpretation and clarification is inherently a legislative act.<sup>82</sup> This ideology was established under Roman legal tradition and revitalized by the French revolutionaries. French revolutionaries did not see the judiciary as a champion of the rights of the people, as in England, but rather as a barrier and a threat to democratic governance. <sup>83</sup>

Under civil law tradition, it is inappropriate to entrust issues of interpretation, especially of the constitution, to the regular courts. Civil law jurisdictions have developed separate institutions for such interpretation. In many of these countries, constitutional courts operate independently from a supreme court and address issues of constitutional interpretation, leaving a supreme court to function simply as the ultimate court of appeals-the court of last resort. Conceptually, these constitutional courts were not to be courts at all and were not considered to be part of the judicial branch, although over time they have assumed an increasingly judicial character. Thus, although judicial review of legislative action has been a sacred element of common law jurisprudence since *Marbury v. Madison*, Judicial review, like any act of judicial interpretation, would be considered a violation of separation of powers under the civil law tradition.

The CJS Concept Paper and the Maoists' draft both provide that issues of constitutional interpretation will be entrusted to the Special Legislative Committee, which is a legislative body. The NBA disagrees, invoking the principle of separation of powers:

a part of the judicial system, but rather a special instrument created by the legislature to protect legislative supremacy from judicial usurpation.").

<sup>82</sup> *Id.* at 30 ("Experience with the pre-revolutionary courts had made the French wary of judicial law-making disguised as interpretation of laws.").

<sup>83</sup> Id. at 35-36.

<sup>84</sup> Id. at 37-38.

<sup>85</sup> Id. at 37–38; see also, e.g., Differences Between the Constitutional Court and the Supreme Court of Justice, NISGUA, available at http://www.nisgua.org/themes\_campaigns/impunity/Differences%20Between%20Constitutional%20Court%20and%20Supreme%20Court%20of%20Justice.pdf (describing the different jurisdiction of these two bodies in Guatemala).

<sup>86</sup> Merryman & Pérez-Perdomo, *supra* note 40, at 37–38.

These special [constitutional] courts, which are not a part of the ordinary judicial system and are not operated by members of the ordinary judiciary, were established in response to the civil law tradition that judges . . . cannot be given such power to review statutes for constitutionality. In time, many of these institutions have acquired judicial character, particularly in jurisdictions that follow the Germanic civil law tradition, and in Latin American civil law tradition. *Id.* at 134–42.

<sup>87 5</sup> U.S. 137 (1803).

<sup>88</sup> CJS Concept Paper, *supra* note 30, at 39; Constitution of the People's Federal Republic of Nepal, (2067/2008) (Proposed Integrated Draft) § 172, at 69, *available at* http://southasiarev.files.wordpress.com/2011/01/new\_draft\_nepal\_consitution.pdf.

The NBA holds the position that the judiciary, and, ultimately, the Supreme Court, should be the final body to interpret the law, including the constitution, as per the principle of the separation of powers and independence of the judiciary. Accordingly, the NBA expresses grave concern with the provision of the JS Concept Paper with respect to the interpretation of constitution by a committee of the federal legislature.<sup>89</sup>

The NBA view, therefore, reflects the perspective and ideology of a common law jurisdiction. Such a perspective may not be surprising given the profound influence of India in the region and the assistance and support the NBA has received from Canadian sources.<sup>90</sup>

A lawyer from a civil law jurisdiction would likely conclude, however, that entrusting constitutional interpretation to the supreme court would be the more serious violation of separation of powers. It is the legislature, after all, that decides what the law is; the courts, with judges operating as mere functionaries, are empowered only to apply the law—ideally mechanically, to the extent that is possible—to individual cases.

There is nothing sacred about entrusting constitutional interpretation issues to the Supreme Court of Nepal. While the principle of constitutional supremacy is a vital one, fundamentally in conflict with the legislative supremacy favored by the Maoists' and CJS Concept Paper's proposals, there is nothing offensive to the core principles of judicial independence in the creation of a separate constitutional court. Further, there may be great advantages to such a court, particularly in its potential to attract consensus both from separation of powers advocates and those who find the status quo unacceptable.

<sup>89</sup> Nepal Bar Ass'n, supra note 72, at 13.

<sup>90</sup> See Nepal Bar Association: Developing Democracy in Nepal (DDN-II), http://nba-cba.org.np/new/index.php?option=CMS&task=detail&cid=5, (detailing the cooperation and support of the Canadian Bar Association with and for the Nepal Bar Association).

<sup>91</sup> Most models for constitutional courts in other countries place the court reasonably beyond the control of any one branch of government. The Indonesian Constitutional court, for example, is composed of nine justices put forward by the three branches of government: three by the President, three by the Supreme Court, and three by the legislature (the People's Representative Council). Mohammad Mahfud, Separation of Powers and Independence of Constitutional Court in Indonesia, at 9, (paper presented by the Chairman of the Indonesian Constitutional Court at the 2nd Congress of the World Conference on Constitutional Justice in Rio de Janeiro, Brazil on Jan., 16–18, 2011), available at <a href="http://www.venice.coe.int/WCCJ/Rio/Papers/INA\_Mahfud\_E.pdf">http://www.venice.coe.int/WCCJ/Rio/Papers/INA\_Mahfud\_E.pdf</a>.

#### VI. WHERE TO GO FROM HERE? RECONCILING IT ALL

Ultimately, any compromises that are reached for the new Nepali judiciary must reflect the ideological and historical forces at play in Nepal. The largely independent judiciary of the past two decades utterly failed to win public confidence and trust .<sup>92</sup> The new judiciary for Nepal must be more accountable and, thus, necessarily less independent than in the past. The status quo is entirely unacceptable; serious changes have to be made, which will come largely with greater accountability measures. Even the NBA position paper—the fiercest defense of judicial independence seen in the debate—speaks strongly about the importance of accountability:

In the survey conducted by the NBA the overwhelming majority of respondents opined that judiciary should be established as a corruption-free sector, and the code of conduct should be implemented strongly against judges. It is obvious that so as to maintain accountability of the judiciary, the effective implementation of codes of conduct and impeachment proceedings must be strictly enforced.<sup>93</sup>

However, the judiciary must also not be held accountable to majoritarian forces. Even if the Maoists prefer to trust the people and see themselves as the champions of the oppressed, Nepal has a long and ugly history of discrimination against unpopular and disenfranchised minorities. He majority can be expected to protect the rights of the majority through legislative action, but someone must guarantee the rights of Nepal's minorities, including women, Dalits, religious minorities, and a host of ethnic subgroups.

The international consensus on best practice for enforcing judicial accountability is to entrust enforcement of ethics codes, and the policing of judicial misconduct and corruption to an independent judicial council. However, the failure of the previous judicial council

<sup>92</sup> See Nepal's Judiciary Is Most Corrupt: TI report, supra note 60.

<sup>93</sup> Nepal Bar Ass'n, supra note 72, at 14.

<sup>94</sup> See, e.g., Press Release, Asian Human Rights Comm'n, NEPAL: Implementation of Anti-Discrimination Laws (July 24, 2010), available at http://www.scoop.co.nz/stories/WO1007/S00470/nepal-implementation-of-anti-discrimination-laws.htm (giving an assessment of the failure to protect human rights of Dalits in Nepal).

<sup>95</sup> The author made precisely this recommendation in an earlier article about the Nepali judiciary. *Constitutional Concepts, supra* note 6, at 294–310. This article reconsiders and amends that position.

to perform this function<sup>96</sup> and the political imperative to avoid anything that appears to perpetuate the status quo,<sup>97</sup> militate in favor of creating a new institution to assume this role. The ideological and historical forces at play in Nepal require no less.

Notwithstanding the Maoists' best intentions, however, this new institution should *not* be a body of the legislature. A better approach would be for the new constitution to create a Judicial Complaints Commission (JCC) within the judicial branch, empowered to investigate charges of judicial misconduct and recommend disciplinary action, including removal of judges found to violate ethical standards. This JCC may be appointed with participation by political actors, but once appointed it should remain one step removed from majoritarian political forces. Otherwise, the JCC could be pressured to harass judges who render unpopular decisions that protect the rights of minorities or judges whose politics or interests are at odds with the ruling party.

Constitutional interpretation should also be at least one step removed from the legislature, lest constitutional standards become subject to the whims of the majority. Again, the judiciary's inability to muster public confidence in the past weighs in favor of a new institution, such as a constitutional court, to perform this role. This new institution, without a history of corruption or politicization, may be the best hope for sound constitutional administration in a new Nepal.

#### VII. CONCLUSION

Nepal must come together and find common ground and consensus for the structure and character of its new government, which will be reflected in the drafting of the new constitution. The debate over the structure and role of the judiciary is divisive, is exacerbated by all sides using similar rhetoric to argue for very different, even inconsistent approaches.

<sup>96</sup> Interview with Khim Lal Devkota, supra note 48; see supra text accompanying note 59.

<sup>97</sup> See supra text accompanying note 20.

<sup>98</sup> There are various ways to insulate JCC members from political interference. One option might be to select JCC members from the ranks of the judiciary, have them serve one term on the JCC, and then return to a secure post in the judiciary. Under this option they need not worry about pleasing the appointing authorities since they cannot be renewed anyway. Further, JCC members need not worry about using their influence to ingratiate themselves to future employers since they have a secure post in the judiciary to which to return in any case.

Reconciliation of this war of words and ideas requires an appreciation of the historical and ideological origins of the conflict. Moreover, Nepal cannot merely adopt or import foreign models; it needs its own institutions tailored to the nation's priorities in light of its culture, history, and ideological orientations. For Nepal, this means a judicial structure that strikes a balance between accountability and independence, decidedly favoring the former. Most likely, it means creating new institutions like (1) a Judicial Complaints Commission to enforce accountability, rather than continuing to rely on a historically ineffective judicial council to do so, and (2) a new, freshly empowered constitutional court to interpret and apply constitutional protections and limitations, rather than continuing to rely on its supreme court to perform this function. Only by replacing the tried-and-failed, or at least tried-and-flawed, institutions against which the Maoists have rebelled for so many years can Nepal hope to forge some semblance of a consensus on the terms of its new constitution and chart a new future for the people of Nepal.

# JUDICIAL INDEPENDENCE AND THE APPOINTMENT OF JUDGES TO THE HIGHER JUDICIARY IN INDIA: A CONCEPTUAL ENQUIRY

Arghya Sengupta\*

#### Introduction

The appointment of judges to the Supreme Court of India and the High Courts has over the years been a subject of intense conflict between the judiciary and the executive. Much of the conflict has stemmed from the need to preserve judicial independence, a term oft-used but little explicated in India's constitutional literature. Judicial independence has meant different things to different people over time— to several members of the Constituent Assembly, it was a principle to allow judges to adjudicate free from extraneous considerations, to a majority of judges of the Supreme Court over time, a requirement of the rule of law enshrined in the basic structure of the Constitution and to several popularly elected governments, a principle which had to be carefully bypassed, while appointing sympathetic judges to the higher judiciary. Today, these differences have been put in sharp relief in the context of the continued operation of the Supreme Court collegium as the focal body for judicial appointments, with judicial independence being used both by judges to justify its perpetuation as well as by the political classes and sections of the civil society activists to explain its purported failures.

Neither does this article analyse each of the senses in which the term has been used by judges, politicians and academics in the last sixty years nor does it delve into a detailed legal analysis of the seminal cases relating to judicial appointments decided by the Supreme Court. Instead, it is concerned with a conceptual enquiry into judicial independence with a view to outlining its precise relevance to the process of judicial appointments in India. To this end, this article is divided into three Parts: Part A provides a brief narrative of judicial appointments in India to set the context for the article; Part B proposes a conceptual understanding of judicial independence, both on the basis of a theoretical enquiry as well as by analysing its role in a formal

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separation of powers framework analogous to India; Part C uses this understanding to assess whether the ways in which judicial independence has been used in India, specifically in justifying the current collegium method of appointment are conceptually well-founded. Through this three-part analysis, it is hoped that a certain degree of conceptual clarity regarding the role of judicial independence in the context of judicial appointments will emerge, thereby providing both an argument as well as a theoretical foundation for reform of the current appointments process.

#### I. JUDICIAL APPOINTMENTS IN INDIA: THE CONTEXT

The narrative of judicial appointments in India is rich and varied in characters and issues. Judges of diverse ideologies and upbringing, Law Ministers with varying degrees of inclination to interfere in the judicial process, Prime Ministers both non-interventionist as well as authoritative, controversies that have riven the nation, judicial decisions that have united it and continuing attempts at finding the ideal and hitherto elusive system of appointment which will secure the independence and high quality of the judiciary are some of its constituent features. To provide a coherent account of this narrative, discern the key issues that have arisen and set the context for the article, this part will briefly discuss three crucial phases relating to judicial appointments: Pre-constitutional discussions (1946-1950), the phase of executive-led appointments (1950-1993) and the current collegium mode of appointment of judges (1993-present).

Appointment of judges to the Supreme Court of India and High Courts is provided for in Art. 124(2)<sup>1</sup> and Art. 217(1)<sup>2</sup> of the Constitution respectively. These articles, which provide that the power of appointment vests in the President, in consultation with the Chief Justice of India for Supreme Court appointments, and in consultation

<sup>1</sup> Art. 124(2) reads:

<sup>&#</sup>x27;Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted...'

<sup>2</sup> Art. 217(1) reads:

<sup>&#</sup>x27;Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court...'

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with the Governor of the concerned state, the Chief Justice of the concerned High Court in addition to the Chief Justice of India for High Court appointments, were products of vigorous debate in the Constituent Assembly. The key issue before the Assembly was to institute a system which would secure judicial independence.<sup>3</sup> During the debates on how to achieve these ends, there was broad consensus that the power of appointment would vest focally, albeit not entirely in the executive. The underlying reasons for this view were clear the system of executive-led appointments which was widely prevalent at the time across the world was seen by the drafters as incorporating a degree of public accountability in the process. At the same time, the unfavourable colonial experience regarding unfettered executive discretion in judicial appointments convinced the drafters that efficient checks and balances on executive power would have to be instituted. This would ensure that judges, in Nehru's words, would be "people who can stand up against the executive government and whoever may come in their way".4

After briefly considering and dismissing a legislative role in appointments for being practically unwieldy and reducing the status of judicial office by making it an object of political bargain,5 the Constituent Assembly agreed on a system by which the President would appoint judges, albeit after mandatorily consulting the Chief Justice of India. The Chief Justice of India was entrusted with this constitutional role since he could provide the necessary apolitical antidote to politically motivated selections by the executive, if they were mooted. However, Ambedkar himself, speaking in the Assembly, was careful to stress that consultation did not amount to a veto being exercised by the Chief Justice of India, since that would result in an untrammelled power being vested in a single person, a constitutionally unwise precedent. In this way, a careful inter-institutional equilibrium in the process of judicial appointments was envisaged by the Constituent Assembly— a multiplicity of authorities across the wings of government, checking and balancing each other to ensure that the dignity of the judiciary was maintained and judicial independence remained sacrosanct.

<sup>3</sup> The key discussions on the issue of appointments were held between the 24th and 27th of May, 1949. See *Constituent Assembly Debates, Vol. VIII* (New Delhi: Lok Sabha Secretariat, 2003) 229-399 (hereinafter "CAD").

<sup>4</sup> CAD vol VIII, 246-247 (24th May 1949).

<sup>5</sup> Ibid., 258 (24th May 1949).

<sup>6</sup> Id.

In the early years of the operation of the constitutionally envisaged system of appointments in independent India, concerns were raised that the role of the executive, especially in the states, was leading to the erosion of the independence of the judiciary. This marked the genesis of a belief that the judiciary itself, through its representatives, was best placed to decide on its own composition, and thereby secure judicial independence. Further credence was attached to this view when during the Prime Ministership of Indira Gandhi, armed with a super-majority in the legislature and having made promises of social justice, the government began to actively interfere with the composition of the higher judiciary. Justifying this move, the Law Minister, Mohan Kumaramangalam proposed a radical re-interpretation to the appointment process, by which the political philosophy of judges, as determined by the government, would be a relevant criterion for appointment.<sup>8</sup>

Fearing that this determination was a superficial guise for creating a judiciary 'made to measure' the Supreme Court responded, albeit belatedly, at a time when its public image was at its nadir. Through two landmark decisions the Court clarified the nature of the consultation process for appointment of judges under Art. 217(1) and transfers under Art. 22212 and held judicial independence to be part of the basic structure of the Constitution. Specifically, in *S. P. Gupta v Union of India* (*'Gupta/ The First Judges' Case'*), the majority of the Court held that while judicial independence did not require the view of the Chief Justice of India in the matter of appointments and transfers to be determinative, nonetheless consultation with him would have to be full and effective and his opinion should not ordinarily be departed from. The power of the executive in appointing judges was accordingly circumscribed although it continued to have the last word on who would be appointed.

<sup>7</sup> Law Commission of India, 'Reform of Judicial Administration' (14th Report 1958) 34.

<sup>8</sup> Mohan Kumaramangalam, Judicial Appointments: An Analysis of the Recent Controversy over the Appointment of the Chief Justice of India (Oxford & IBH Pub Co, New Delhi 1973) 83.

<sup>9</sup> Nani Palkhivala, Our Constitution: Defaced and Defiled (MacMillan, New Delhi 1974) 93.

<sup>10</sup> This was primarily owing to its perceived capitulation before the government during the Emergency in the infamous *Habeas Corpus* case holding that Art. 21 was the 'sole repository' of the right to life and the government, by law, could validly suspend the same. *A.D.M. Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521.

<sup>11</sup> S. P. Gupta v Union of India, AIR 1982 SC 149.

<sup>12</sup> Union of India v Sankalchand Sheth (1977) 4 SCC 193.

<sup>13</sup> AIR 1982 SC 149.

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This decision, which adhered to a literal interpretation of the constitutional provisions for appointment and transfer of judges, was widely perceived as failing to sufficiently secure judicial independence. Academics, lawyers and political commentators all felt that it gave primacy to the executive in the process of appointment of judges and failed to institute adequate safeguards.14 Acting on these widely held fears and perceived executive overreach in appointments, the Supreme Court in the case of Supreme Court Advocates-on-Record Association v Union of India<sup>15</sup> ('SCAORA/ The Second Judges' Case') substantially overruled The First Judges' Case and fundamentally altered the nature of the appointments process. It established a judicial collegium consisting of the Chief Justice of India accompanied by the seniormost judges of the Supreme Court as the focal body for appointment after tracing the need for vesting the Chief Justice of India, acting as the paterfamilias of the judiciary, with primacy in the appointments process. In doing so, it expounded its conception of judicial independence, echoing a view expressed by the Law Commission three decades earlier, that the judiciary itself, without executive interference was best placed to determine its own composition and thereby secure its independence.

The modalities of how the judicial collegium would actually perform this task were unclear in the decision; hence, in an advisory opinion in *Special Reference No. 1 of 1998*<sup>16</sup> ('*The Third Judges' Case'*) the Supreme Court unanimously clarified its earlier decision. According to this ruling, the Chief Justice of India would have to consult his four seniormost colleagues for Supreme Court appointments and his two seniormost colleagues for High Court appointments. Additionally, the seniormost judge of the Supreme Court acquainted with the High Court from which the potential candidate hailed (for Supreme Court appointments) and to which High Court the candidate was proposed (for High Court appointments) would have to be consulted. Further, the Chief Justice of the High Court too, in forming his opinion, would have to consult his two seniormost colleagues. No detailed reasoning was provided

<sup>14</sup> For illustrative examples see Upendra Baxi, Courage, Craft and Contention: The Indian Supreme Court in the Eighties (NM Tripathi Pvt. Ltd., Bombay 1985) 23, 55; HM Seervai, Constitutional Law of India vol III (4th edn Universal Law Publishing, New Delhi 2008) 2854; Arun Shourie, Mrs. Gandhi's Second Reign (Vikas Publishing House, New Delhi 1983) 266-268.

<sup>15 (1993) 4</sup> SCC 441.

<sup>16 (1998) 7</sup> SCC 739.

for the differential sizes of the collegium except to state its rationale - to select the best available judicial talent in the country for the higher judiciary, in keeping with the need for the independence of the judiciary. Though nominally the formal warrant of appointment would continue to be issued by the President, these decisions ensured that the substantive power lay in the hands of the judicial collegium, ostensibly to safeguard judicial independence.

It is this process laid down by *The Third Judges' Case* that governs judicial appointments today. However, owing to several questionable selections, the lack of transparency of proceedings and the limited accountability for decisions taken, this process has created considerable public resentment. <sup>17</sup> Reform seems imminent, motivated by the fundamental need to protect judicial independence and restore public confidence in the judiciary as an impartial arbiter of disputes.

This brief history of judicial appointments in India points to the significance of judicial independence to the appointments process. The need for an independent judiciary provided the underpinning for the initial system envisaged by the drafters, and every reform instituted or recommended thereafter by the Supreme Court, the Law Commission of India or the government. Today, as the collegium system of appointment faces considerable strain, judicial independence is again at the forefront, used both by advocates and critics of the collegium to buttress their position. Thus it is an apposite juncture to analyse judicial independence closely and attempt to formulate a conceptual understanding to delineate its precise role in the appointments process. It is this conceptual enquiry concerning judicial independence which Part II deals with, taking a step back from the current controversies surrounding judicial appointments, with the ultimate aim of carrying the discussion a step forward.

#### II. JUDICIAL INDEPENDENCE: A CONCEPTUAL ANALYSIS

# A. First Principles

Judicial independence, like rule of law or accountability, is a catchphrase of our times. Concern for judicial independence is nearuniversal, extending to developed and developing countries, old legal

<sup>17</sup> For a succinct summary of problems of the collegium system, see TR Andhyarujina, 'Appointment of Judges by Collegium of Judges' *The Hindu* (New Delhi 18<sup>th</sup> December 2009) <a href="http://beta.thehindu.com/opinion/op-ed/article66672.ece">http://beta.thehindu.com/opinion/op-ed/article66672.ece</a> accessed on 13<sup>th</sup> March 2011.

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systems and new. This wide usage of judicial independence is however accompanied by considerable disagreement regarding its meaning. Of course, a large proportion of differences in understanding can be attributed to context and the differing nature of threats to judicial independence in different countries. But it would be fallacious to assume context to be a catch-all explanation for prevalent differences. People have different ideas in mind when they use the term judicial independence because they perceive threats differently and accord different values to a range of interests which require protection. In order to conceptually understand judicial independence, it is necessary to sift through the super-structure of differences, primarily complicated by different definitions used by commentators and analysts, and delve into the sub-structure of the concept. This, I believe, is best done by asking the focal question: 'Why judicial independence?' Attempting to answer this question will require a careful analysis of first principles regarding the independence of the judiciary, in the course of which it is hoped that the rationale for judicial independence in a system governed by the rule of law will become evident.

To arrive at a conceptual understanding of judicial independence, let us take a hypothetical case situation of a judge with two parties who have come before him to adjudicate a private dispute. Assume that the society in which the judge and the parties live prizes the value of justice and expects its courts to apply the law to reach just results. Now X, a detached observer, non-interested in the dispute and with no knowledge of its particulars, is asked what the judge should do in this case. Though X would most likely not have an opinion regarding the substantive outcome of the case, she would certainly believe that the judge should adjudicate the dispute impartially. In addition she will want the decision given by the judge to be effective and capable of being enforced. Since the latter depends on conditions extraneous to the judge, conditions regarding which no information is provided in this example, it will not be pressed further. If however pressed further on the first point of what adjudicating the dispute impartially demands, she would most likely believe the following:

- 1. The judge should not be related to either of the parties in any way
- 2. He should not be in a position to be influenced by the parties or their agents

- 3. He should be safeguarded from threats from the parties or their agents
- 4. He should carry on proceedings openly
- 5. He should hear the parties fully and adequately
- 6. He should base his decision on reasons which are valid and relevant

Of course, there could be further points which X believes are necessary to ensure impartial adjudication of the dispute. But as a rational person, the afore-mentioned points would, in all likelihood, figure in her list of necessities. If these six points, broadly understood as aspects of fairness, are scrutinised, then they can be sub-divided into two types of requirements: independence (points 1-3) and accountability (points 4-6). The requirement of independence in this respect connotes a certain degree of detachment between the judge and the parties. Of course the judge and the parties are members of the same society and it is possible that they (or any combination of them) share certain objective commonalities such as age, gender etc. But these commonalities should be almost entirely irrelevant for the purpose of adjudicating impartially between the parties. This has been explained in terms of a judge showing a party impartiality which is necessary and issue impartiality which is not.<sup>18</sup> The requirement of independence hence seeks to ensure the exclusion of improper influences on particular decisions, thereby making the judge a detached and impartial arbiter of the dispute.

Accountability factors equally seek to ensure that extraneous considerations are not grounds for the decision. However the approach is markedly different from independence, being based on external checks to the exercise of judicial power rather than reducing restrictions on judicial power as independence factors tend to do. Through these checks, appropriately established, the judge is to be made answerable for his decision, thereby mitigating the possibility of improper influences affecting him. It is in this narrow, literal sense of answerability for decisions taken effectuated through external checks on power, that accountability is used here. Accountability with respect to the judgment in this example flows from the judge both to

<sup>18</sup> This is a broad distinction, for further qualifications of which see Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Dartmouth Publishing, Aldershot 1999) 64.

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the public through the medium of open hearings and reasoned judgment as well as to the higher courts (if any) which may reverse the decision on appeal.<sup>19</sup> Other forms of accountability may equally exist, which are however not relevant for the present discussion.<sup>20</sup>

Two points become clear from this analysis: First, independence of an individual judge is required to ensure impartial adjudication of a dispute; second, independence is one of several factors (accountability is another key factor which has been identified for the purpose of this analysis, but it need not be the only one) which leads to impartial adjudication.

This understanding of the rationale for judicial independence helps greatly in understanding what judicial independence means.<sup>21</sup> Without this prior question being answered, judicial independence, taken literally could logically mean a judge deciding to come to court not dressed in his traditional black-and-white robes or even a judge ignoring precedent, since both would be expressions of his independence. But since we know that judicial independence is needed to ensure impartial adjudication of disputes, we begin to see clearly what kinds of independence are necessary for this purpose and why sartorial habits of the judge or his desire to defy precedent are unwarranted expressions of his independence. Three further points emerge: First, that absolute independence is not necessary and may not be desirable for a judge; second, following from the first, is that the key question to ask of a judiciary is not whether it is independent or not but rather how independent it is and whether the extent of independence serves the rationale of impartial adjudication adequately; third, independence and accountability are two independent variables which are both relevant to impartial adjudication, though they follow different approaches to reaching it.

These points can be further developed through a second, modified example in a context analogous to India's constitutional framework. Suppose the respondent before the judge is the state in a

<sup>19</sup> This is termed 'decisional accountability' which can either flow to the public and the litigants (public accountability) or to higher courts (legal accountability). Charles Gardner Geyh, 'Rescuing Judicial Accountability from the Realm of Political Rhetoric' (2006) 56 Case Western Reserve Law Review 911.

<sup>20</sup> Richard Mulgan, 'Accountability: An Ever-Expanding Concept?' (2000) 78 Public Administration 555.

<sup>21</sup> The concept of independence as impartiality has been explained in Irving R Kaufman, 'The Essence of Judicial Independence' (1980) 80 Columbia Law Review 671.

case involving a challenge to the constitutionality of a statute by a private citizen. Assume further that the society to which the judge belongs has adopted a model of constitutional government based on the separation of powers with judges being appointed by the executive, capable of being removed by the legislature and having the power of judicial review of legislative and executive action. Now if X, our detached observer, is asked the same question as to what the judge should do in this case, her first answer would likely be the same—the judge must adjudicate the dispute impartially and in an effective manner. But in the substantiation of what such adjudication requires, though the points relating to accountability (points 4-6) may remain unchanged, her points relating to independence (points 1-3) become prima facie problematic. The judges, being part of the judiciary, are state functionaries and hence by implication 'related to' the state, the actions of which, albeit performed by another organ, are being called into question. Equally the questions of being influenced or threatened by the other organs of government assume an institutional dimension within the state paradigm, especially because judges are appointed and can be removed by other organs of the state, which is a litigant before the court. The question of effectiveness and enforcement of the decision too acquires an institutional dimension, especially if the decision by the court is adverse to a co-ordinate wing of the government which is responsible for enforcing it. Concluding on this basis however that the system is not independent and there will be no impartial and effective adjudication is too quick. Instead, as the previous example showed, the key issue is not a binary determination of whether the institution of the judiciary is independent or not but rather how independent it is and whether such independence serves the end of impartial and effective adjudication. This is the question we turn to next, which requires an analysis of the role of the judiciary and the checks and balances imposed on it within a formal separation of powers framework.

# B. Separation of Powers and Judicial Independence

This section aims to provide a basic conceptual sketch of the separation of powers; understands the role of the judiciary within it and finally examines the need for judicial independence in furthering the rationale of a government based on a theory of separation of powers. Through this analysis, it is hoped that the institutional dimension of judicial independence will become clear thereby assisting X, our

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detached observer, to come to a conclusion regarding whether the hypothetical fact situation extracted above allows the judge to adjudicate impartially and effectively, allowing us to understand the role judicial independence plays conceptually in the appointments process.

#### The Judiciary in a Separated Framework I: Montesquieu

As a doctrine, various rationales have been propounded to justify the separation of powers.<sup>22</sup> For the purpose of this article, Montesquieu's seminal understanding of separation of powers as essential for preservation of liberty, an understanding widely employed by the Indian Supreme Court in separation of powers questions, will be used as a basis.<sup>23</sup> According to Montesquieu, if legislative, executive and judicial powers are exercised by a single person, there is no liberty.<sup>24</sup> Thus power sources need to be checked by countervailing sources of power, which is only possible if the sum total of political power is divided and subsequently balanced. This division, according to Montesquieu, is optimally threefold consisting of 'legislative power, executive power over the things depending on the right of nations, and executive power over the things depending on civil right.'25 The second type of the executive power is alternatively referred to as 'the power of judging.'26 These compartments are not water-tight but allow for inter-dependencies between the organs such that they can check and balance each other. This non-adoption of a sacrosanct separation of powers is significant for two key reasons. First, it promotes the need for balance between organs of government by introducing mutual checks and balances. Second, it introduces a concern for efficiency, another fundamental rationale for constitutional government.

<sup>22</sup> For a conspectus of rationales see, Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review 633, 642; for a historical development of rationales for separation of powers see, WB Gwyn, The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to its Adoption in the United States Constitution (Tulane University, New Orleans 1965) 28.

<sup>23</sup> See *Kesavananda Bharati v State of Kerala*, (1974) 4 SCC 1461) at ¶1873 (Per M.H. Beg J.); *IR Coelho v State of Tamil Nadu*, (2007) 2 SCC 1. Montesquieu's doctrine is in contradistinction to a 'pure doctrine' where powers, organs and persons are absolutely separated. See MJC Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund, Indianapolis 1998) 14.

<sup>24</sup> Montesquieu, The Spirit of Laws (Anne Cohler, Basia Miller and Harold Stone (eds), CUP, Cambridge 1989) 157 [hereinafter 'Montesquieu']

<sup>25</sup> Supra Montesquieu, 156.

<sup>26</sup> Supra Montesquieu, 157.

In this structural web of differentiated governmental organs and separated powers envisaged by Montesquieu and commonly used subsequently, the judiciary has long been considered 'the least dangerous' and 'the weakest of the three departments of power.'<sup>27</sup> This understanding can be traced to the fact that in early separation of powers theory, the judiciary was not seen as a distinct branch of government. In most early accounts, the judicial power was seen as a component of executive power.<sup>28</sup> The patent conflict of interest and unfairness as a result of vesting the executive with the power to judge was seldom a contentious matter since the content of judicial power was limited. Though this restricted content of judicial power was not explicitly contested by Montesquieu,<sup>29</sup> its consolidation with the executive power was challenged by him on grounds of unfairness and impracticability.

For Montesquieu, if the judge and executor were the same, 'the judge could have the force of an oppressor...and it (sic) can destroy each citizen by using its particular wills. '30 Hence he envisaged a limited separation, which albeit not divesting the fundamental executive nature of judicial power, would ensure that it was not exercised by the same body of persons as those who were responsible for executing laws. From this context, the fundamental rationale for separating the judicial power from the executive is evidenced— the maxim that no person shall be a judge in his own cause. This rationale was sought to be fortified by securing a degree of judicial independence so that separation did not become a sham. In Montesquieu's scheme, this was achieved by drawing jurors directly from the people, to whom they owed their direct allegiance, and limiting their tenure to particular disputes at hand. Thus the need for independence of jurors had both an inherent and an instrumental dimension. Inherently it flowed from separating powers between organs of government, which implied a certain degree of independence for each organ. Instrumentally, it was necessary to secure the fundamental requirement of natural justice that no person shall be a judge in his own cause, not merely formally

<sup>27</sup> Alexander Hamilton, James Madison and John Jay, *The Federalist* (The Belknap Press, Cambridge 2009) 510 [hereinafter 'The Federalist'].

<sup>28</sup> John Locke, 'An Essay Concerning the True Original, Extent, and End of Civil Government' in Peter Laslett (ed), *Two Treatises of Government* (CUP, Cambridge 1988) 265, 364-66.

<sup>29</sup> The 'power of judging' involved punishing crimes and judging disputes between individuals. *Supra* Montesquieu, 157.

<sup>30</sup> Supra Montesquieu, 157.

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but substantively, by preventing a slide back to executive control of judges and consequently capricious government.

Though judicial independence was significant in ensuring impartial decision-making, it did not play a role in the mutual checks and balances scheme which Montesquieu envisaged would be necessary to ensure moderate government preserving the liberty of its citizens, owing to the constricted nature of judicial power. Judging was a crucial governmental function, but given the judiciary's semi-permanent status, limited powers and shifting composition of lay jurors, it was seen as distinctly inferior in nature to legislative and other executive functions and thereby incapable of balancing them. The potential to transform the judges from a disparate group of varying individuals to an independent institution however existed, if its status, powers and composition were suitably modified. This transformative potential was seized upon by the authors of the Federalist Papers, key preparatory documents to the final text of the Constitution of the United States of America.<sup>31</sup>

## The Judiciary in a Separated Framework II: The American Federalists

According to Hamilton, one of the authors of the Federalist Papers, judges of the Supreme Court, as the telling title of Federalist No 78 suggests, were to be 'Guardians of the Constitution'. <sup>32</sup> To enable them to fulfil this task, two significant departures from Montesquieu's theory were proposed. First, judges would have the final power to test the constitutionality of legislative and executive action, i.e. the power of judicial review; <sup>33</sup> second, the judiciary would be an independent institution, a co-equal branch of government, separated from the executive. <sup>34</sup> In this manner, the judiciary was contemplated as a separate and independent branch of government, instrumental in effectuating checks and balances on its co-ordinate wings and in turn being subject to reciprocal checks. Three questions, relevant for understanding judicial independence conceptually, arise as a result of this changed perception of the judiciary: First, why was this change

<sup>31</sup> For the influence of the Federalist Papers on the American Constitution, see Sam J Ervin Jr, 'Separation of Powers: Judicial Independence' (1970) 35 Law and Contemporary Problems 108.

<sup>32</sup> Federalist No 78 in *Supra* The Federalist 508. For critical perspectives regarding the concepts in Federalist No 78, see Stephen B Burbank, 'The Architecture of Judicial Independence' (1998-99) 72 Southern California Law Review 315, 318.

<sup>33</sup> Federalist No 80 in Supra The Federalist 521, 522.

<sup>34</sup> Federalist No 78 in Supra The Federalist 508.

from the earlier understanding of the judicial role in separation of powers theory contemplated? Second, how was this change to be made effective? Third, what reciprocal checks would be imposed on the judiciary as a result of this change? These questions are now taken up one by one.

Like Montesquieu, a chief concern expressed by the authors of the Federalist Papers was a need for moderated government. To achieve this, Madison believed that wings of government should check each other so that 'ambition... [is] made to counteract ambition.'35 In this interplay of competing ambitions, it was the legislature which was viewed as the most powerful and hence necessitating maximal controls from co-ordinate wings of government. As the executive veto of legislative actions, which was a proposed check, was deemed inadequate, Hamilton proposed that the judiciary be established as a co-equal branch of government, with ultimate authority to interpret the Constitution.<sup>36</sup> Two significant functions would be accomplished by this institutional modification. First, it would firmly ensure impartiality in adjudication, especially in litigation involving the government, as the judiciary would be institutionally more secure. Second, it would deter non-compliance with the Constitution by the legislature. If any statute passed by the legislature was at variance with the Constitution, the courts could strike it down. Thus by interpreting the Constitution, the Court would obviate the possibility of legislative tyranny and promote the ends of moderate government.

In order to enable the judiciary to effectively perform this role, a substantially bolstered understanding of judicial independence was proposed. The inherent weakness of the judiciary attributable to neither having control over finances nor the army, would be offset by a fortified conception of judicial independence which would allow judges to exercise their judgment freely, thereby effectively ensuring legislative and executive compliance with the Constitution. This would specifically entail that judges of the Supreme Court were appointed during good behaviour, with fixed salaries that could not be reduced to their disadvantage by the government, no retirement age and

<sup>35</sup> Federalist No 51 in *Supra* The Federalist 341. For an analysis of this aspect see David F Epstein, *The Political Theory of the Federalist* (The University of Chicago Press, Chicago 1984) 136.

<sup>36</sup> Federalist No 78 in Supra The Federalist 508.

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removal only by impeachment.<sup>37</sup> Permanence in office would ensure that an independent spirit pervaded the judiciary and possibilities of governmental interference reduced substantially. Non-reduction of compensation would be equally crucial to maintain this spirit, since pecuniary control over the judge would imply the potential to influence his judgment. The procedure for impeachment too was complex and multi-layered, such that the threat of removal could not be used as a stick by the government to ensure conformity. In this manner, governmental intervention in judicial functioning was restricted.<sup>38</sup>

Judicial independence, both in terms of functioning as well as authority, thus had two goals: it promoted impartial decision-making by ensuring effective separation between the judiciary and other wings of government, which would be litigants before it. Crucially it also ensured effective adjudication, i.e. decisions rendered were capable of exercising constitutional control over the legislature and the executive and enjoy public confidence.<sup>39</sup> However the authors of the Federalist Papers were aware of the deficiencies of securing a constitutional setup on the foundation of such high principle alone. To ensure that adjudication was effective, apart from the principled requirement of judicial independence, a key pragmatic element was extended to the judiciary—mutual checks and balances.

Mutual checks and balances were deemed necessary to promote moderate government by appropriately conditioning the autonomy of each organ and promoting accountability *inter se*. Specifically for the judiciary, while judicial independence was secured and extensive powers of judicial review provided on the one hand, checks in the form of legislative removal by impeachment, the executive power of appointment, and the Senate's power of confirmation of members of the federal judiciary on the other, ensured inter-dependence between

<sup>37</sup> Federalist No 79 in Supra The Federalist 518, 520.

<sup>38</sup> These provisions were significantly, albeit not wholly, influenced by the Act of Settlement, 1701 in the United Kingdom which was a landmark development relating to the protection of judicial independence, providing that appointment of judges would be *quamdiu se bene gesserint* (during good behavior) which was a radical change from the earlier pleasure doctrine by which judges were in office only during the pleasure of the monarch. See Robert Stevens, 'The Act of Settlement and the Questionable History of Judicial Independence' (2001) OUCLJ 253.

<sup>39</sup> Both impartial and effective decision-making fostered the efficiency rationale for the judiciary, i.e. how the independence of the judiciary gave the institution the necessary form to efficiently perform its constitutional function. For more see Nick Barber, 'Prelude to the Separation of Power' (2001) 60(1) Cambridge Law Journal 59.

wings of government. This inter-dependence was necessary to ensure that adjudication by the judiciary remained effective. Having invested significant powers in the judiciary and ensured sufficient guarantees of its independence, the possibility of abuse of judicial power needed to be guarded against. Though the judiciary was the weakest branch, nonetheless such abuse would denude public confidence in the judiciary, create friction and hence, render it an inefficacious checking mechanism on the other branches of government. To obviate this possibility, the judiciary would thus be checked, to a specified degree, by its co-ordinate branches. Equally, the legislative and executive role in judicial removal and appointments respectively would ensure that these organs had a stake in judicial functioning thereby leading them to act in concert in the wider scheme of exercise of governmental power, without each following its independent and possibly mutually hostile trajectory. The need for mutual checks and balances, in addition to judicial independence would thus ensure that the cornerstone of the judicial function in a formal separation of powers framework, i.e. effective adjudication, was securely founded and the equilibrium in the political system maintained.

From this account, we begin to see the role of judicial independence in a formal separation of powers framework. Having had the benefit of this analysis, X, our detached observer in the second hypothetical example, will want the judge to not only adjudicate impartially, but also in a manner such that the judiciary is effective in exercising constitutional control over the legislature and the executive and enjoying public confidence. In construing the independence factors which lead to this end, X should ask whether these factors lead to the right amount of independence. In ascertaining this right amount, the balance between independence and the need for mutual checks and balances, both of which lead to impartial and effective adjudication, has to be considered. It is evident that judicial independence on the one hand and mutual checks and balances on the other, though congruent in aims, may often be opposing forces in application— the more of the former may often per se lead to less of the latter and vice-versa. However, this opposition does not necessarily lead to undue compromise of either. The mere fact that the judge is appointed by the executive and can be removed by the legislature should not lead to the conclusion that the judge is related to other organs of government, capable of being influenced and threatened

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by them and hence not independent. Such measures may, on the contrary, be necessary to create an inter-institutional equilibrium and promote accountability in the particular system. Unless, as a consequence of independence, mutual checks and balances or any other interest being promoted, another value relevant for impartial and effective adjudication is *patently emasculated*, a specified degree of independence must not be denounced but rather seen in its particular context, with its inter-relationship between mutual checks and balances leading to the conclusion as to whether the particular schema relating to the judiciary promotes impartial and effective adjudication.

It is to this extent that judicial independence can be explained conceptually— a non-exclusive, spectral value necessary for impartial and effective adjudication. Accountability of individual judges, as well as mutual checks and balances, in the system by which such accountability may be secured, are equally relevant in ensuring that adjudication remains systemically effective. Where on the spectrum of independence, the balance between the two values lies cannot be determined in abstraction but is contingent on the specific political and constitutional setup in a particular context. Having established this conceptual foundation and its doctrinal consequence, the final part of the article returns to the issue of appointment of judges in India, delineates the practical relevance of this understanding with specific emphasis on the key theoretical flaws underlying the collegium system and thus suggests the basis on which appointment reform should proceed.

# III. REVISITING JUDICIAL INDEPENDENCE AND JUDICIAL APPOINTMENTS IN INDIA

As Part I has showed, the view that judicial independence is the key value to be secured in the process of judicial appointments has been widely held in India. However the term judicial independence has been used in many different senses leading to different systemic arrangements for appointment of judges. Thus understanding the term conceptually as a value leading to impartial and effective adjudication which is to be balanced with the need for mutual checks and balances, provides a touchstone against which these understandings and their consequent systems of appointment can be assessed. This Part undertakes such an analysis, starting with the original understanding

adopted by the Constituent Assembly, and with specific emphasis on the judicial collegium method of appointments which exists currently. It finds that a conceptual folly regarding the role and rationale of judicial independence, brought into sharp relief in the creation and perpetuation of the collegium method, lies at the heart of judicial appointments. Remedying this flawed conceptual understanding is thus crucial if appointment reform, which is being currently contemplated, is to succeed.

In the Constituent Assembly, judicial independence was seen as a necessary requirement for the judiciary to adjudicate impartially, insulated from political interferences. Such non-politicisation was deemed necessary given the experience of colonial appointment of judges which was at the unfettered discretion of the executive and consequently led to the appointment of several judges favourable to the colonial government.<sup>40</sup> Despite the need to prevent the recurrence of such politicisation that would adversely affect the impartiality of the judiciary, if not the perception thereof, the Assembly invested the power of appointment focally with the President, who would act on the aid and advice of the Council of Ministers, who were political persons. This seemingly counter-intuitive formulation can be explained by a view which resonated widely in the Assembly, that the appointment of judges was fundamentally an executive function.<sup>41</sup> The threat of politicisation which was concomitant with the vesting of such a power would have to be neutralised without divesting the executive of the power altogether. Thus the pragmatic requirement of the President having to consult the Chief Justice of India for all appointments was introduced. This combination of factors, it was envisaged, would ensure the independence of the judiciary without resulting in its institutional insulation.

Thus there appears to be a natural fit between the role of judicial independence in the appointments process understood theoretically in Part II and the understanding of the drafters of the Indian Constitution. Judicial independence as a requirement to ensure an impartial i.e. non-political judiciary demonstrated a clear cognizance of independence as an instrumental virtue which would allow the judiciary to adjudicate unaffected by partisan political compulsions.

<sup>40</sup> See Tej Bahadur Sapru (ed.), 'Constitutional Proposals of the Sapru Committee' (Bombay 1945).

<sup>41</sup> CAD vol VIII, 258 (24th May 1949).

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At the same time, the device to secure such independence, i.e. the vesting of the appointment power in the President, in consultation with the Chief Justice of India, would mean that an inter-institutional equilibrium was established in the process, wrought by the interplay of the executive and judiciary balancing each other in the process of appointment. This equilibrium, it was believed, would not only ensure an independent judiciary but also one which was selected through an accountable process, checked by the executive. The requirements of processual accountability through the role of the executive were thus harmonised with the requirements of judicial independence, and both these values were deemed significant for the higher judiciary to adjudicate in a manner that enjoyed public confidence.

In the early stages of the working of this executive-centric model of appointment post-independence, a disjunct soon developed between factors which preserved judicial independence and those which sought to preserve executive control, with the former alone being seen as necessary for the judiciary to adjudicate impartially and effectively. This was primarily owing to the findings of the 14th Law Commission Report which reported that executive influence in appointments had led to communal and regional considerations being taken into account.42 The corollary to such a view was that reducing such influence while at the same time augmenting the role of the Chief Justice of India by requiring his concurrence for all appointments would be necessary to tilt the balance in favour of judicial independence. This disjunct widened when the executive expressly sought to neutralise the consultative role of the Chief Justice of India by appointing a person whose socio-political views matched its own, breaking the long-established seniority convention in appointment of the Chief Justice.<sup>43</sup> This governmental quest for a 'committed judiciary', appointing judges on the basis of their social and political philosophy as determined by the executive, thus conclusively resulted in the view that any executive role in the appointments process would lead to an automatic erosion of judicial independence.

Two consequences ensued as a result of these developments. First, judicial independence came to acquire a settled meaning,

<sup>42</sup> Law Commission of India, 'Reform of Judicial Administration' (14th Report 1958) 34.

<sup>43</sup> For an account of the supersession of Justices Hegde, Shelat and Grover in favour of Justice A. N. Ray, see Kuldip Nayar, *Supersession of Judges* (Indian Book Co, New Delhi 1973).

understood widely as non-politicisation of the appointments process. Thus a conceptual debate over the need for judicial independence in India's constitutional setup was foreclosed, its meaning limited to preserving the judiciary against the immediate threat of politicisation which confronted it. Second, preserving such independence consequently became inextricably intertwined with the view that greater weight should be attached to the opinion of the Chief Justice of India in proposed appointments. The role of the Chief Justice, envisaged by the drafters as the key apolitical check on unfettered executive discretion thus assumed greater significance as the potential threat of politicisation it was instituted to guard against, actually manifested itself. At the same time, its efficacy came under severe scrutiny since the executive overtures in appointing a sympathetic Chief Justice, breaking the seniority convention, meant that the interinstitutional equilibrium carefully wrought by the drafters became amenable to political manipulation.

The pressure on the consultative process owing to the history of executive dominance, led to the intervention of the Supreme Court in *The First Judges' Case*. In this case, the Supreme Court had the occasion to clarify its understanding of judicial independence, circumscribe the executive role in appointments within constitutionally permissible limits and in the process restore the interinstitutional equilibrium which had been displaced by an overreaching executive. In a judgment spanning 724 pages of written text, containing seven cross-cutting opinions, the Supreme Court laid down the constitutional position regarding appointments and its interface with judicial independence, albeit not entirely authoritatively, given the ambiguity which characterised several opinions on crucial questions of law.

Each of the seven judges held that independence of the judiciary was a basic feature of the Constitution. However only four of the seven judges proceeded beyond rhetorical enunciations, to advance a view of what judicial independence entailed in the constitutional framework.<sup>44</sup> No consensus emerges from these opinions however regarding such meaning. Noteworthy among them were the view of Bhagwati J. who extended his conception of independence from his earlier view in *Sankalchand*,<sup>45</sup> to include independence not only from executive pressures but also 'fearlessness of other power centres, economic or political, and freedom from prejudices acquired and

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nourished by the class to which the Judges belong...'<sup>46</sup> and Desai J. who held that judicial independence was necessary to prevent transgressions of the Constitution by government organs through the institution of an independent body which can adjudicate such questions 'untrammelled by external pressures or controls.'<sup>47</sup> However it was one amongst a number of values, over-emphasising which to the extent of 'idolising it, would (hence) be counter-productive.'<sup>48</sup>

In terms of a conceptual understanding of judicial independence, these opinions demonstrate recognition of the distinction between the concept per se and the threat of politicisation of the judiciary, the immediate threat it had to repel. In the aftermath of executive dominance of the appointments process, such an understanding presented a nuanced view of judicial independence which hitherto had assumed its equation with non-politicisation of the judiciary as natural and non-problematic. This nuance also allowed the majority judges to see judicial independence as one in a conspectus of values sought to be protected by the appointments process. Accountability, identified by Bhagwati J. was another such value protected by the exercise of the power of appointment by the President.<sup>49</sup> Such a view would not have been possible had the enquiry relating to judicial independence not been steered to a deeper questioning of its constitutional rationale and the optimal amount of independence that is necessary for the judiciary to function impartially and effectively.

Insofar as the inter-relation between the authorities in the appointments process was concerned, the Court split both on the legal question on whether judicial independence required primacy of the Chief Justice of India in the consultative process, primacy understood as pre-eminence in terms of weight attached to his opinion, as well as the factual question of whether the constitutionally-mandated requirement for consultation prior to appointment (and transfer) had taken place in the cases brought before it. The majority refused to incorporate the language of primacy in the constitutional

<sup>44</sup> Justices Gupta, Tulzapurkar and Pathak did not offer a view of what judicial independence meant, stressing instead on its importance in the constitutional framework. *Gupta* [119] (Gupta J.), [618] (Tulzapurkar J.), [866] (Pathak J.).

<sup>45 (1977) 4</sup> SCC 193.

<sup>46</sup> Gupta [26] (Bhagwati J.).

<sup>47</sup> Gupta [704] (Desai J.).

<sup>48</sup> Id.

<sup>49</sup> Gupta [29] (Bhagwati J.).

50 Id.

interpretation of Art. 217 with the implication that the President, Chief Justice of India, Chief Justice of the concerned High Court and the Governor of the concerned state were co-ordinate authorities, all of whose opinions would be given the greatest weight, the ultimate decision in case of disagreement lying with the President. However the President could only validly take a decision after full and effective consultation with the aforementioned constitutional authorities and the advice provided by the Chief Justice would ordinarily be accepted; if rejected, it would have to be accompanied by a reasoned justification. Thus, it can be inferred from the majority opinions that judicial independence did not require the executive to be divested of its focal power of appointment; circumscribing such power would suffice to ensure independence while at the same time retaining an element of accountability in the process, given the popularly elected nature of the government.<sup>50</sup>

The widely perceived failure of this decision in circumscribing unwarranted executive interference in the appointments process led to its overruling in The Second Judges' Case. As described in Part I of this paper, by this decision, a majority of the Supreme Court speaking through Verma J., conclusively established the primacy of the Chief Justice of India in the process of judicial appointments operationalised through the judicial collegium, which would henceforth be the focal body for appointments. This collegium, comprising the seniormost puisne judges of the Supreme Court (for Supreme Court and High Court appointments) and the seniormost puisne judges of the concerned High Court (for appointments to that High Court alone) would recommend judges for appointment. Doubts have been raised regarding the interpretive correctness and legitimacy of the Court in reaching this conclusion elsewhere.<sup>51</sup> However, in this article, only the understanding of judicial independence which facilitated such a conclusion in the lead opinion of Verma J., will be analysed closely, as a result of which the weak conceptual foundation of the collegium system of appointment will become evident.

According to Verma J., any decision on the proper process for judicial appointments must be seen in the backdrop of the need to protect judicial independence. Such need flows from the fundamental

<sup>51</sup> These doubts have been succinctly captured in the note by the *amicus curiae* A. K. Ganguli in *Suraz India Trust v Union of India*, W/P (Civil) No. 204 of 2010, proceedings initiated in the Supreme Court to reconsider *The Second Judges' Case*.

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necessity of the rule of law which provides the underpinning to India's constitutional democracy. The relevance of the rule of law to the appointments lies in the need to ensure that discretionary authority in the appointments process be kept to a minimum. This had not happened in all occasions on the past, leading to questionable selections that had in turn led to public questioning of the executive-centric process of judicial appointments itself. Thus to correct the existing lacunae and fulfil the constitutional purpose of ensuring judicial independence in the appointments process, primacy would be accorded to the view of the Chief Justice of India, who would be in the best position to assess the merit of a candidate. According such primacy would also obviate any political influence which may arise otherwise. However, cognizant of the drafters' mandate for multiplicity of authorities, this decision would not be a personal prerogative of the Chief Justice of India, but would be 'the opinion of the judiciary symbolised by [his] view'52 and would be arrived at after consultation with the seniormost puisne judges. The executive would continue to have a role, albeit a highly circumscribed one, by which they could refuse to accept the recommendation of the Chief Justice of India for cogent reasons and ask for reconsideration. However, even in cases where such power was exercised (and the opinion is clear that ordinarily it should not) and the Chief Justice refused to reconsider the decision, the executive would be bound to accept it.

There are three striking aspects with relation to the understanding of judicial independence and the impact it had on the decision. First, there was an implicit belief that since a focal role for the executive was antithetical to judicial independence, replacing the executive with the judiciary would *per se* ensure that judicial independence would be protected. This was not an unnatural assumption, since the expectation that judges themselves would best protect judicial independence in the appointments process, has intuitive appeal. However, the arguments made by the Attorney-General outlining comparative experiences in other jurisdictions and how judicial independence was secured despite an executive role, showed that there was no exact correlation between the appointing authority and the protection of judicial independence. Thus a mere vesting of the power of appointment in the judiciary itself could scarcely guarantee judicial independence. By failing to countenance

this argument, the Supreme Court relied on an intuitive understanding of how judicial independence would be best protected, rather than a theoretically and comparative well-founded one, an understanding which has seemingly been belied two decades hence when collegium appointments have been engulfed in controversy adversely affecting public confidence in the system.

Second, following closely from the first, is the failure to adequately recognise the importance of the actual process of judicial appointment, focusing solely on the appointing authority, in the protection of judicial independence. The majority judges espoused a view, adopted in the early years of judicial appointments that the protection of judicial independence could be best achieved by investing the power of appointment with high constitutional authorities. However, as pointed out earlier in Part I, this mandate of multiplicity of authorities was only one strand of the drafters' design to ensure judicial independence in appointments. An equally key element was the need for an inter-institutional equilibrium which would be wrought through a complex process of multiple authorities checking and balancing each other. 53 Key to the operationalisation of such checks and balances was the intricacies of the process of judicial appointments and how the Chief Justice of India, as an apolitical authority would act as a check on executive discretion in appointment.

The decision to make the collegium, headed by the Chief Justice of India, the focal body for judicial appointment reversed the relation between the executive and the judiciary in the process. Such a reversal would thus require a concomitant check by the executive on the collegium, thereby instituting a process by which no single authority could ride roughshod over the other. However in the process of establishing the primacy of the Chief Justice of India and the judiciary in judicial appointments and eliminating political influence, the judges constricted the role of the executive to such an extent that it ceased to remain an effective check on the power of the collegium. Replacing executive control with judicial control of appointments, without setting out an appropriate process by which checks and balances could be implemented was thus a key failing of this decision and its attempt to secure judicial independence in the appointments process.

<sup>53</sup> It is not being suggested that the equilibrium initially designed was an optimal one. Rather, that there was a need for an equilibrium which was envisaged, a view which was largely lost sight of by the majority judges in establishing the collegium and vesting it with untrammeled power to appoint.

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Third, was the rhetorical understanding of judicial independence which was adopted in this decision. The understanding of judicial independence as a requirement of the rule of law is unproblematic, but is of little explanatory value. Seeking to explain a normative concept such as judicial independence in terms of an even more complex normative concept such as rule of law is philosophically poor practice. Even then, the particular requirement of rule of law identified as key in this case, i.e. the requirement that discretionary authority be limited, does not encapsulate the role and rationale for judicial independence in the appointments process entirely. It is axiomatic to state that unfettered discretion is anathema to the rule of law. But the key questions in the protection of judicial independence in the appointments process are: What is the extent to which discretion is permissible? On what legal basis is the judiciary to be vested with the said discretion? How will the limits on the exercise of such discretion be enforced? Equally, there are other facets of judicial independence which are not captured by the rule of law as limits on discretion formulation does judicial independence require appointment power to be exercised by the judiciary? Is judicial independence the most significant value to be protected in the scheme of appointments? Might there be other values which are equally worthy of protection? Having underlined the importance of judicial independence to appointments but without answering these key questions, the majority opinion elevates judicial independence to the level of dogma without explaining the concept appropriately. As a result, the collegium system of appointment which operates today is founded on an obscure and inadequately explicated understanding of judicial independence which asks more questions than it answers.

The operation of the collegium mode of appointment has, since *The Second Judges' Case* which established it, created considerable public disquiet.<sup>54</sup> Paradoxically however, the understanding of judicial independence adopted in the case has not been questioned, even in *The Third Judges' Case* which qualified it, leading to judicial independence being a dogmatic, yet scarcely understood concept in

<sup>54</sup> The case of Justice P.D. Dinakaran, recommended by the collegium as a judge of the Supreme Court despite consistent adverse reports against him including allegations of a spate of illegalities and the confirmation as permanent judge of Justice Ashok Kumar of the Madras High Court despite adverse reports and without consultation are illustrative examples of the shortcomings of the collegium process. See Fali S Nariman, 'Before Memory Fades: An Autobiography' (Hay House India, New Delhi 2010) 387; See also VR Krishna Iyer, 'For a National Judicial Commission- I' The Hindu (New Delhi 30 October

relation to judicial appointments. Such a development is not sudden or unexpected. As the previous history of appointments showed, in India, judicial independence, subject to a nuanced view adopted in the Constituent Assembly Debates and the majority judges in *The First Judges' Case*, has remained wedded to the elimination of politicisation in the appointments process. Such has been the intensity of the correlation that at a time when politicisation by the executive is not necessarily the key threat in the appointments process, this view still prevails. As a result, the collegium today operates largely unchecked, despite concerns of the lack of intra-institutional independence within the judiciary, expressly contravening the constitutional and theoretical understanding of judicial independence as a value leading to impartial and effective adjudication.

Specifically, the operation of the collegium has marked the complete breakdown of the inter-institutional equilibrium envisaged in Art. 124 and Art. 217. The collegium system enshrines de facto judicial supremacy over appointments. Though the executive must formally confirm the appointment, its role is marginal as its objections can be overridden by the collegium, whose decision is determinative in practice. This is clearly demonstrable by the non-acceptance by a recent collegium of the objection raised by the Prime Minister's Office regarding the appointment of Justices Dattu, Ganguly and Lodha to the Supreme Court over the more senior Justices Shah, Patnaik and Gupta, an objection which was disregarded.55 The constrained role of the executive hence denudes the possibility of an inter-institutional check and balance on the judiciary and also renders public questioning of the executive in relation to judicial appointments futile as the executive inevitably pleads helplessness. In addition the system itself has limited process-related safeguards. The process is initiated by the Chief Justice of India (or the Chief Justice of the High Court as the case may be) and does not incorporate any form of public participation. There are no open hearings, no public consultations and no provision for objections to be invited. 56 Though it is specified in *The Third Judges*' Case that all documents must be in writing, the said documents will not be made public, even in a court judgment. Further, judicial review

<sup>2002) &</sup>lt;a href="http://www.hinduonnet.com/2002/10/30/stories/2002103000121000.htm">http://www.hinduonnet.com/2002/10/30/stories/2002103000121000.htm</a> accessed on 21st March 2011.

<sup>55</sup> Diwakar and Dhananjay Mahapatra, 'PMO returns 3 names mooted for SC judges' *The Times of India* (New Delhi 11<sup>th</sup> November 2008) <a href="http://timesofindia.indiatimes.com/articleshow/3697198.cms?">http://timesofindia.indiatimes.com/articleshow/3697198.cms?</a> accessed on 21<sup>st</sup> March 2011.

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too is limited to the ground of non-consultation with constitutional functionaries as held by the Supreme Court in the case of Shanti Bhushan v. Union of India.<sup>57</sup> The tendency of the judiciary in this case, which challenged the decision of the Chief Justice of India to appoint Justice Ashok Kumar to the Madras High Court despite adverse reports against him and without consultation with the collegium in clear violation of The Third Judges' Case, to shield the Chief Justice who had clearly made an erroneous decision, by making its orders prospective without a semblance of legal reasoning, is also indicative of the relative inefficacy of judicial review as a means of checking the power of the collegium. It has also meant that improprieties and biases operating within the judicial collegium, (instances of which have been communicated to the author by judges, both within the collegium previously and outside, on the condition of anonymity) have no channel for being publicly disclosed. Thus in the final analysis, with the aid of a dogmatic understanding of judicial independence, the collegium system, as it operates today, emasculates any hope of checks and balances and with it an inter-institutional equilibrium in the process of appointments, and immunises the appointing judges from public and judicial scrutiny for decisions taken, thereby giving rise to the overwhelming perception of the higher judiciary being an institution in abject disorder. A conceptually clear understanding of judicial independence in the constitutional schema, recognition of its inter-relation with checks and balances and consequently a realisation of the practical implications of such an understanding in terms of the judicial and executive role in the process of appointment, are thus imperative, if judicial appointments in India are to proceed on a footing which is theoretically justified and practically efficacious.

#### CONCLUSION: WHERE DO WE GO FROM HERE?

This article is being written at a time when reform of the appointments process is being widely contemplated. The Supreme Court is seized of a matter which calls for reconsideration of *The Second Judges' Case* and the collegium system of appointment that has operated since then. With the Attorney-General supporting the submission of the *amicus curiae* seeking reconsideration, the matter has now been posted before the Chief Justice for further directions,

<sup>56</sup> The closed nature of the process has been criticised in Editorial, 'Closed Brotherhood' Economic and Political Weekly (New Delhi 21st March 2009) 6.

<sup>57 (2009) 1</sup> SCC 657.

with the possibility of a larger Bench being constituted to re-examine the issues decided in *The Second Judges' Case.* <sup>58</sup> Calls from civil society to include higher judiciary appointment reform in the judicial reforms roadmap have also been widely articulated.

I have argued in this article why such reform is needed from the point of view of securing judicial independence and provided a conceptual foundation for it. Though judicial independence has been seen as the key factor to be secured in the appointments process, it has seldom been understood conceptually, beyond requiring the appointments process to be immune from political manipulation. As a result today, this view of judicial independence as non-politicisation in the appointments process is anachronistic, since the operation of the collegium, despite not being overtly politically coloured, suffers from an acute lack of transparency and accountability, which bring into question the independence of the judiciary.

A conceptually sound understanding, which sees judicial independence as a value leading to impartial and effective adjudication, to be optimally balanced with mutual checks and balances, is thus necessary for the appointments process to operate in a practically effective manner, relevant to the current circumstances. This has two specific ramifications for proposed reform of the appointments process: first, any system of appointment must understand judicial independence not only as an end in itself, or simply repelling the immediate threat that confronts the judiciary but rather as a value which is both inherently and instrumentally necessary for the judiciary to adjudicate impartially and effectively; second, any reform must be equally focussed both on the appointing authorities as well as the process by which such authorities interact and not only on the former as has happened previously. Such equal focus was the intention of the drafters of the Constitution as well, seeking a multiplicity of authorities checking and balancing each other while appointing judges. By explicitly articulating such an understanding conceptually in terms of what judicial independence means and requires, this article hopes to bring the discussion regarding judicial appointments full circle, laying the foundation for a new process of judicial appointments, theoretically justifiable and practically efficacious in the current circumstances, much like the Constituent Assembly Debates did in its time, sixty-two years ago.

<sup>58</sup> Suraz India Trust v. Union of India, W/P (Civil) No. 204 of 2010, available at http://indiankanoon.org/doc/1391599/.

## TRACING A MEANINGFUL RIGHT TO VOTE

Manmeet Singh Rai\*

Right to vote is the *sine qua non* of a democratic society. The Indian judiciary has time and again emphasized the importance of free and fair elections. The legislature enacted and amended many laws to safeguard the process of elections and ensure that it is free and fair. In this turmoil of safeguarding the most essential and sacred process in a democracy, the basic question of whether the citizens have a 'right to vote' was never answered. When this question was posed for the first time before the Apex Court, a mammoth task of interpretation of the Constitution and various legislative texts was undertaken which is still sub-judice.

The present article reflects upon the political scenario in India after independence and then looks into the role of the Supreme Court in tackling the complex issues of election law. While dealing with the newly emerging problems of corruption, muscle power, and criminalization of politics, the Supreme Court was forced to answer the question of whether the citizens of India have a right to vote. If they do, where do they derive the right from? A reflection on international documents, the Constitution, and prior judgments suggests that the answer to the question should be in the affirmative, and the right is nothing short of a constitutional right. Voting forms an integral part of the democratic culture of India. The previous interpretations were based upon the British Judgments and jurisprudence which the English Courts themselves have done away with. Thus there is no reason why the right to vote should not be

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regarded as a constitutional right without which democracy cannot be achieved to its fullest amplitude.

#### Introduction

The rule of law and free and fair elections are the basic features of a democracy.¹ All other rights, no matter how essential, become illusory in the absence of the right to vote.² The Supreme Court of India has time and again fortified the essence of free and fair elections in a democracy.³ Elections in India have caused a great deal of concern in the legislature, the judiciary, and the executive alike. The most affected is the common person⁴ for whom the right to vote plays the most vital role in choosing the members who would decide his fate to the legislature There have been concerns about the growing involvement of criminals in politics,⁵ use of money,⁶ coercion,⁻ and corrupt practices to win elections. Although a substantial amount of time, intellect, and ink has been spilled by the courts in India to interpret election laws, they were never confronted with the issue of interpreting the true essence of the 'right to vote' under the

- 1 Kihoto Hollohan v Zachillhu and Ors., 1992 Supp. (2) SCC 651.
- 2 Wesberry v. Sanders, 376 U.S. 1 at 17.
- 3 Indira Nehru Gandhi v. Raj Narain, 1975 Supp. SCC 1 at 87, (Khanna, J. observed "democracy can indeed function upon faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in reality and form and are not mere rituals calculated to generate illusion of defense to mass opinion"); See also Mohinder Singh Gill v. Chief Election Commissioner, (1978) 1 SCC 405.
- 4 Union of India v Association for Democratic Reforms, (2002) 5 S.C.C. 294 at 309 quoting Sir Winston Churhcill "at the bottom of all tributes is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point."
- 5 See 170th Law Commission Report on Electoral Reforms, submitted to the Ministry of Law & Justice, Government of India dated June 9, 1999; The report dated March 31, 2002 by the National Commission to Review the Working of the Constitution established vide Government resolution dated February 22, 2000, <a href="http://lawmin.nic.in/ncrwc/finalreport.htm">http://lawmin.nic.in/ncrwc/finalreport.htm</a>; See VOHRA Committee Report submitted to the Government of India, (The Committee was established vide Order No.S/7937/SS(ISP)/93 dated July 9, 1993 to take stock of all available information about the activities of Crime Syndicates/Mafia organizations which had developed links with and were being protected by Government functionaries and political personalities).
- 6 Kanwar Lal v. Amarnath, AIR 1975 SC 308, (The court after examining the various aspects of § 77 of the Representation of Peoples Act, 1950 concluded that "the availability of disproportionately larger resources is also likely to lend itself to misuse or abuse to political parties or individuals possessed of such resources, undue advantage over other political parties or individuals"); Gadakh Y.K. v. Balaseh Vikhe Patil, AIR 1994 SC 678, Dr. P. Nalla Thampy Terah v. Union of India and Ors., AIR 1985 SC 1133.
- 7 Supra note 5.

## Constitution of India until recently.8

A meaningful right to vote can only be achieved if it is embedded in the Constitution, a right that cannot be taken away, and carries along with it different ancillary rights which would include the right to expression, to seek information about the contesting candidates, and to remain neutral. Information is the only virtue through which democratic institutions and the governance of the country can be transformed. It was therefore not surprising that when the right to information was sought to be read with the right to vote, to revamp the democratic ideals in India, it gave rise to a whole new jurisprudence on the right to vote. There have been conflicting opinions by two different benches of the Supreme Court of India on the issue of whether the right to vote should be treated as a mere statutory right or as a Constitutional right coupled with the right to information and expression. The constitutional dispute has now been referred to the Chief Justice of India to be put up before a larger bench.

- 8 People's Union for Civil Liberties & Anr. v. Union of India & Anr., (2009) 3 SCC 200, (the Supreme court was approached under its original jurisdiction, seeking directions to be issued to the Election Commission of India for ensuring that the provision for negative voting was available on the electronic voting machines. The court after looking into the split between the two benches of the Supreme Court on the issue of whether the right to vote was a statutory right or a Constitutional right, referred the matter to the Chief Justice of India to be decided by a larger bench).
- 9 Association for Democratic Reforms v. Union of India & Anr., AIR 2001 Delhi 126, upheld in Union of India v. Association for Democratic Reforms & Anr., (2002) 5 SCC 294.
- 10 Peoples Union for Civil Liberties v. Union of India & Ors., (2003) 4 SCC 399.
- 11 Lily Thomas v. Speaker Lok Sabha & Ors., (2006) 7 SCC 1.
- 12 Association for Democratic Reforms v. Union of India & Anr., *supra* note 9 at ¶ 1. ("Information is a many splendored virtue. It is the key to power, fortune, science and technology and even steadfast democracy. Its potential when channelized is capable of banishing ignorance, poverty, hunger and want. It plays significant role in every walk and sphere of life, including the field of politics and democracy. It can transform democratic institutions and the governance of the country").
- institutions and the governance of the country").

  13 Beginning with the Association for Democratic Reforms case (*ld.*) to Peoples Union for Civil Liberties case (*Supra* note 8).
- 14 The conflict was between the judgments of the Supreme Court in the cases, Peoples Union for Civil Liberties v. Union of India & Ors., (2003) 4 SCC 399 and Kuldeep Nayar v. Union of India & Ors., (2006) 7 SCC 1 respectively.
- 15 N.P. Ponnuswami v. Returning Officer, Namakkal Constituency and Ors., AIR 1952 SC 64, (the Constitution Bench held: "The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it."), reiterated in Jyoti Basu & Ors. v. Debi Ghoshal & Ors., (1982) 1 SCC 691.
- 16 Supra note 8 ("We have carefully read paragraphs 349 to 364 of the aforesaid [Kuldeep Nayar's] judgment, which are found under the head Right to Vote A Constitutional/

The present article traces the constitutional interpretation of the right to vote and argues that without proclaiming the right to vote as a constitutional right and the right to information as its concomitant, the right to vote would be nothing more than an illusion. This piece also looks into the constitutional dimensions of the right to vote from heretofore unprecedeented points of view. The article suggests that the right to vote is a political value inherent in the democratic setup which affirms the membership of an individual. Moreover, the right to vote should be characterized as a constitutional right having a wider connotation than a mere statutory right. The jurisprudence developed by the Supreme Court in evolving various features such as the basic structure of the Constitution, with democracy<sup>17</sup> being one of them, brings the right to vote within the basic structure. A meaningful right to vote is thus a *sine qua non* to all democracies without which a democracy, becomes fragile.

# I. THE POLITICAL SCENE IN INDIA: THE TRIGGERING POINT FOR THE NEW JURISPRUDENCE ON 'RIGHT TO VOTE'

Immediately after India gained independence, a magnificent document (the Constitution) was drafted to ensure a smooth working of the nation and to safeguard the rights of the citizens. A few decades later it was amended, and sometimes abused for the ulterior motives of the politicians. This dangerous trend, initiated during the tenure of the then Prime Minister Mrs. Indira Gandhi, in the later years came to harm the ability of the citizens to govern themselves through free and fair elections. The corrupt practices, the criminalization of politics coupled with the lack of political unanimity, will power to frame laws and tackle concerns together, compelled a new renaissance of redefining the electoral process by demanding a meaningful right to vote.

#### A. The Indian Politics

To appreciate the jurisprudence of 'right to vote' it is essential to have a bird's eye view of the political scenario in India after it gained

Fundamental Right and find that even though the Constitution Bench did not overrule or discard the ratio of the two three-Judges Bench judgments in Union of India v. Association for Democratic Reforms (supra) and People's Union for Civil Liberties v. Union of India (supra), the opening line of para 362 tends to create a doubt whether the right of a voter to exercise his choice for the candidate is a necessary concomitant of the voter's freedom of expression guaranteed under Article 19(1)(a) of the Constitution. Therefore, this issue needs a clear exposition of law by a larger Bench.")

<sup>17</sup> His Holiness Kesavananda Bharati v. The State of Kerala and Ors., AIR 1973 SC 1461.

freedom from the tyrannical rule of the British Empire on August 15, 1947. On November 26, 1949<sup>18</sup> the Constitution of India came into existence, and with it India became the biggest democracy in the world because of the colossal nature of the elections held in the country. <sup>19</sup> The Constitution of India in Article 326 stipulates that all elections to the House of People and the Legislative Assemblies of the State would be on the basis of adult suffrage. After independence, Indian National Congress ("Congress") enjoyed parliamentary majority for almost 48 years, except for a few brief periods during the 1970s and late 1980s.

Politics in India was pretty stable and the electoral process largely free and fair, until Mrs. Indira Gandhi was elected as the Prime Minister of India on March 24, 1966 and ruled for the next 16 years. Shalendra D. Sharma states that it was in these years that the institutions of governance (such as the cabinet, the Parliament, the judiciary, and the civil service) were ignored and their authority and legitimacy greatly weakened.<sup>20</sup> The executive superseded the Parliament and the Prime Minister's office became the epicenter of power.<sup>21</sup> Constitutional rights were suppressed under the guise of social revolution,<sup>22</sup> and the Constitution was prostituted by frequent amendments to achieve personal interests. The Judiciary was compelled to step in,<sup>23</sup> but had to pay a heavy price for the same.<sup>24</sup> Emergency was declared by the

<sup>18</sup> The Constitution of India was adopted by the Constituent Assembly on 26th November 1949 and came into force on 26th January 1950.

<sup>19</sup> M.P. Jain, Indian Constitutional Law, 450, (N.M. Tripathi Pvt. Ltd, 1987) (1962).

<sup>20</sup> Shalendra D. Sharma, Indian Democracy and The Crisis of Governability, 18-SPG Fletcher F. World Aff. 147. (Referring to the turmoil in the Indian Democracy caused by the Congress: "Mrs. Gandhi's Machiavellianism and criminalization of politics under her son and putative heir Sanjay Gandhi introduced evils into the Indian politics that led to the degradation of governance in India.")

<sup>21</sup> Granville Austin, Working a Democratic Constitution: The Indian Experience, 174, (Oxford University Press, 2000).

<sup>22</sup> Id. See generally, Indira Gandhi: In Context and In Power, Chapter 7.

<sup>23</sup> The election of Mrs. Gandhi was challenged by Raj Narain on the grounds of electoral malpractice and abuse of government machinery for election campaign. The Uttar Pradesh High Court declared the election of Mrs. Gandhi void. Immediately thereafter a Constitutional amendment was passed (Article 329-A inserted by 39th Constitutional Amendment Act) to circumvent the judgment, which was later, in the case of Indira Nehru Gandhi v. Raj Narain, 1975 Supp. SCC 1, struck down as it violated basic structure of the Constitution while declaring the election of Mrs. Gandhi valid.

<sup>24</sup> The Judiciary acted through the judgment in Kesavananda Bharati's case (*supra* note 17) in which the constitutional bench comprising thirteen judges, by a majority, limited the scope of Parliament's amending power under Article 368. This was not taken kindly by the then Government headed by Mrs. Gandhi. On April 25, 1972, Justice A. N. Ray, who was among the dissenters, was appointed the Chief Justice of India superseding three senior Judges, J.M. Shelat, A.N. Grover, and K.S. Hegde. Such a decision was

Congress between 1975-1977 to circumvent the judicial decision;<sup>25</sup> the period has come to be regarded as the darkest period for human rights in India.<sup>26</sup>

In the process, many other political factions emerged to oppose the unbridled powers and Congress domination of Indian politics. One of the major political parties was the Bhartiya Janta Party<sup>27</sup> ("BJP"). BJP emerged as an immediate response to the alleged autocratic regime under Mrs. Gandhi and later came to power.<sup>28</sup> The BJP not only mixed religion with politics, but has also been alleged to be involved in criminal acts to achieve its political goals.<sup>29</sup> The problem was not limited to just the Congress and the BJP, but spread like wildfire among regional and other national political parties. Booth capturing, buying votes, and seeking help of criminals became a common feature of elections. With the infusion of money, muscle, and criminals to win elections in the decisive years, in which the Constitution and the Indian democracy were put to test, Indian politics deteriorated.<sup>30</sup> Although these problems were debated, they were never seriously remedied, because many of the so-called people's representatives in the Parliament were the ones who resorted to such means to win elections. The Indian Judiciary throughout this period stood steadfast to preserve the democratic ideals and uphold the constitutional mandate while deciding election disputes.<sup>31</sup> The Supreme Court in different cases pointed out electoral flaws, lamented the use of money power and

unprecedented in the judicial history of India and subsequently led to the resignation of Shelat, Grover, Hegde & Sikri JJ.; *See* generally Supra note 22, Granville Austin, Chapter 12, A 'Grievous Blow': The Suppression of Judges at 278.

<sup>25</sup> Supra note 21.

<sup>26</sup> See Sorabjee, Soli J., "Human Rights During Emergency", Indian Advocate, Vol. XXIV (1992). P. 64-71.

<sup>27</sup> The party was founded in 1980 and was a successor to the Bhatiya Jana Sangh. It was an outcome of retaliation to Indian National Congress and its foundation was strengthened during the days of emergency.

<sup>28</sup> BJP came to power in the coalition government from 1998 to 2004.

<sup>29</sup> See Madhu Kishwar, Criminalization of Politics, First published in Manushi No. 79 (Nov-Dec 1993) available at < http://www.manushi-india.org/pdfs\_issues/articles/Criminalisation%20of%20Politics.pdf >, (referring to the active involvement & support of BJP in demolishing Babri Masjid and murder of mahant of the Ram Janamsthan mandir, Baba Lal Das who had deposed before the People's Tribunal on Ayodhya about the involvement of VHP-RSS-BJP in the massacre, "The Sangh parivar poses a grave threat to the Indian polity and society, not so much because it mixes religion and politics, but because it resorts to criminal acts").

<sup>30</sup> Supra note 35.

<sup>31</sup> Supra note 22.

criminalization of politics<sup>32</sup> and with its own wisdom interpreted the electoral statutes to maintain the rule of law. The Indian Judiciary enjoyed the undying faith of the citizenry throughout this tough phase.<sup>33</sup>

The Parliament did pass minor electoral reforms but never addressed the core concerns. At different intervals various commissions<sup>34</sup> and committees<sup>35</sup> were instituted to probe into the electoral problems and the growing network between criminals and politicians,<sup>36</sup> and to give their recommendations. All the committees and commissions were unanimous in pointing out the growing nexus between the politicians and the criminals,<sup>37</sup> with the most comprehensive and sensational observations made in the Vohra Committee Report.<sup>38</sup> The report was never made public because of its far-reaching implications.<sup>39</sup> Despite such observations<sup>40</sup> the

- 33 Supra note 21.
- 34 Supra note 5.
- 35 Id.
- 36 Id.
- 37 Id., Vohra Committee Report at ¶¶ 3.2.4, 4.12 & 6.4 respectively.
- 38 *Id.*, (The report highlighted that the networks of *mafias* were virtually running a parallel government, criminal gangs enjoyed the patronage of politicians cutting across party lines, protection was afforded to the leaders of criminal gangs by the government functionaries and political leaders and due to this nexus, leaders of gangs were getting themselves elected to local bodies, State Assemblies, and the Parliament).
- 39 Dinesh Trivedi, M.P. & Ors. v Union of India & Ors., (1997) 4 SCC 306, (while dealing with the petition to make the Vohra Committee Report along with its accompanying annexure public the apex Court speaking through A. M. Ahmadi, C. J., as he then was, held that although in a democracy citizens have right to information it is subject to recognized limitations and is not an absolute right. The Court while refusing to make the report public observed "transactions which have serious repercussions on public security, secrecy can legitimately be claimed because it would then be in the public interest that such matters are not publicly disclosed or disseminated.")
- 40 Supra note 5. the recommendations suggested the disclosure by the contesting candidate's assets, liabilities, educational qualifications, and any criminal cases pending against him

<sup>32</sup> Gadakh Yashwantrao Kankarrao v. E.V. alias Balasaheb Vikhe Patil, AIR 1994 SC 678, ("For democracy to survive, rule of law must prevail, and it is necessary that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values who win the elections on a positive vote obtained on their own merit and not by the negative vote of process of elimination based on comparative demerits of the candidates. It is also necessary that the impact of money power which has eliminated from electoral contest many men of undoubted ability and credibility for want of requisite financial support should be able to re-enter the field to make the people's choice meaningful (sic). This can be achieved only if elections are contested on a positive vote and the comparison is between the merits and abilities of the contestants without the influence of power and pelf and not between their comparative demerits and the support of money power. Apart from the other adverse consequences, the growing influence of money power has also the effect of promoting criminalization of politics.")

Parliament was unable to amend or pass any new electoral law due to the lack of unanimity and political will power. The problem went to an extent that in 2008 nearly a fourth of the 540 Parliamentarians faced criminal charges, ranging from human trafficking, immigration rackets, embezzlement, and rape to murder. A few of the Parliamentarians who faced criminal prosecution for heinous crimes were contesting elections from within the prisons. It almost became difficult to distinguish between criminals and politicians.

The rampant use of muscle and money power to win elections, coupled with the ignorant electorate and lack of transparency, made the situation even worse. There was an outcry all across the nation when politicians with criminal records not only became members of the Parliament backed by political parties, but were also appointed as cabinet ministers. <sup>42</sup> On one hand it could be argued that every citizen has a right to contest elections even if he is alleged to have committed a criminal offence as the criminal jurisprudence presumes every accused to be innocent until proven guilty. On the other hand it should be realized that those who choose to enter public life and seek the support of the people should submit themselves to very stringent standards of scrutiny of their conduct. <sup>43</sup> That is the price they must be willing to pay for the perks and privileges readily claimed by them at public expense when elected or appointed as Ministers. <sup>44</sup>

# B. The Citizen's Initiative, Legislative Impediment and the Judicial Response

It is imperative that vital information about a candidate contesting election is officially published, because the majority of the electorate in India is illiterate<sup>45</sup> and highly influenced by factors like

- on an affidavit along with the nomination paper filed in accordance with § 32 of the Representation of People's Act, 1951. The Law Commission suggested that any person who is accused in a criminal case in which the punishment is of five years or more, or the case is pending, or where the court has taken cognizance should be disqualified from contesting elections.
- 41 Emily Wax, With Indian Politics, The Bad Gets Worse, 'Shameful' Vote in Parliament Highlights Extent of Government Corruption, (2008), <a href="http://www.washingtonpost.com/wp-dyn/content/article/2008/07/23/AR2008072303390.html">http://www.washingtonpost.com/wp-dyn/content/article/2008/07/23/AR2008072303390.html</a>>.
- 42 V. Sundaram, Lawless and Vibrant Criminal Union Cabinet Ministers, http://www.boloji.com/analysis2/0145.htm>.
- 43 See B.S. Raghvan "Criminals in politics" <a href="http://www.hinduonnet.com/businessline/2001/01/22/stories/042255of.htm">http://www.hinduonnet.com/businessline/2001/01/22/stories/042255of.htm</a>.
- 44 Id.
- 45 See UNESCO Institute of Statistics, literacy rate in India has gone up from mere 12% in 1947 to 66% in 2007, <a href="http://stats.uis.unesco.org/unesco/TableViewer/document.aspx?ReportId=121&IF\_Language=eng&BR\_Country=3560">http://stats.uis.unesco.org/unesco/TableViewer/document.aspx?ReportId=121&IF\_Language=eng&BR\_Country=3560>.</a>

money, communal lures, and false speeches. The information made public would help the electorate make an informed decision. The growing concerns of corruption in all walks of life, the overwhelming participation of criminals in politics<sup>46</sup> coupled with the indifferent approach, and the lack of interest of the political parties in remedying the paralyzed electoral system, despite the various recommendations, <sup>47</sup> compelled the citizens to take the initiative through public interest litigation<sup>48</sup> before the constitutional courts. Association for Democratic Reforms, 49 an a political, non-partisan, and non-governmental organization sought judicial intervention<sup>50</sup> by filing a public interest petition before the High Court of Delhi seeking implementation of recommendations of the law commission, and pre-disclosure of information (pending criminal cases, assets, liabilities, and educational qualifications) about candidates contesting elections to the Parliament and the state legislatures. The High Court was not only concerned with its intervention in the electoral system but was posed with the bigger constitutional question that whether the elector had right to information.<sup>51</sup> The court, while narrating the prevailing political scenario,52 and the interpretation given to Article 19 of the Constitution<sup>53</sup> that embodies within it the right to

- 47 Supra note 5, see Part IX of the 170th Law Commission Report.
- 48 See Jagdeep S. Chhokar, Electoral Reforms: Need for Citizens Involvement, Economic and Political Weekly, Vol. 36, No. 42 (Oct. 20-26, 2001), pp. 3977-3980, (the citizens and civil society groups have to use all possible systems including the judicial system through public interest litigation to monitor the functioning of the political system).
- 49 Association for Democratic Reforms official website, <a href="http://www.adrindia.org/About-Us/Content/about-adr.html">http://www.adrindia.org/About-Us/Content/about-adr.html</a>>.
- 50 Supra note 9.
- 51 Id. at ¶ 8.
- 52 Id. at ¶ 9.

<sup>46</sup> After the 2009 Assembly elections there were 162 (29.83 %) MPs with criminal charges, 76 (14.00 %) MPs with serious criminal charges and a total of 522 criminal cases pending against MPs; See the final report submitted to the Government of India by the National Commission to Review the Working of the Constitution, March 31, 2002, (Identifying that there are increasing number of contestants with serious criminal antecedents ranging from rape, murder to armed robbery).

<sup>53</sup> State of Uttar Pradesh v. Raj Narain and Ors., [1975] 3 SCR 333, "In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing....". Romesh Thappar v. State of Madras, 1950 SCR 594 "[The freedom] lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse.... [But] it is better to leave a few of its noxious branches to their luxuriant growth, than, pruning them away, to injure the vigour of those yielding the proper fruits."

seek information,54 answered the question in affirmative.55

The Court emphasized that a decision without adequate information was no decision in the eyes of law and therefore the disclosure of relevant information about a candidate is necessary to give effect to the right to seek information under Article 19. Elaborate directions were given to the Election Commission to secure information from each candidate contesting elections to the Parliament and State Legislatures. The Court further directed the Election Commission to issue appropriate directions and notifications to ensure compliance with the judgment. Though vague, the judgment has been regarded as the victory of democratic ideals by the citizens. It was a step towards achieving transparent elections based on disclosure.

The Union of India soon after challenged the judgment before the Supreme Court on various jurisdictional and legal grounds.<sup>59</sup> The case was taken up along with another petition filed by People's Union for Civil Liberties ("PUCL")<sup>60</sup> on similar grounds and was intervened<sup>61</sup>

<sup>54</sup> *Id.* Right to seek information has been read into Article 19 of the Constitution of India through judicial interpretation.

<sup>55</sup> Supra note 9 at ¶ 28 ("It is the obligation of this Court to enforce their fundamental rights. Rights guaranteed to the citizens to seek and receive information for casting intelligent and rational votes certain directions need to be given by us.").

<sup>56</sup> The information sought was: (a) whether the candidate is accused of any offence(s) punishable with imprisonment? If so, the details thereof; (b) Assets possessed by a candidate, his or her spouse and dependent relations; (c) Facts giving insight to candidate's competence, capacity and suitability for acting as Parliamentarian or legislator including details of his/her educational qualification; (d) Information which the Election Commission considers necessary for judging the capacity and capability of the political party fielding the candidate for election to Parliament or the State Legislature.

<sup>57</sup> Id. at ¶ 29

<sup>58</sup> Bhavdeep Kang, Not Quiet the Full Monty, The Outlook, November 20, 2000, <a href="http://www.outlookindia.com/article.aspx?210423">http://www.outlookindia.com/article.aspx?210423</a>.

<sup>59</sup> Supra note 4 at ¶ 8 arguing that the Judiciary was not entitled to issue directions to the Election Commission of India as the same had been complied with and doing so encroached upon the domain of Legislature.

<sup>60</sup> *Id.* at ¶ 7 ("People's Union for Civil Liberties (PUCL) has filed Writ Petition No. 294 of 2001 under Article 32 of the Constitution praying that writ, order or direction be issued to the respondents- (a) to bring in such measures which provide for declaration of assets by the candidate for the elections and for such mandatory declaration every year during the tenure as an elected representative as MP/MLA; (b) to bring in such measures which provide for declaration by the candidate contesting election whether any charge in respect of any offence has been framed against him/her, and (c) to frame such guidelines under Article 141 of the Constitution by taking into considering 170th Report of Law Commission of India).

<sup>61</sup> The Indian National Congress filed an application praying to be impleaded as a party and be allowed to put forth its arguments.

by the Congress. 62 The Apex Court after examining the issues rejected the appeal, and upheld the judgment of the Delhi High Court. 63 The Supreme Court restated the need for pre-election disclosure by the candidates in light of the recommendations and directed the Election Commission of India to ensure that the information is produced in the form of a sworn affidavit along with the candidate's nomination form.<sup>64</sup> The case was treated as the epitome of the democratic ideals and was highly appreciated and commented upon.65 The celebration was short lived as the Parliament passed an amending law66 through which the candidates were not liable to pre-disclose their assets, liabilities, and educational qualifications. This amending law circumvented the judicial pronouncement. The amending act brought two new provisions into the Representation of the People Act of 1951.<sup>67</sup> The first amending act made it mandatory to disclose criminal antecedents<sup>68</sup> while filing the nomination paper,<sup>69</sup> while the second starting with a non-obstante clause<sup>70</sup> made the disclosure of any other information such as assets, educational qualification, etc. solely subject

<sup>62</sup> *Id.* at ¶ 6 "[The] High Court ought to have directed the writ petitioners to approach the Parliament for appropriate amendments to the Act instead of directing the Election Commission of India to implement the same." Challenge to the judgment was also made on the ground that educational requirement was never a pre-requisite to contesting elections especially in a country like India and that is a reason why it was never incorporated in the Constitution or the legislature, *see* ¶ 10.

<sup>63</sup> Right to seek information under the fundamental right to speech and expression was for the first time read into the right to vote.

<sup>64</sup> Union of India v. Association for Democratic Reforms & Anr., (2002) 5 SCC 294 at ¶ 56.

<sup>65</sup> V. Venkatesan, "The Voter's Right To Know", Frontline, Volume 19 - Issue 12, June 8-21, 2002; K. Subramanian, "Towards free and fair elections in India", The Hindu Available at <a href="http://www.thehindu.com/2008/07/02/stories/2008070253151100.htm">http://www.thehindu.com/2008/07/02/stories/2008070253151100.htm</a>; B.G. Verghese, "Keep them out of politics", The tribune, Available at <a href="http://www.tribuneindia.com/2005/specials/tribune\_125/main7.htm">http://www.tribuneindia.com/2005/specials/tribune\_125/main7.htm</a>.

<sup>66</sup> People's Representation (Amendment) Act, 2002 (Act 72 of 2002) made effective from August 24, 2002.

<sup>67</sup> An Act to provide for the conduct of elections of the Houses of Parliament and to the House or Houses of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections.

<sup>68 § 33-</sup>A of the Representation of the People Act, 1951, introduced through the § 2 of the Amendment Act of 2002.

<sup>69</sup> Id

<sup>70</sup> Supra note 18 (§ 33B. Candidate to furnish information only under the Act and the rules: Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made there under.")

to the Representation of the People Act, 1951, and the rules framed there under. The second amendment nullified the decision of the Supreme Court as it meant that the candidates contesting elections were not liable to disclose any information except their criminal antecedents unless it was specifically mandated by the Representation of the People Act, even though the courts had held otherwise.

The provision introduced to circumvent the Supreme Court's judgment in Union of India v. Association for Democratic Reforms & *Ors.* was immediately challenged on constitutional grounds. <sup>71</sup> The three judge bench of the Apex Court, speaking through M. B. Shah, J., in very strong words pronounced § 33-B unconstitutional and observed that the legislature had no power to ask the instrumentalities of the state to disobey or disregard decisions given by the courts.<sup>72</sup> The court in all the above cases, though not expressly, treated the right to vote as a constitutional right,<sup>73</sup> which was accorded the protection of various fundamental rights. The Court did encounter the problem of pinpointing the genesis of the right to vote but it assumed it to be a part of the Constitution. While granting the right to information as a part of right to vote the courts were also careful by stating that they were entitled to fill in the gaps where no legislative text could be found.74 It seemed for once that the controversy had finally come to an end, but soon thereafter a five judge bench of the Supreme Court<sup>75</sup> while dealing with the challenge to another amendment to the Representation of the People Act, 1951 which deleted the requirement of 'domicile' in state concerned for getting elected to council of states (Rajya Sabha) disagreed with the interpretation of the 'right to vote' by the three judges bench in Association for Democratic Reforms case.<sup>76</sup> Although the five judge bench did not overrule the previous judgments, they interpreted the right to vote in a very narrow context<sup>77</sup>

<sup>71</sup> Supra note 10.

<sup>72</sup> Id. at ¶ 7.

<sup>73</sup> See Part II A "Does the Constitution Grant the 'Right to Vote'?" (infra). The Court in all the judgments regarded democracy as an essential feature of the Constitution that could not be sustained without the 'right to vote'. The right thus had to flow through the Constitution to ensure that it neither be amended, altered nor abrogated.

<sup>74</sup> Supra note 72.

<sup>75</sup> Supra note 14, Kuldeep Nayar's case.

<sup>76</sup> Supra note 4.

<sup>77</sup> Supra note 14, In Kuldeep Nayar's case relying upon Jyoti Basu & Ors. v. Debi Ghoshal & Ors., (1982) 1 SCC 691 and Rama Kant Pandey v. Union of India, (1993) 2 SCC 438, it was held that "right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a

and washed away the decade long effort of the citizens to make the 'right to vote' a meaningful right. When the Court amidst this split revisited the electoral domain to read the right to stay neutral within the 'right to vote', the matter was referred to the Chief Justice for adjudication by a larger bench.<sup>78</sup> The question gives rise to a bigger constitutional problem of tracing the genesis of the right to vote. If it were to be treated as a statutory right, then it would be prone to frequent legislative amendments and would not carry along with it other ancillary rights, such as the right to information unless expressly granted by the statute. On the other hand, if it were treated as a constitutional right it would be better protected.<sup>79</sup> Another possibility though not impossible would be to read the right to vote as a form of the right to expression by expanding the scope of Article 19.<sup>80</sup>

The split and the controversy emerged due to the lack of jurisprudence on the point. The right to vote in the last sixty-two years of the working of the Constitution of India never came up to be interpreted, as it was considered so sacrosanct that there was never a need felt to trace and pinpoint its scope under the Indian democracy.

#### II. SEARCHING THE 'RIGHT TO VOTE' IN INDIA

The right to vote is not expressly mentioned either in the Constitution or in any other statute. Irrespective of voting being a recognized right, its value is intrinsic to a democratic nation state. Embedded within the very 'compact' between the citizens and the state, voting also transforms the very identity of a citizen. While the Constitution conferred on a citizen the right to be registered as a voter, the Representation of the People Act on the other hand laid down provisions for exercising the right. Right to vote seemed to be a political privilege rather than a right<sup>81</sup>. The question that arises is whether the citizens of India have a right to vote in absence of any express provision? If the answer to this question is in the negative, then the basic premise i.e. "democracy" on which India is governed would be a nullity, while if the answer is in the affirmative, then it has to be

statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election."

<sup>78</sup> Supra note 9. "[T]o find if the right to speech and expression flowing from Article 19 of the Constitution was a concomitant to the right to vote".

<sup>79</sup> Sunra note 73

<sup>80</sup> Supra note 10, see the seperate opinion of P. Venkatarama Reddi, J.

<sup>81</sup> Rameshwar Dial, Election Law, 255 (4th Ed. 1985).

ascertained as to where such right is derived from?

## A. Does the Constitution Grant the 'right to vote'?

Neither the Constitution nor any other statute expressly grants the right to vote but the same is reflected through the constitutional scheme. The Constitution reflects two broad concepts, firstly the term "democratic republic,"82 and secondly 'adult suffrage,' as being the sole basis for election to the Parliament and the state legislatures.83 Both these concepts are interlinked and are inseparable. The Preamble is an integral part of the Constitution84 and the objectives specified in it contain the basic structure of the Constitution.85 The term "democratic" as stated in the Preamble has many meanings, but in a broad context the term connotes that India would have a Parliamentary form of representative government.86 The right to vote is embedded within the term 'democratic republic,' which allows people with opposing views to be candidates and seek the electorate to vote for them. Only the candidate who enjoys an electoral majority is worthy of holding public office and being a member of the legislature. This unique characteristic gives life to the right to vote in a democracy, and is said to be the core feature<sup>87</sup> that can neither be amended nor abrogated. Any measures to cripple the right to vote in the sense that people may be given the right to vote for one party or only one candidate, either affirmatively or negatively, and are not given the choice to choose another opposed to it (or him) is something which was not the vision of the framers of the Constitution. The right to vote under the Constitution envisages a right that forms the founding block for the working of a democratic nation. Although an unenumerated right,88the Constitution of India does grant to its citizens the 'right to vote' which is reflected in the constitutional scheme.

<sup>82</sup> Supra note 18, Preamble to the Constitution.

<sup>83</sup> Id., Article 326.

<sup>84</sup> Keshvanand Bharati v. State of Kerala, (1974) 4 SCC 1461.

<sup>85</sup> Supra note 17 at ¶¶ 292, 599, 682, 1164 and 1437, also see Excel Wear v. Union of India, (1978) 4 SCC 224.

<sup>86</sup> H. M. Seervai, "Constitutional Law of India", (3rd Ed. 1984), at P. 1505 (The meaning of the word "democracy" must be determined not generally but with reference to the Constitution).

<sup>87</sup> Supra note 17.

<sup>88</sup> Rights that are not expressly mentioned in the written text of a Constitution but instead are inferred from the language, history, and structure of the Constitution, or cases interpreting it.

The Constitution of India is the supremalex89 i.e. the reservoir of all powers from which the different institutions and an independent judiciary derive their authority to safeguard the rule of law in the country. A thirteen judge bench of the Supreme Court in the Keshvanand Bharati case redefined the scope of the legislature to amend the Constitution and clarified that there are certain features of the Constitution that cannot be amended, as without them the Constitution would have no significance. These features have been termed as the 'basic features<sup>90'</sup> of the Constitution. It was not at all surprising to see that 'democracy' was one of those basic features of the Constitution. 91 The Supreme Court in the landmark judgment expressed the true essence of democracy that embodied within it the 'right to vote. 92 By holding that the legislature does not have the power to amend, repeal or abrogate any constituent feature of democracy, it ensured that the 'right to vote' be read as a part of the constitutional scheme. Many rights, even though unseen in the Constitution have been held to be a part of fundamental rights, such as the right to privacy,93 the right to environment,94 the right to health.95 When democracy has been afforded constitutional protection in the strictest sense, it is logical to protect the 'right to vote', which flows from the Constitution and forms an integral part of democracy.

§ 62 of the Representation of the People Act worded in the negative phrase is titled as the "right to vote" and in the preceding sub-sections lays down the qualifications of a voter. Assuming but not conceding that the statute was the only source of acquiring the 'right to vote', then it would create an anomaly as the Representation of the People Act, being a mere statute, can be amended by the Parliament in the simplest possible manner and could take away the right to vote. Would this mean that the 'right to vote' rests against the whims and fancies of the politicians? This was never the intention

<sup>89</sup> Raja Ram Pal v. Hon'ble Speaker, Lok Sabha and Ors., (2007) 3 SCC 184.

<sup>90</sup> Supra note 84.

<sup>91</sup> Id.

<sup>92</sup> Id.

<sup>93</sup> Kharak Singh v. State of UP, AIR 1963 SC 1295, Peoples Union for Civil Liberties v. Union of India, (1997) 1 SCC 301.

<sup>94</sup> Common Cause v. Union of India, AIR 1996 SC 1619.

<sup>95</sup> State of Punjab v. Mahinder Singh Chawla, (1997) 2 SCC 83.

<sup>96</sup> Shubhankar Dam, Peoples Union For Civil Liberties v Union of India: Is Indian Democracy Dependent on a Statute?, P.L. 2004, Win, 704-711 (2004), (Arguing that, if the right to vote is merely a statutory right, it would only require a repeal of §62 to effectively end the Indian democracy).

of the drafters of the Constitution. The phrase 'democratic republic' in the Constitution read in conjunction with Article 326 grants the 'right to vote' under the principal of constitutionalism. Feen fundamental rights are open to reasonable restrictions and so is the 'right to vote'. There is no right which can be absolute, without regulation; even the 'right to life and liberty' cannot be said to be an absolute right as it does not confer the right to take away one's life. Fe 26 of the Representation of the People Act imposes those restrictions by providing qualifications such as that the voter's name should be on the electoral rolls, should not be debarred under § 1699 of the Act, can only vote from one constituency, and even if his name appears twice on the rolls he would be entitled to vote only once. In effect § 62 only lays down the qualifying criteria of the 'one citizen one vote' doctrine, and does not confer the right to vote. It tries to streamline the voting mechanism to facilitate free and fair elections.

Neither Article 326 nor § 62 of the Representation of the People Act expressly grants the right to vote. While Article 326 grants the right to be registered as a voter, § 62 lays down the pre-requisites for exercising the right to vote. Surely enough, when the Act and the Constitution are silent on the face of it then the answer has to be searched for within the Constitution. It is therefore an unenumerated right that is regulated through the statute.

Reading unenumerated rights within the Constitution of India is something that is not alien to constitutional law jurisprudence. The Supreme Court in many judgments has identified unenumerated rights to expand the scope of fundamental rights. Often termed as judicial activism, social jurisprudence, or simply terming the Constitution as a living document, irights have been read into the Constitution to give effect to the basic philosophy envisaged by its

<sup>97</sup> The concepts of Constitution and constitutionalism are distinct in modern political thought. While the Constitution not only grants power to the different organs of the government but also seeks to restrain those powers, on the other hand constitutionalism recognizes the need for the government but insists upon limitations being placed on governmental power, i.e. it reflects checks and balances. *See* M. P. Jain, Indian Constitutional Law, N. M. Tripathi Pvt. Ltd. (1987) at 4.

<sup>98</sup> Gian Kaur v. State of Punjab, (1996) 2 SCC 648, the "right to life" guaranteed by Article 21 of the Constitution does not include the "right to die".

<sup>99</sup> It lays down the disqualifications for registration in the electoral rolls.

<sup>100</sup> T.K. Tope, "Supreme Court of India and Social Jurisprudence", (1988) 1 SCC (Jour) 8.

<sup>101</sup> Goodyear India v. State of Haryana, (1990) 2 SCC 71 at ¶ 17.

drafters. 'The right to life' 102 over the years has embodied within itself the right to travel abroad, 103 the right to privacy, 104 the right to livelihood, 105 freedom from torture, cruel, inhumane, and degrading punishment, 106 the right to speedy trial, 107 the right to legal aid, 108 the right to health, 109 the right to clean, and wholesome environment. 110 The term procedure established by law in Article 21 has been judicially construed to mean a procedure which is reasonable, fair and just. 111 Articles 14 and 19 have been intricately woven with Article 21, giving birth to new rights and freedoms, which never found place in the original text of the Constitution. 112 Similarly the Preamble initially was never seen as a part of the Constitution but was later interpreted to be an integral part. 113 The Preamble was not only a tool to interpret the Constitution, but also embodied within it the essential features of the Constitution.

## B. International Law, the Constitution, and the 'Right to Vote'

The right to participate in the functioning of one's state is one of the few internationally recognized rights. The right to vote is a well-established norm of customary international law.<sup>114</sup> Significant international treaties protect the citizen's claim to universal and equal suffrage.<sup>115</sup> International human rights law, if incorporated into

- 102 Supra note 83, Article 21.
- 103 Mrs. Maneka Gandhi v. Union of India, AIR 1978 SC 597.
- 104 Kharak Singh v. State of UP, 1 SCR 332 (1964); R.C. Jain, National Human Rights Commission, India, Indian Supreme Court on Right to Privacy, July 1997.
- 105 Narendra Kumar v. State of Haryana, (1994) 4 SCC 460.
- 106 Inderjeet v. State of UP, (1979) 4 SCC 246.
- 107 Sher Singh v. State of Punjab, (1983) 2 SCC 344.
- 108 Hussainara v. Home Secretary, State of Bihar, (1980) 1 SCC 98; Ranchod v. State of Gujarat, (1974) 3 SCC 581.
- 109 State of Punjab v. Mahinder Singh Chawla, (1997) 2 SCC 83.
- 110 M. C. Mehta v. Union of India, (1987) 1 SCC 395.
- 111 Mrs. Maneka Gandi v. Union of India & Anr., (1978) 1 SCC 248.
- 112 See Generally Vijayashri Sripati, "Human Rights in India Fifty years after Independence", 26 Denv. J. Int'l L. & Pol'y 93. Analyzing the manner in which the normative content of International Human Rights law has infused within Indian constitutional standards.
- 113 Supra note 17 at ¶¶ 292, 437, 599, 682 & 1164.
- 114 For the interrelationship between democracy, right to vote and international law see generally Robin L. Nunn, "Lock Them up and Throw away the Vote", 5 Chi. J. Int'l L. 763 (Winter 2005); and John O. Mc Ginnis and Ilya, Somin Democracy And International Human Rights Law, 84 Notre Dame L. Rev. 1739 (April 2009).
- 115 Article 21 see section I of Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948); Article 25 see section II of Covenant on Civil and Political Rights (1976); 1966, 999 UNTS 171, COUNCIL OF EUROPE, Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 1953) This document is enforced by the European Court of Human

international custom, is equal in authority to domestic law,<sup>116</sup> which has been the *grund norm* across many democratic states. The Indian Constitution provides the power to the legislature to enact laws to give effect to international agreements.<sup>117</sup> The Supreme Court of India has opined that in the absence of domestic law occupying the field,<sup>118</sup> international treaties, and conventions which are not inconsistent with the fundamental rights, and are in harmony with its spirit, must be read into part III of the Constitution<sup>119</sup> to enlarge the meaning, content and to promote the object of the constitutional guarantee.<sup>120</sup> The thought of having 'right to vote' under part III of the Constitution of

Rights and pursuant to Article 3 of Protocol I of the Convention Parties undertake to hold free elections at reasonable intervals by secret ballot "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." Articles 9, 10, and 11 of this Convention also ensure the right to freedom of thought, the right to freedom of expression, and the right to freedom of peaceful assembly; ORGANISATION FOR SECURITY AND COOPERATION IN EUROPE (OSCE), International Standards of Elections (1990), "free elections held at reasonable intervals by secret ballot are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings;" EUROPEAN UNION (EU), Council Regulations 975/99 and 976/99 (1999). These regulations provide a legal basis for EU operations that "contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms". They state that the EU shall provide technical and financial aid for operations aimed at supporting the process of democratization, in particular in support for electoral processes. These regulations are mentioned in a Communication from the Council on EU Election Assistance and Observation; ORGANIZATION OF AMERICAN STATES (OAS), American Convention on Human Rights (entered into force 1978); Inter-American Convention on the Granting of Political Rights to Women (entered into force 1954); Article 23 of the American Convention on Human Rights and Article 20 of the American Declaration of the Rights and Duties of Man guarantee the right of citizens to vote and be elected in genuine periodic elections. The Charter of the Organization of American States (OAS) establishes in its preamble, "representative democracy is an indispensable condition for the stability, peace and development of the region," and establishes that one of its purposes is "to promote and consolidate representative democracy, with due respect for the principle of non-intervention." In 1991 the General Assembly of the Organization of American States established a process by which the OAS will take action if the democratic order is interrupted in any member country. In 1992 the Protocol of Washington, (in ratification), strengthened the mechanisms for defending democracy; AFRICAN UNION (Formerly Organization of African Unity), African Charter on Human and Peoples' Rights (1981), Article 13(1) of the African (Banjul) Charter on Human and Peoples' Rights provides that every citizen shall have the right to participate freely in their government.

- 116 John C. Penn, "Sexual Harassment: Proscriptive Policies of the European Community, Ireland, and New Zealand", 6 Am. U. J. Gender & L. 139, 156 (1997).
- 117 Supra note 18, Article 253.
- 118 Id., Article 51.
- 119 Vishaka & Ors. v. State of Rajasthan & Ors., (1997) 6 SCC 241.
- 120 This is implicit from Article 51(c) and the enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution.

India does not sound unreasonable, but if the same is constitutionally guaranteed, and protected through the fundamental rights, a dual purpose of giving effect to the international treaties and strengthening the constitutional philosophy of democracy is fulfilled. The absence of an express provision regarding the 'right to vote,' either in the Constitution or in statute, signifies that the 'right to vote' has to be read as being inherent in the constitutional scheme to give effect to the international instruments and democracy.

The growing consensus among international law jurists that human rights and democracy are the two sides of the same coin<sup>121</sup> justifies placing the right to vote within the founding document of a democratic nation. Human rights and democracy complement each other. No doubt, the two notions are seen from a different point of view, - human rights connote a legal idea whereas democracy connotes a political idea. Human rights, a narrower concept, can only be strengthened by democracy.<sup>122</sup> Part III of the Constitution of India grants various basic human rights including fundamental rights that can only be well protected if there is a constitutional right to vote. The constitutional right to vote would protect the democratic feature of the Constitution, and strengthen the human rights through citizen's participation in the government.

The Indian Constitution borrowed many features from the American, <sup>123</sup> British, Australian, and Canadian models. It would be worth turning towards them, which is a generally accepted norm in Constitution law making. <sup>124</sup> Adult suffrage, which is the "acceptance"

<sup>121</sup> Henry J. Steiner, "A Symposium On Constitutional Rights And International Human Rights Honoring Professor David Kretzmer: Two Sides Of The Same Coin?: Democracy And International Human Rights", 41 Isr. L. Rev. 445 (2008).

<sup>122</sup> Yehudah Mirsky, "The ICJ's Advisory Opinion And International Relations Theory: Human Rights, Democracy, And The Inescapability Of Politics; Or, Human Dignity Thick And Thin", 38 Isr. L. Rev. 358 (2005), ("We can think of democracy, in all its variations - presidential, parliamentary, quasi-monarchical, liberal, communitarian - as the process of self-governance whereby the thin universal precepts of human rights are thickened within given cultures, societies and histories. One dimension of this thickening is the range of institutions and procedures through which political disagreement and consensus are shaped and channeled; another is the non-political, social corollary of this thickening, namely civil society.").

<sup>123</sup> Maureen B. Callahan, "Cultural Relativism and the Interpretation of Constitutional Texts", 30 Willamette L. Rev. 609, 611 (1994), ('referring to the constituent assembly debates which show that the Indian Constitution borrowed a lot of its features from the American Constitution.').

<sup>124</sup> Nelson Tebbe & Robert L. Tsai, "Constitutional Borrowing", 108 Mich. L. Rev. 459 (2010).

of the fullest implications of democracy" <sup>125</sup> is an unenumerated right under the U.S. Constitution. The U.S. Supreme Court has nevertheless recognized an equal right to vote in the absence of explicit constitutional language. <sup>126</sup> The U.S. Supreme Court has gone one step further by holding right to vote as a fundamental right <sup>127</sup> protected by the equal protection clause. <sup>128</sup> The fact that even democracy is unenumerated and yet forms the foundation of the democratic country, strengthens the argument that even though under the Indian Constitution the 'right to vote' may not have been expressly granted, it flows through the broad constitutional framework.

Another jurisdiction worth referring to is the United Kingdom, from where majority of the laws in India were borrowed. Until the twenty-first century in the United Kingdom, the will of the people or the electorates was superseded by parliamentary sovereignty. 129 Residence became a pre-requisite for granting the right to vote and women were granted voting rights in 1918. 130 These reforms led to significant changes in how the electoral rights were seen and interpreted. The reforms, for the first time, also gave birth to representative and participatory democracy as a primary principle of constitutionalism in Britain, while embedding democracy within it. 131

<sup>125</sup> Supra note 17.

<sup>126</sup> Jane S. Schacter, "Unenumerated Democracy: Lessons From The Right To Vote", 9 U. Pa. J. Const. L. 457, (2007).

<sup>127</sup> Reynolds v. Sims, 377 U.S. 533, 561-567 (1964); James E. Fleming, Securing Deliberative Autonomy, 48 Stan. L. Rev. 1, 34 (1995) (noting that as the unenumerated right to vote is a significant precondition for deliberative democracy, it should be held to be a fundamental right).

<sup>128</sup> Erwin Chemerinsky, "Constitutional Law: Principles And Policies," 842 (2d Ed. 2002).

<sup>129</sup> A.V. Dicey, "Introduction to the Study of the Law of the Constitution," 40 (E.C.S. Wade ed., 9th ed. 1956) p. 73-74 (1885). ("The courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or kept alive in opposition to the wishes of the electors.").

<sup>130</sup> Representation of the People Act of 1918, 7 & 8 Geo. 5, c. 64 (Eng.).

<sup>131</sup> *See* Lord Irvine Of Lairg, Lecture: Sovereignty In Comparative Perspective: Constitutionalism In Britain And America, 76 N.Y.U.L. Rev. 1 (April, 2001), (arguing that the theory on which the governments in UK and US work are similar with the historic difference that UK was based upon parliamentary sovereignty and with the evolution it now embodies representative for Parliament's composition determined by the electorate in whom ultimate political sovereignty resides. Whereas the same is followed in US with the exception that US since the inception of its Constitution followed the principle in its spirit and was opposed to the then prevailing parliamentary sovereignty in UK.).

It is surprising that basic ideals of due process and fundamental rights were borrowed from the US but the Representation of the People Act and the interpretation of 'right to vote' were based upon the supremacy of the Parliament, which no longer holds good in England. This anomaly has led to the confusion, thus giving rise to the split among the benches of the Supreme Court of India.

# C. Analyzing The Value of 'Voting'

Something more than just the text of the Constitution must surely be involved in understanding the motivation behind a democratic and participatory constitution that tries to create a legitimate space for different types of people in a diverse society. 133 Enfranchisement is valuable not only for the vital role it plays in democratic governance, but also because it transforms the identity of the voter. It enables a voter to affirm his sense of membership in a society and have a cohesive feeling with the democratic society as a whole. Beyond the instrumental uses of a vote, the participatory experience of voting is valuable in itself.<sup>134</sup> Elections embody within themselves the core principles, aspirations and values of the political ethos that have become a part of our democratic culture. It was these explicit democratic values and principles that influenced the drafters of the Constitution. The identity of the voter is reflected through the electoral process, and transforms in making a popular government while strengthening the democratic philosophy. When one votes, he/ she celebrates popular sovereignty, 135 the essential feature that legitimizes a democratic government. The very sense of enfranchisement, distinct from voting, may have a constitutive effect on one's sense of membership and consequently his dignity. 136

The government is artificial and its power is derived from the people. The citizens of India agreed to form a society governed by majority rule through a social contract reflected in the Constitution. The government had a fiduciary relationship with the people. Thus,

<sup>132</sup> See Part II-D, Infra.

<sup>133</sup> Amartya Sen, Rights, Laws and Language, 31 Oxford J. Legal Stud. 437 (2011).

<sup>134</sup> James Q. Wilson, Political Organizations 34-51 (1973). The values that are attached to the act of participation, apart from the ends achieved or sought, "purposive" incentives to collective action.

<sup>135</sup> Daniel D. Polsby & Robert Popper, The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 Yale L. & Pol'y Rev. 301, 315 (1991) (arguing that voting is "a means to affirm the philosophy of popular sovereignty").

<sup>136</sup> Adam Winkler, "Expressive Voting", 68 N.Y.U. L. Rev. 330 (1993) at 367-369.

<sup>137</sup> See generally John Locke, Two Treatises on Government, 10th edition.

the people retained the power to remove the government<sup>138</sup> if it breached its fiduciary duty, one of them being enfranchisement of citizens. This power can only be retained through unbridled voting rights, irrespective of the fact of whether it is enumerated or unenumerated in the Constitution.

The social contract on which the very existence of the nationstate rests can only be reflected through the general will. This general will, in a well-ordered society, is identified by the vote.<sup>139</sup> It is voting that makes a governmental society indispensible because, when properly formed and operated, it assures maximum protection and enjoyment of the premise of general will, on which it was formed.<sup>140</sup>

The democratic process in India is not only reflected through national and state governments, but also through the local governments scattered across India – *panchayats* in rural areas and Municipal Corporations in the urban areas. Since both these kinds of governments enjoy constitutional status,<sup>141</sup> and members to which are elected through a popular majority, the value of voting is further personified through the democratic culture of India. It is the value embedded in voting that legitimizes the government and not *viceversa*.

# D. The 'Right to Vote' and the Supreme Court of India

The Supreme Court of India so far has never been directly confronted with the question of whether or not the 'right to vote' is a constitutional right? All rulings referring to the right to vote have been in cases where an issue arising from an election dispute was before the constitutional court. Because of the nature of election disputes, which are based on strict procedural and statutory requirements, the courts have never ventured into addressing the issue of whether there exists a constitutional right to vote. The requirements are mandatory as the popular will of the electorate cannot be undermined. This is the sole reason that courts have always weighed heavily on the statutory requirements set forth in the Representation of the People Act. On

<sup>138</sup> Ashcraft, Richard, 1986, Revolutionary Politics & Locke's Two Treatises of Government. Princeton: Princeton University Press.

<sup>139</sup> Melissa Schwartzberg, Voting the General Will, Political Theory, Vol. 36 No. 3, June 2008, 403-423.

<sup>140</sup> The idea of a state is derived from the universal principle of right, Allen W. Wood, Kantian Ethics 259 (2008), at 215.

<sup>141</sup> Supra note 117, Part IX & IXA.

one hand while the dicta in many judgments has been that the right to contest and challenge elections is neither a common law right nor a fundamental right but a statutory right and is subject to limitations, including the right to vote along with it even though it was never in issue before the Supreme Court is unreasonable and untenable.<sup>142</sup>

The most unique aspect is that in all the judgments the Supreme Court has unambiguously held that the 'right to elect,' is fundamental to democracy. The Court in Ponnuswami's case143 while deliberating the issue of whether a petitioner could invoke the extraordinary jurisdiction of a High Court to remedy the alleged illegal rejection of his nomination paper, ruled against the petitioner. The reasoning behind this was based upon the interpretation of the term 'election' in Article 329(b)144 and the words "arising out of or in connection with" which are used in Article 324(1) and the phrases "with respect to all matters relating to, or in connection with" which are used in Article 327<sup>145</sup> and 328. <sup>146</sup> Weight was also given to the well-recognized doctrine that where a statute which gives a special remedy for enforcing it, creates a right or liability, only the remedy provided by that statute must be availed of. Every aspect of the judgment was in consonance with law until the Court, overwhelmed by the judgment of the Privy Council<sup>147</sup> and the observation of Lord Chancellor Cairns<sup>148</sup> held the 'right to elect' to be a statutory right. The observation of Lord Chancellor Crain at no stage reflects that the right of the elector flows

<sup>142</sup> It has to be emphasized that there is a difference in treatment of the right to vote and the right to contest elections. The right to contest elections can be made subject to classification to uphold affirmative action and ensure equal representation of all classes in the House of Commons.

<sup>143</sup> Supra note 15.

<sup>144</sup> No election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

<sup>145</sup> Power of the Parliament to make provision with respect to elections to Legislatures.

<sup>146</sup> Power of Legislature of a state to make provision with respect to elections to such Legislature.

<sup>147</sup> The Berge v. Laudry, (1876) 2 App. Cas. 102.

<sup>148</sup> *Id.* At ¶ 27, "Now, the subject matter, as has been said of the legislation is extremely peculiar. It concerns the rights and privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privilege have always in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist. And it would be a result somewhat surprising, and hardly in consonance with the general scheme of the legislation, if with regards to rights and privileges of this kind, it were to be found that in the last

through a special statute but only suggests that such rights and privileges are maintained and protected by the special statutes. Moreover the era in which the case was decided was when parliamentary supremacy in the United Kingdom was the norm, changed to representative democracy.<sup>149</sup>

The trend and the interpretation that was accorded by the constitutional bench comprising of five judges in *Ponnuswami's* case has been under-mining the legitimacy of constitutional right to vote. Subsequently all cases concerning impleading of parties in an election petition<sup>150</sup> including the recent dispute over deletion of 'requirement of domicile' for getting elected to the Council of States (*Rajya Sabha*)<sup>151</sup> have relied on the misconceived interpretation of 'right to vote' accorded in *Ponnuswami's* case. This lopsided and untenable trend that has been carrying on since 1954 shows the reluctance of courts to come out of the colonial mind set despite the fact that England has now become a representative democracy.<sup>152</sup>

The issue was partly raised before the Apex Court wherein subsection 5 of § 62 was under challenge as it disfranchised people under lawful detention, as being violative of Article 14, 19 and 21 of the Constitution<sup>153</sup>. The Supreme Court speaking through Verma J. in the first part of the judgment justified the reasonable restriction<sup>154</sup> which could be imposed on the fundamental right.<sup>155</sup> In the later half of the judgment relying upon the narrow interpretation granted to the 'right to vote', it held the 'right to vote' to be a statutory right.<sup>156</sup> Giving reasons justifying the reasonable restriction on the fundamental right to vote and then stating that the 'right to vote' a statutory right created more confusion.

resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the Superior Court which the Legislative Assembly had put in its place, but belonged to the Crown in Council, with the advice of the advisers of the Crown at home, to be determined without reference either to the judgment of the Legislative Assembly, or of that court which the Legislative Assembly had substituted in its place".

- 149 Supra notes 129-132.
- 150 Jagan Nath v. Jaswant Singh & Ors., AIR 1954 SC 210.
- 151 Supra note 14, Kuldeep Nayar's Case.
- 152 Supra note 131, and accompanying text.
- 153 Ankul Chandra Pradhan v. Union of India & Ors., (1997) 6 SCC 1.
- 154 Id. at ¶ 8.
- 155 It seemed as if the right to vote was being treated as a fundamental right in the first half of the judgment.
- 156 Id. at ¶ 9, 10 & 11.

Even though the Indian Supreme Court was never faced with the task of interpreting of the 'right to vote' and its relationship with the Constitution it has granted a narrow and obsolete interpretation to the 'right to vote'. This faulty interpretation was for the first time negated by the Supreme Court in Association for Democratic Reforms case,157 speaking through Hon'ble Justice Shah while deciding the challenge to the Parliament's attempt to circumvent the previous judgment of the Supreme Court - granting the right to seek information about the antecedents about the candidate. 158 The court clarified that challenges to elections, remedies that can be granted, the qualifications and pre-requisites to contesting elections are derived from the statute and governed by the statute's strict procedural requirements. On the other hand the 'right to vote', which is the essence of democracy and further strengthened by the voters right to seek information flowing through Part-III of the Constitution makes it imperative not to treat the right at par with other electoral rights. The Court strongly held that any provision of the statute that limits or abrogates fundamental rights should be struck down. It was clarified that the statutory right to vote does not limit the fundamental right to seek information. Even though the strong wording of the Court hinted towards the right to vote as being embedded in the Constitution, the judgment never expressly held so.

This trend did not last long. The constitutional bench comprising of five judges disagreed with the findings of the bench in *People's Union for Civil Liberties* case<sup>159</sup> but did not overrule it. There may have been good reasons for not overruling it, as the issue was election to the Council of States (*Rajya Sabha*) which is through indirect elections as opposed to the House of Commons (*Lok Sabha*) where direct elections fill the seats. The court never clarified the distinction between 'voting' for the two houses but did oppose the reasoning of right to vote as a constitutional right by relying upon narrow jurisprudence of *Ponnuswami's* case.

The disagreement could also be due to a contextual difference of facts present before the two benches or it could be the outcome of different interpretational norms applied to the Constitution. As of now the legitimacy of the right to vote is unclear from the judgments of

<sup>157</sup> People's Union for Civil Liberties & Ors. v. Union of India & Ors., (2003) 4 SCC 399,  $\P$  66 158 Id .

<sup>159</sup> Id.

the Supreme Court but there is no dispute in stating that the sacrosanct right to vote flows from the Constitution and is subject to reasonable limitations imposed by the statute. It would not be surprising if in the near future, activist judges of the Supreme Court of India hold the same.

# III. RIGHT TO VOTE AND ITS INTERRELATIONSHIP WITH EQUALITY, AND SPEECH & EXPRESSION

Having extensively argued for the existence of right to vote under the Constitution, it would be unfair not to see its relationship with fundamental rights enshrined under the Constitution. Without affording the protection of fundamental rights to the right to vote a voting right would be nothing more than a mere illusion. It would also be justified to read the right to vote as an inherent feature of exercising the right to expression. The right to vote forms one of the most sacred rights under the Constitution essential to the working of a democracy. The constitutional trinity of Right to Equality, Right to Freedom, and due process protects the right to vote.

# A. Right to Vote and Freedom of Speech & Expression

Article 19(1)(a) of the Constitution of India grants the citizens the right to speech and expression. There is no other fundamental right that is so intrinsically connected with the right to vote as the fundamental right to freedom of speech and expression. It is the freedom of expression that is essential for advancing knowledge, discovering truth and also for participation in decision-making in a democratic society. 160 By casting a vote in favor of or against a candidate, or by remaining neutral, a citizen expresses himself which right is protected under Article 19(1)(a). Through elections, different political parties and candidates project their ideology and views which they would pursue if they were elected. It is the vote cast by the voter that gives effect to that ideology. Voting is not only an instrument to determine the political will of the people but also has a wider implication for the society. Through elections the citizens participate in a collective process in which they express their beliefs, judgments and perceptions by casting their vote. It would not be out of place to say that voting is a means of expression and the fundamental right to speech and expression thus protects the right to vote.

Though based on the First Amendment to the US Constitution, Article 19 has been construed differently. 161 Neither the courts in US nor in India have dealt with voting as a means of expression. 162 The reason behind this is that voting has always been conceived as an instrument to further political objectives without looking at it as an essential component of individual identity. 163 The right to vote should be viewed as more than a political instrument by identifying it as a meaningful participatory too that would help strengthen the jurisprudence of both the instrumental and constitutive values of voting. 164 Voting not only communicates the "yes" or "no" of a citizen but also communicates the overall ideologies that the voter thinks are justified. It is this expression through the vote that also compels the candidates contesting elections to frame, change and amend their election manifestos accordingly. The outcome of the election process shapes the future political agendas. Voting is thus a means of identifying an individual with a set of political ideas and beliefs and therefore should find protection within the right to speech and expression.

Standing the test of time and judicial interpretation the right to freedom of speech and expression has embodied within it much more than what it was originally conceived to be. With regard to the right to vote, the freedom of speech and expression embodies within itself two broad concepts - expression, as discussed above, and information. Every citizen is entitled to participate in the affairs of his country but the participation would be crippled unless the citizen is well informed about the issues and opinions of others and above all has the right to express his opinion on these issues. One-sided information, disinformation, misinformation, and non-information all equally create an uninformed citizenry. Democracy is a farce if the

<sup>161</sup> Trav-Cochin v. Bombay Co. Ltd., (1952) SCR 1112 at 1120.

<sup>162</sup> Supra note 10 (PUCL Judgment) see the separate opinion of P. Venkatarama Reddi, J..

<sup>163</sup> Supra note 10.

<sup>164</sup> Supra note 136, (arguing that voting is an expressive act that may give a voter "a sense of belonging, transcendence, and dignity that comes from being a valued member of the society").

<sup>165</sup> Dinesh Trivedi, M.P. and Ors. v. Union of India and Ors., (1997) 4 SCC 306, (In the said case, the Court dealt with citizen's right to freedom of information and observed "in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare". The Court also observed "democracy expects openness and openness is concomitant of a free society and the sunlight is a best disinfectant" (sic).

medium of information is monopolized.<sup>166</sup> This right as interpreted was to ensure that the people are well aware about the decisions in a democracy and to protect the press in dissemination.<sup>167</sup> of such information. Speech and expression also embodies the right to educate, to inform and to entertain, and also the right to be educated, informed and entertained.

The Supreme Court while dealing with secrecy claimed either by the state governments or by any state institutions has always been reluctant in approving it. The Apex Court has held that the right to know, which traces its genesis from the right to speech and expression, is a factor which should make one wary when secrecy is claimed for transactions that can, at any rate, have no repercussion on public security. 168 In a democratic country like India, the more exposure to public gaze and scrutiny would lead to a more clean and healthy administration. 169 It is in this broad interpretation accorded to Article 19(1)(a) coupled with the dicta in Narasimha Rao<sup>170</sup> wherein the court brought the members of Parliament under the status of public servants to ensure that they are amenable to the Prevention of Corruption Act. This interpretation makes it amply clear that every citizen entitled to vote should also have relevant information about the political process including the antecedents of all contesting candidates as they would be the ones who in near future would be entrusted with regulating the society and making crucial decisions.<sup>171</sup> At all stages of making

<sup>166</sup> Secretary, Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal, [1995] 1 SCR 1036.

<sup>167</sup> Indian Express Newspapers (Bombay) Private Ltd. and Ors. etc. v. Union of India and Ors, [1986] 159 ITR 856 (SC), (The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic country cannot make responsible judgments.....).

<sup>168</sup> State of Uttar Pradesh v. Raj Narain, (1975) 3 SCR 333, ("In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing....").

<sup>169</sup> S. P. Gupta v. Union of India, [1982] 2 SCR 365, (Bhagwati, J., while dealing with secrecy).

<sup>170</sup> P.V. Narasimha Rao v. State (CBI/SPE), 1998 Cri.L.J. 2930 at ¶ 162, ("In a democratic form of government it is the Member of Parliament or a State Legislature who represents the people of his constituency in the highest lawmaking bodies at the center and the State respectively. Not only is he the representative of the people in the process of making the laws that will regulate their society, he is their representative in deciding how the funds of the center and the State shall be spent and in exercising control over the executive. It is difficult to conceive of a duty more public than this or of a duty in which the State, the public and the community at large would have greater interest....").

information accessible to all the courts were always conscious about the abuse of such broad interpretation but the benefits of information to society and its impact on the efficient working of the democracy overshadowed the dangers.<sup>172</sup> It is therefore this right to seek information as a voter which is also protected by the right to speech and expression.

# B. Right to vote and Equality

The restriction imposed to enroll as voters under the Constitution<sup>173</sup> are of age, <sup>174</sup> citizenship<sup>175</sup> and other restrictions imposed by the Representation of the people Act. 176 India has always been haunted by the inequalities which were generated centuries ago<sup>177</sup> based on caste, creed, and religion. The Constitution makers strived hard to remove these disparities by incorporating equality as a fundamental right and ensuring that the quota system (reservation)<sup>178</sup> is imposed to afford opportunities to the underprivileged and victims of discrimination. It is a well-accepted premise that under the Indian Constitution ideas such as 'substantive equality' and 'distributive justice' are at the heart of understanding of the guarantee of 'equal protection before the law'. 179 Article 14 of the Constitution of India reflects this ideology and grants the right of equality before law and prohibits the state from differentiating on the basis of religion, race, caste, sex, and place of birth. The reservation system policy in India has gone beyond the affirmative action doctrine in terms of jurisprudence.

Yet the reservation system has not influenced the right to vote. However, there is reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People<sup>180</sup> and the Legislative

<sup>172</sup> See generally note 48.

<sup>173</sup> Supra note 141, Article 325.

<sup>174</sup> *Id.* (the age was reduced from 21 to 18 by § 2 of the Constitution (Sixty-first Amendment) Act, 1988).

<sup>175</sup> *Id.* The provisions relating to citizenship in India are contained in Part II (Article 5-11) of the Constitution and further regulated by the Citizenship Act, 1955.

<sup>176</sup> The grounds enumerated are of non-residence, unsoundness of mind, crime or corrupt or illegal practice and any disqualification imposed by the law passed by the legislature.

<sup>177</sup> Nicole Lillibridge, "The Promise Of Equality: A Comparative Analysis Of The Constitutional Guarantees Of Equality In India and The United States," 13 Wm. & Mary Bill Of Rts. J. 1301, (2005).

<sup>178</sup> Supra note 173, Part XVI (Special Provisions Relating to Certain Classes).

<sup>179</sup> Union of India v. Rakesh Kumar & Ors., 2010 (1) SCALE 281.

<sup>180</sup> Supra note 178, Article 330.

Assembly<sup>181</sup> in proportion to the number of seats from each state as compared to the population of Scheduled Castes and Scheduled Tribes in that specific state. These provisions have not affected the right to vote. Every citizen is granted the right to vote subject to the restrictions imposed by the Constitution and the statute.<sup>182</sup> Any violation of or limitations to the right to vote can be challenged as violative of equality enshrined under Article 14 of the Constitution of India. The overarching protection to equality and non-interference with the right to vote emphasizes that under the Constitution of India, right to vote is protected by Article 14 and strengthens the one-person one '-' vote doctrine.

The right to vote and right to equality for the first time came under the scrutiny of the Apex Court when § 62(5)183 of the Representation of the People Act, disfranchising people under lawful detention was challenged as being violative of Article 14.184 The challenge was not successful and the petition was rejected on the grounds of reasonable classification to prevent criminalization of politics and maintain probity in elections. 185 The reasoning emphasized the statutory limitations placed on the right to vote as stipulated in the Representation of the People Act and the object it sought to achieve. The reasonable classification and the restrictions imposed by the legislature on the right to vote as stipulated under the Representation of the People Act satisfy the two-fold test; First, that the classification should be non-arbitrary<sup>186</sup> and second, that the classification should have a rational nexus with the object sought to be achieved by the statute in question. The election statute like any other statute should not give unguided and unrestricted powers to the administration to affect the rights of a person without laying down the policy which will guide the authority to exercise the same. 187 Each of the limitations imposed on the right to vote, by the Constitution or by the Representation of the People Act, has a well-defined nexus which it

<sup>181</sup> Id. Article 332.

<sup>182</sup> Supra note 173-176 and the accompanying text.

<sup>183 &</sup>quot;No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police: Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force."

<sup>184</sup> Supra note 153.

<sup>185</sup> Id. at ¶ 5.

<sup>186</sup> It should be based on an intelligible differentia that distinguishes persons or things grouped together in the class from others left out of it.

<sup>187</sup> Maneka Gandhi v. Union of India, (1978) 2 SCJ at 350

strives to achieve in terms of who can be a voter. Moreover it also complies with the rationale of differentiating between people capable of making decisions on their own and those who are incapacitated due to age, mental illness or felons. The limitations imposed on the right to vote that are stipulated in Article 326 and § 62 satisfy the above test. Any other restrictions imposed on the right, either substantive or procedural, would violate the fundamental right to equality. The right to vote, though free from the reservation system, is enveloped with restrictions that viloate the fundamental right to equality.

#### IV. THE NEW DIMENSIONS: PROBLEMS & PROSPECTS

Rulings that have reformed the electoral process have also given rise to a few procedural problems. Without addressing these concerns it would make the decade long crusade futile. The problem not only lies with their enforcement but also with other existing electoral provisions that render them a nullity. The Association for Democratic Reforms judgment<sup>188</sup> mandated a pre-disclosure of (1) Assets and liabilities of the candidate, his spouse and dependents; (2) educational qualifications and (3) criminal antecedents. The issue of criminal antecedents was addressed by the legislature by incorporating § 33-A.<sup>189</sup> The enforcement of this section was assured through the insertion of §125-A<sup>190</sup> in the Representation of the people Act. This newly inserted section imposes a penalty of imprisonment up to six months or a fine, or both for the failure to furnish or for providing false information mandated under § 33-A. The Supreme Court<sup>191</sup> further clarified that even cases in which cognizance has been taken would have to be disclosed, which was not mandated by § 33-A.

The Election Commission was directed to issue notifications to ensure the compliance of disclosure of assets, liabilities, and education qualifications. The powers<sup>192</sup> under which the Election Commission of India issued such notifications are still disputed. The Election Commission of India amended the Conduct of Election Rules 1961<sup>193</sup>

<sup>188</sup> Supra note 4.

<sup>189 § 33-</sup>A of the Representation of the People Act, 1951 introduced through the § 2 of the Amendment Act of 2002.

<sup>190</sup> Introduced through § 5 of the Representation of Peoples (Amendment) Act, 2002.

<sup>191</sup> Supra note 10.

<sup>192</sup> The Election Commission of India derives its powers from Article 324 of the Constitution of India, 1950.

<sup>193</sup> Published with the Ministry of Law Notification. No. S.O. 859, dated the 15th April, 1961, see the Gazette of India, Extraordinary, Part II, Section 3 (ii) at Page 419.

and incorporated the new disclosure requirements through an affidavit which was to be submitted along with the nomination paper. There is no mechanism in place through which the veracity of the information supplied by a contesting candidate could be verified before the elections. Even if the affidavit is challenged before the returning officer, the application is not entitled to a summary judgment and may be even rejected if the allegations are found to be true.<sup>194</sup>

The ambiguity with regard to questions, regarding information on assets and liabilities, either concealed or wrongly furnished, has not yet been answered. Even if a challenge is made on the ground that the Representation of the People Act does not require the registration and due stamping of a document<sup>195</sup> it would make the entire reform with regard to disclosure of assets and liabilities an illusion. The High Courts so far have been pondering on this issue and have been reluctant in interfering with the electoral mandate, by declaring the election of the returned candidate void on the grounds of wrongful disclosure. The pre-disclosure requirements are not pre-requisites to contesting elections but only allow the voters to make an informed choice. The grey area in the new reforms can only be remedied by the legislature until which time judicial intervention would help in seeking information as described above but the authenticity of such information cannot be ascertained.

#### V. Conclusion

A democracy with a 'right to vote' manifests the democratic culture of India without which the Indian Republic cannot be conceived. Even after sixty years of being a constitutional democracy, the 'right to vote' has not found its place under the Constitution. A right to vote that is at the mercy of the legislature is incapable of preserving democracy. When political turmoil was at its peak the citizens of India decided to approach the judiciary to ensure free and fair elections by invoking their right to information about contesting candidates. The Court readily accepted their demands but this

<sup>194</sup> Supra note 10 at ¶ 133.

<sup>195 § 93</sup> of the Representation of the People Act, 1951.

<sup>196</sup> Neeraj Dangi v. Jagsi Ram & Ors., Election Petition No. 2 of 2009 (Rajasthan High Court, Jodhpur) order dated August 11, 2009. The election petition challenged the election of the returned candidate on the ground of furnishing wrong information with regard to his assets and educational qualification. The court rejected the petition on the ground the petition did was unable to disclose any cause of action. Copy of the order available with the author.

triggered a search for the right to vote under the Constitution.

Prior judgments<sup>197</sup> had a misconceived notion about the interpretation of the right to vote which was based upon the English model that had changed from the parliamentary supremacy to a representative and participative democracy. The Supreme Court in the past has also narrowly interpreted the right to vote in the guise of electoral disputes. The right to vote is not only a political tool but is also a mode of expression through which the electorate expresses its willingness in favor of or against a political ideology. The right to expression is a basic human right accepted internationally. Safeguarding this right by reading voting as a mode of expression under Article 19(1)(a) would help find a place for the right to vote under Part III of the Constitution of India.

To make the voting right meaningful, it is essential to hold that the right to vote forms an integral part of the Constitution of India and is read into other fundamental rights. The Constitution, being a living and organic document, has the greatest claim to be interpreted liberally and broadly<sup>198</sup> to give effect to its democratic ideals. The jurisprudence of 'right to vote' is yet to develop and the events so far have only created a platform for initiating a process that would mark a new beginning of Indian democracy by ensuring a constitutionally protected 'right to vote'.

# RIGHT TO HAVE RIGHTS: SUPREME COURT AS THE GUARANTOR OF RIGHTS OF PERSONS WITH MENTAL/INTELLECTUAL DISABILITY

Archana Parashar\*

#### Introduction

One of the distinctive features of the Indian Constitution is that it guarantees specified fundamental rights of every citizen. The Supreme Court amongst its other duties is charged with interpreting the Constitution, and in that capacity, is the legal institution that determines when in the course of governmental actions a fundamental right has been transgressed and needs to be upheld. One such instance presented itself to the Supreme Court when it heard a petition to stop the imminent termination of pregnancy for a woman with intellectual disability. The Supreme Court rose to the occasion and prevented the governmental authorities from proceeding with the abortion and thus protected a fundamental right, which can be described as the right to bodily autonomy for the woman. The woman subsequently gave birth to a healthy child and both the mother and child are doing well.

My main purpose in bringing this story to your notice is to examine how and by what reasoning the Supreme Court (hereinafter referred to as SC) was able to reach this outcome. I wish to argue that the SC missed an opportunity to articulate a sound jurisprudence of rights for persons with mental/intellectual disability. Unfortunately it did not engage with the connection between rights and legal capacity and thus made no normative advance in ensuring that the rights of persons with disabilities are actually guaranteed. However, it is not sufficient to only to point out that the SC judges could have reached a different outcome. Instead my wider aim is to argue that in situations where substituted decision is necessary the SC (other courts of the world) as the guarantor of fundamental rights claims the exclusive authority to be the decision maker. Hence, the medical experts or those caring for the person are denied this decision-making role in

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<sup>1</sup> For the purposes of this paper I will disregard the procedural technical issue whether a court granting injunctive relief is under an obligation to give detailed reasons for its decision. In view of the argument I wish to develop it would be imperative that the court explain the basis on which it reaches a decision.

the name of protecting the rights of the person. The suggestion is that whenever the fundamental rights of a person incapable of making a decision are involved in a course of action it is only the impartial judges who can be entrusted with the responsibility of making the right decision.

If the courts are to discharge this responsibility in a principled manner it is essential that there is an open discussion of the grounds on which the court is assumed to have the necessary expertise or authority to uphold or override the fundamental rights of any person. Therefore, I wish to explore whether the concept of legal reasoning can be understood in a manner that makes it the responsibility of the judges to reach a fair and just conclusion in every case. This will require a review of the contemporary theories of the judicial task. The mainstream theoretical discussions of the judicial task of interpretation rely on the concept of legal reasoning and are in turn critiqued by others. I aim to argue for a conceptualization of the nature of the judicial task in a manner that brings into focus the point that every judgment requires a choice to be made. Once it is accepted that choice is an integral part of the decision making process, it follows that the decision maker is responsible for the consequences of the choice he makes.

The article is divided into three main parts. In part one, the decision of the SC is discussed especially in relation to the decision of the High Court of Punjab and Haryana (HC from now on). Part two analyses the concept of legal capacity and the link between capacity and rights. In part three the argument that the judicial task ought to be conceptualized as a task about exercising judgment and that judges carry the responsibility of interpreting legal provisions in a manner that reaches fair and just outcomes is developed.

#### Part One

Supreme Court as a Protector of Persons with Intellectual Disabilities Kajal has intellectual disability and a sad history of misfortune.<sup>2</sup>

<sup>2</sup> She is referred to as the 'victim' in the judgment of the High Court of Punjab, Haryana and Chandigarh to protect her but I have chosen to use her name in order to avoid treating her as a non-person. Kajal was born on 8th December 1991. She became an orphan and eventually was placed under the guardianship of New Delhi Missionary of Charity until December 1998 and transferred to another institution in Chandigarh. Kajal ran away from this institution in March 2005 but was brought back by the police to yet another institution, Nari Niketan. From here she was handed over to a woman who claimed that Kajal was her lost daughter but then 'returned' her to Nari Niketan. In March 2009 she was shifted to Ashreya, a new institute. It was at this institute that she was raped and became pregnant.

She eventually finds herself pregnant and it turns out that she was raped at the institution where she was staying. She does not quite understand the implications of being raped but is emphatic that she wants the child. The Chandigarh Administration approached the High Court of Punjab and Haryana to ask for permission to terminate her pregnancy. Her institutional caretakers think that she is not capable of looking after herself or her child and it is in her best interests that she should abort the fetus.

There is a statutory and a constitutional aspect of this issue. Indian law regulates the availability of abortion under the combined operation of the Indian Penal Code and the *Medical Termination of Pregnancy Act, 1971*(hereinafter referred to as MTPA). The legal issue is whether her situation is covered by the MTPA and if yes, the fact that she has intellectual impairment raises the question of who should be able to take this decision on behalf of Kajal. The Constitutional issue is whether the fundamental rights of persons with mental or intellectual disabilities can be subordinated to other considerations.

Since persons with disabilities are often deemed to lack legal capacity it is assumed that the 'experts' can make decisions on behalf of such persons and in the process at times override their rights. Thus the legal and constitutional issues are inextricably linked.

The HC decided the question about the application of the MTPA on the basis of the legal capacity (or the lack thereof) of Kajal<sup>3</sup> Significantly, the HC did identify the constitutional issue, that is, whether the right to bear a child is a fundamental right and if yes, can it be curtailed by anyone and on what basis? However it eventually decided to resolve the issue before it as a legislative interpretation exercise.<sup>4</sup> The HC described its decision as adopting a holistic approach in interpreting the MTPA, particularly in view of the progressive purpose of the disability related laws.<sup>5</sup> It declined to accept the proposition that the MTPA requires the consent of the woman even if she has intellectual disability.<sup>6</sup> Moreover, it held that despite the clear

<sup>3</sup> Chandigarh Administration v Nemo, (2009) 156 PLR 489.

<sup>4</sup> Supra n 3

<sup>5</sup> The two statutes discussed are the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

<sup>6</sup> The term mental retardation in the legislation is conventionally used to indicate intellectual disability and it is meant to distinguish intellectual disability from mental illness. This distinction is claimed to be progressive as it is meant to safeguard the rights of persons

language of Section 3(4) of the MTPA, every court in exercising its *parens patriae* jurisdiction is competent to act or appoint a guardian ad-litem of a woman with mental retardation, for the purpose of deciding whether to terminate a pregnancy.<sup>7</sup> In this case it was in the best interests of the woman that her pregnancy ought to be terminated.

In effect, the decision of the HC amounts to saying that the institutions of care are not safe places for women with intellectual disabilities. Since we cannot ensure their safety and it is a sad reality that the woman has been subjected to sexual assault the best outcome is that she should have an abortion. The fact that she wants to have the child is unfortunately irrelevant, as she does not have the capacity to look after herself or the child.

The friends of the woman approached the SC to stop the medical termination and the SC did grant the injunction.<sup>8</sup> However, in giving the reasons for its decision the SC confined itself to a technical analysis of the scope of the provisions of the MTPA and lost an opportunity to give a definite answer whether women with intellectual disability have the right to bear children. I will analyze below the reasoning adopted by SC with a view to identifying whether it established any principles that could be applied in subsequent decisions. The SC as the highest court in the country is ideally suited to develop a sound jurisprudence about the rights of persons with mental and intellectual disabilities. Unfortunately the SC in this instance let the opportunity pass.

The SC based its decision on two considerations first, whether consent is required for a procedure under the MTPA and second, even if it is assumed that the woman suffers from mental illness could the court's *parens patriae* jurisdiction be exercised in the best interests of the woman. On the first point the SC held that a plain reading of the MTPA necessitates that a medical termination of pregnancy can only

with intellectual disabilities, who may require assistance in exercising their rights rather than require medical treatment. Moreover, intellectual disability may not necessarily mean that the person lacks legal capacity.

<sup>7</sup> Traditionally the court's parens patriae jurisdiction is an aspect of public policy that the court must protect the interests of persons unable or incapable of doing so themselves. In Common law doctrine it is an inherent power of the courts and although initially it was exercised for persons suffering mental incapacity it gradually extended to protecting children as well. See Sallyanne Payton, 'The Concept of the Person in the Parens Patriae Jurisdiction Over Previously Competent Persons' 1992, 17(2) Journal of Medicine and Philosophy, pp. 605-645.

<sup>8</sup> Suchita Srivastava and Another v Chandigarh Administration,, AIR 2010 SC 235.

happen with the consent of a woman who does not suffer from any mental illness. Moreover, the difference between mental illness and mental retardation is significant. This distinction between mental illness and mental retardation is present in the MTPA and it was discussed by the High Court as well. In rejecting the HC's interpretation the SC emphasized the legislative intent behind the 2002 amendment of the MTPA. In the amendment the definition of a mentally ill person in Section 2(b) specifically excludes 'mental retardation' from its scope and thus indicates that the Parliament wanted to narrow the class of persons for whom their guardians could make decisions. A similar distinction is maintained in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 where mental illness and mental retardation are treated as two different forms of disability.9 The significance of maintaining the distinction is that it shows a legal trend toward according greater autonomy to persons with mental retardation.<sup>10</sup>

The SC therefore went on to say that under the MTPA while a guardian could make decisions on behalf of a 'mentally ill' person the

<sup>9</sup> Section 2(i) defines disability as including mental illness and mental retardation, sub section (q) defines mental illness as any mental disorder than mental retardation and sub sec (r) defines mental retardation. The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 uses a similar definition of mental retardation.

<sup>10</sup> However, the disaggregation between mental illness and mental retardation was introduced in the Mental Health Act of 1987, that defined a mentally ill person as a person in need of treatment for any mental disorder other than mental retardation. The rationale for this disaggregation was to underscore that the treatment provided to persons with mental illness should not be extended to persons with mental retardation. In fact persons with mental retardation require education and training and not treatment. In order to underscore this point the above definition was adopted with the inadvertent consequence that persons with mental retardation were not only ousted from the care and treatment part of the Mental Health Act but also from the guardianship segment. Insofar as there was no law providing for guardianship of adults, the Mental Health Act did not recognize the legal capacity of persons with mental retardation it put them in a legal vacuum where they were neither possessed of legal capacity nor were any substitute arrangements made for their exercise of legal capacity. This limbo situation continued till 1999 when the National Trust Act, 1999 was enacted which provided a system for the appointment of guardians for persons with mental retardation. The Statement of Object and Reasons to the Medical Termination of Pregnancy Amendment Act 2002 just baldly states that the word "lunatic" has been replaced by "mentally ill person" without informing why the exercise was undertaken. Insofar as the MTPA was being amended to professionalize the carrying out of medical terminations, the health ministry and the medical profession was involved in the exercise. It is reasonable to speculate that the change signified no more than using modern non-stigmatizing terminology. The legal consequences of the change were not really appreciated by the legislators and they created a situation very similar to what they did when they amended the Mental Health Act.

same could not be done for a person with mental retardation. Therefore, the State must respect the personal autonomy of a woman with mental retardation and deny the permission to terminate her pregnancy without her consent. The Court invoked Article 21 of the Constitution of India and observed that 'reproductive choice' is a dimension of personal liberty and the woman's right to privacy, dignity and bodily integrity should not be restricted. However, in the light of this constitutional guarantee the enactment of the MTPA requires an explanation.

The SC decided that it is explainable, as there is an exercise of the state's compelling interest in protecting the life of the child to be born. Thus even though the law puts some restrictions on the exercise of reproductive choices by the woman it is compatible with the right to liberty. That being the case the State must respect the personal autonomy of a mentally retarded woman and not override her decision to carry a pregnancy to term. The SC thus said that it could not permit the dilution of this requirement of consent, as it would otherwise amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim.

However, the SC made no effort to engage with the fraught issue of the interdependence of legal capacity, mental/intellectual disability and rights. I will return to this issue later after deliberating on the limitations of relying on the technical rules of statutory interpretation to reach a just outcome. The technical reading of the MTPA as distinguishing between mental illness and mental retardation allowed an outcome in this case that turned out to 'protect' the right of Kajal to have a child. However, it is doubtful indeed whether this decision can be read as laying down a principle of law, which holds that a woman with mental retardation has full legal capacity and whether it follows that she can exercise her rights like any one else.

I will analyze the implications of this stand of the SC for ensuring the rights of persons with intellectual disabilities. One must note that if mental retardation were irrelevant in assessing legal capacity, it would not occur as a phrase or a concept in so many legislations dealing with

<sup>11</sup> It is surprising that the SC failed to consider the effect of IPC provisions that criminalize abortion and the fact that the HC had earlier analyzed the relationship between the provisions of IPC and the MTPA. Thus the observation of the SC that the MTPA puts 'legitimate' restrictions on the woman's right to liberty in matters of procreation seems at the very least inaccurate.

disability related rights. Therefore it is important that the SC take the lead in creating a discourse about the rights of persons with intellectual disabilities in the context of the continued relevance of constructing legal capacity. It is thus the first ground of decision that will be the main focus of the analysis below but before that I will briefly discuss the second ground.

The SC had said that the *parens patriae* jurisdiction can only be exercised for the best interests of the person. Conventionally the only reason for a court to exercise *parens patriae* jurisdiction is when the person is unable to look after their own rights and interests. If however, in the context of the MTPA, the distinction between mental illness and mental retardation is applied in a strictly technical manner and the woman is not a minor, no scope remains for the court to exercise this jurisdiction.<sup>12</sup> Since the SC adopted this position I am not even sure why it went ahead to examine and reject the HC's interpretation of what constitutes the best interests of Kajal.

Coming back to the main ground of decision, both courts have focused on the interpretation of the MTPA. The HC had rejected the literal approach and instead adopted a purposive approach in interpreting the MTPA and held that the legislative object of this enactment has to be understood in the context of the IPC treating medical termination as a criminal offence. One of the objects of the MTPA was to permit termination on humanitarian grounds when the pregnancy was caused by rape or intercourse with a lunatic woman.<sup>13</sup> The HC asserted that in addition to having the plenary and inherent jurisdiction to act as a custodian of the fundamental human rights of all citizens it also exercised the parens patriae jurisdiction and had to protect the rights of the 'guardee'. Another reason given by the HC for adopting this approach to interpretation was that when one considers the specific enactments that deal with the rights of persons with mental disabilities and illness it is clear that the legislature intended to extend the positive benefits to both categories of people - defined either as suffering mental illness or mental retardation.<sup>14</sup> The common

<sup>12</sup> Supra n.10.

<sup>13</sup> The phrase 'lunatic woman' was replaced by an amendment in 2002 but which prior to the amendment included mentally retarded pregnant woman also. Therefore the interpretation of the section should adopt a liberal approach.

<sup>14</sup> The two Acts are The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

aim of all these legislations is to pursue the welfare of persons with mental illness as well as with mental retardation. Therefore, in the MTPA the exclusion of mentally retarded persons from the category of mentally ill persons is not absolute. It should not be read to mean that the court could not appoint a guardian to determine the consequences of continuing the pregnancy for a woman with mental retardation, specially when exercising its *parens patriae* jurisdiction.

The SC described the above reasoning in the HC decision as that court agreeing that a literal interpretation of the MTPA provisions would lead to the conclusion that a woman with mental retardation would need to give consent for termination of a pregnancy. The SC quietly overlooked the fact that the HC invoked the *parens patriae* jurisdiction to go beyond the literal interpretation of the statute as well as to reach the conclusion that the best interests of the woman would be served by the termination. Thus the SC in less than accurate terms implied that the reasoning and the eventual judgment of the HC are contradictory.

More pertinently however, the issue for us is about the judges making choices. The choice of the rules of interpretation is notoriously discretionary and the interpretation of a concept like the 'best interests' is similarly left to the judgment of the decision maker. Significantly the SC did not and I suggest, could not say that the HC made a mistake of law in choosing to interpret the statutory provisions in a non-literal manner. The SC being the superior court did replace the choice made by the HC with it's own choice. However, it is not possible to extract from the SC judgment any principle of law as to the correct rule of statutory interpretation that ought to be adopted or the most appropriate or definitive understanding of the 'best interests' concept.

I will briefly compare this approach of the SC with that adopted by the High Court of Australia in a roughly similar situation. In *Marion's case* the High Court of Australia (HCA from now on) was asked by the Family Court to pronounce the guiding legal principles that would be used by the courts cases involving women with intellectual disabilities.<sup>16</sup> The specific questions the HCA had to decide

<sup>15</sup> Significantly there is no mention of the conventional rules regarding exercise of discretion by the courts and the strict conditions in which the superior court is permitted to override the discretionary judgment of a lower court.

<sup>16</sup> Secretary, Department of Health and Community Services v JWB and SMB (Marion's case) (1992) 106 ALR 47; In this case the person involved was a minor girl with severe intellectual disabilities and her parents wanted her to undergo a hysterectomy.

were whether the medical procedure of hysterectomy could be performed on intellectually disabled women or girls. If yes, who would be competent to make that decision? The HCA addressed the issue as one about consent to medical treatment. The HCA famously held that in case the person cannot make a medical treatment decision and where the proposed medical procedure is invasive and irreversible, only the courts could exercise the authority to consent to that procedure on behalf of the person. Significantly the decision had to be that of the court and not of parents or the medical experts. This stand asserts that persons with intellectual disabilities are as entitled to the right to bodily integrity as any other person. If however, the decision-making capacity of the individual is impaired it is the responsibility of the law that their rights are protected and therefore the scrutiny of the court is imperative.

This decision has been hailed as a right step towards the recognition of the personhood of people with disabilities.<sup>17</sup> There are two issues of particular relevance for our present purpose and even though *Marion's* case dealt with a minor, the status of minority and disability both have a bearing on the determination of legal capacity.

First, the HCA asserted that people with disabilities are entitled to dignity and respect and thus to bodily integrity. Secondly, the court held that it is important to assess in each individual case whether the person with intellectual disability or mental illness has the capacity for decision- making rather than assuming that the disability equals legal incapacity. It is this second step that makes meaningful the first step of acknowledging that individuals with disabilities are entitled to rights. Therefore, the jurisprudential task is to examine how the construction of legal capacity plays a complimentary role to the everwider trend of recognizing rights.

#### Part Two

Legal Capacity and Agency

In this sub section two distinct but inter-connected issues are discussed – first, an increasing trend towards recognition of the rights of people who were formerly denied the status of being persons and the function of the concept of legal capacity; second, the connection

<sup>17</sup> Melinda Jones and Lee Ann Basser Marks 'Valuing People Through Law – Whatever Happened to Marion?' 2000, 17(2) Law in Context 147-180.

between rights and responsibilities which requires elaboration.

It is undoubtedly true that in recent decades there has been a global trend towards recognizing the rights of persons who previously were considered to have fewer rights by reasons of mental incapacities whether as a consequence of age or disability. This development is evident both in international and state legal systems. It is now common to assert that the connection between rationality and rights is not inevitable and personhood in law is granted on many other bases. One obvious manifestation of this trend is that the 'rights of the child' discourse has gained wide acceptance. It is no longer acceptable to deny children certain rights on the presumption of their minority.<sup>18</sup> Similarly the rights of people with disabilities, especially of a mental or intellectual nature is increasingly being recognized. 19 While this is a welcome trend that is underpinned by a desire to treat all human beings as equals it is also important to emphasize that the rights of any person are intertwined with the concept of legal capacity. Unless this link between rights and legal capacity is brought into sharp focus the benefit of rights cannot accrue to the full extent.

The law relating to legal capacity struggles between ascribing status and actually assessing the abilities in each individual case. Although it is understandable that categorization by reference to particular criteria is a pragmatic necessity it is nonetheless imperative that rights of individuals are not subordinated to practical contingencies. Amita Dhanda has written extensively on this connection between rights and the concept of legal capacity.<sup>20</sup> She argues that it is important to understand the significance of legal capacity for the realization of rights for persons with disabilities. In the national laws of India the issue of legal incapacity is determined

<sup>18 &#</sup>x27;Gillick competency' is a short hand term for using the test of competency laid down by the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 (HL).

<sup>19</sup> At the international level this trend is manifest in the making and the growing ratification of the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

<sup>20</sup> For the following discussion I am primarily relying on her article 'Legal Capacity Module' in Legal Capacity Handbook, Office of the High Commissioner on Human Rights, Geneva, forthcoming; see also A Dhanda, 'A CRPD Evaluation of Indian Mental Health Law' in The Convention on the Rights of Persons with Disabilities in India, Ministry of Health, Government of India, forthcoming; For an assessment of the advances made in the CRPD see Amita Dhanda, 'Legal Capacity in the Disability rights Convention: Stranglehold of the Past or Lodestar for the Future' 2006-2007, 34 Syracuse Journal of International Law and Commerce 429-461

by reference to many mechanisms. She identifies four different ways in which identity and agency get interlinked for persons with impairments. 1. Status based incapacity arises when a person with disabilities or impairment is attributed legal incapacity because of their impairment<sup>21</sup>; 2. in certain laws legal capacity is allowed to persons with impairment provided they act in socially approved ways<sup>22</sup>; 3. Construction of legal capacity is linked to the legal function required to be performed<sup>23</sup>; 4. It is made imperative that a legal determination is made on the capacities/incapacities of the person with disabilities but it is a global determination and not for each function.<sup>24</sup>

All these tests end up being over inclusive because they operate in the context of a *de facto* presumption of incapacity and thus operate more like status tests.<sup>25</sup> Successive law reforms have attempted to change the legal norms and introduce better tests of functional capacities. For example, the burden of proof has shifted as laws now assert that all persons with disabilities possess legal capacity and it is for those asserting the incompetence to prove the claim. It is also explicitly provided that in arriving at a decision of incompetence the decision makers should only consider the capacity to reason rather than the kind of decision made by the person. So too the distinction between the ability to make decisions and the ability to communicate must be maintained so that the lack of communication skills does not

<sup>21</sup> For example, blind persons cannot operate a bank account or access net and telephone banking; persons with intellectual disabilities cannot adopt a child; leprosy cured person cannot stand for elections and persons with hearing impairments cannot obtain a driving license.

<sup>22</sup> For example, a person with mental illness is deemed capable of voluntarily seeking medical/psychiatric treatment but the competence of the same person can be questioned and their decision overruled if they decide to discontinue the treatment. In other instances the socially unpopular decision itself is seen as evidence of mental impairment and the consequent lack of capacity. Examples of this abound in cases dealing with divorce when an inability to cook, accord respect to elders, or being overly familiar with strangers is tendered as evidence of the unsoundness of mind of the woman.

<sup>23</sup> For example, whether a person with mental or intellectual impairment can enter into a contract will be determined by reference to their functional capacity. Not every one with mental or intellectual impairment will be deemed to lack the requisite capacity but since it is the fact of impairment that leads to the assessment of capacity this test puts every one with impairment under scrutiny.

<sup>24</sup> However, since there is a global investigation rather than an enquiry from function to function, a finding of incompetence with regard to one function actually ends up as the justification of creating the status of global incompetence for that individual.

<sup>25</sup> Amita Dhanda argues that even though forensic psychologists have tried to improve the reliability of the tests to fulfill the requirements of the law, as they have been more focused on the accuracy of tests they have not questioned the legal presumptions informing the tests.

lead to a finding of functional incapability.

Moreover, an obligation is placed on the state to provide assistance where the person with disability needs assistance in making decisions. This obligation on the state leads to many experiments in the methods of giving assistance. Traditionally the law has responded to the lack of competence of a person to make decisions by appointing a guardian of person or property. The guardian has the authority to make decisions of behalf of the person with the incapacity.

In contrast the reform efforts aim to support rather than supplant the decision of the concerned person. However, the power of making substitution arrangements has been retained. Dhanda continues that these are no doubt moves in the right direction but it still remains the case that while the courts have guarded against wrongfully placing non-disabled persons into guardianship they have not shown an equal concern when the guardians for persons with disabilities are appointed. Disability continues to be the threshold condition, as the functional capacities of only those with disabilities become an issue while the persons without disabilities do not have to subject themselves to similar scrutiny and possible denial of rights.

Similarly Donnelly argues that while in general health care decision-making upholds the autonomy of the patientthere is clear legislative insistence that the right to refuse treatment for a mental disorder must be restricted.<sup>26</sup> This is irrespective of the decision-making capacity of the person. This is starkly illustrated in cases dealing with medical consent in relation to invasive and radical surgical procedures. In Australia the issue has come to be defined as the permissibility of sterilization of girls with intellectual disabilities. The courts have struggled to be fair and protect the interests of this most vulnerable section of society but even the High Court has ultimately held that it is permissible to sterilize young women or girls with intellectual disabilities for other than therapeutic reasons only. As explained above the decision to allow the medical procedure would be that of the High Court as presumably even of the parents who have the responsibility of looking after the person cannot be trusted to rise above self-interest. This is precisely what happened in Marion's case discussed above.

<sup>26</sup> Mary Donnelly, 'From Autonomy to Dignity: Treatment for Mental Disorders and the Focus for Patient Rights' in Bernadette McSherry Ed International Trends in Mental Health Laws, Sydney, The Federation Press, 2008, 37-61

One just needs to pause and consider whether such a determination would be countenanced by anyone with regard to young women or girls who did not suffer from intellectual disabilities. The significant difference between the two scenarios is the disability and the association of incapacity with disability. My argument here is not denying that young women or girls with intellectual disabilities may lack certain capacities but the point is that their disability opens the possibility for the decision makers to subordinate their rights to other considerations. Similar lack of capacities in non-disabled person would not ever be a concern of the law and thus the threat of denial of rights will not accrue either. It is not enough to say that the incapacities are the result of their disabilities because this very assumed connection is the source of the problem. If the actual capacity for making decisions was the threshold test for upholding rights for everyone and some were denied the rights that would be understandable. However the legal systems in liberal societies do not adopt this stance, as certain rights are considered fundamental and inalienable. It is in the light of this, the different attitude towards persons with disabilities is problematic.27

When the SC in the case of Kajal confined itself to a reading of the MTPA to exclude the decision makers supplanting her consent with their own consent it contributed nothing to securing the rights of persons with intellectual disability. It chose to read the MTPA as excluding those with mental retardation from the scope of provisions authorizing substituted decision-making in this particular legislation. It is no doubt a progressive move to distinguish between mental illness and intellectual disability and I am not suggesting that intellectual disability is an illness. However, the bigger issue for the present purposes is whether those with intellectual disabilities are entitled to basic human dignity and rights without having to establish their functional capacities. Even as an exercise in statutory interpretation the response of the SC is inadequate as it does not concern itself with the existence of the category of mental retardation in this very

<sup>27</sup> Therefore, the general depiction of the CRPD article 12 as providing recognition for the need to assess the legal capacity and thus the rights of persons with disabilities still does not remove the discrimination. For even if particular assessment of capacity is made it is only ever done for a person with mental disability. For the rest of the population lack of capacity is never made a testable issue; see Annegret Kampf, 'The Disabilities Convention and its Consequences for Mental Health Laws in Australia' in Bernadette McSherry Ed International Trends in Mental Health Laws, Sydney, The Federation Press, 2008, 10-36 at 31.

legislation. It is not suggested by anyone that since the handing down of this decision by the SC full legal capacity is now attributed to persons with mental retardation. And this brings me to the second point mentioned above.

The second important point is that the rights and responsibilities go together and the exercise of capacity carries with it certain consequences. Traditionally the lack of legal capacity excused the person from being held responsible for their actions. For example, the defense of mental incompetence in criminal law serves this function. Thus the concept of capacity simultaneously served two functions: it could be used to deny rights to the person deemed to lack legal capacity but it also worked to absolve that person from having to take responsibility for the consequences of their actions. It may be argued that the latter consequence is a paternalistic response and any benefit it gives is a dubious gain as it undermines the autonomy of the person. Nevertheless, in the context of this discussion it does point to a logical connection between rights and responsibilities. This connection is yet to be fully articulated in the context of moving to the tests of functional capacity for determining legal capacity. Thus if a 'minor' is judged to be capable of making legally relevant decisions presumably it follows that they will also be responsible for the consequences of those decisions or actions. In most instances that may be unproblematic but at times it will create moral dilemmas.<sup>28</sup> More importantly it can serve as an excuse for not providing facilitative services for the exercise of these functional capacities by the 'minors'.

In an earlier article I have argued that the movement for the granting or recognition of children's rights has to confront and address the link between rights and responsibilities.<sup>29</sup> As long as the category of 'minors' continues to be deployed to assess the legal capacity of young persons it is necessary also to analyze the interdependence of the granting of rights with responsibility of the rights holder for their actions. Thus it is not simply a matter of replacing status-based tests of capacity with individual assessments of functional capabilities but also requires an articulation of whether the individual can now be held responsible for all consequences of their actions or their status is still relevant in other instances.

<sup>28</sup> The obvious difficult area is when underage children are convicted of serious crimes.

<sup>29</sup> Archana Parashar, 'Equality and the Child' in Swati Deva Ed Law and (In)Equalities: Contemporary Perspectives, Eastern Book Company, India, 2010, 55-72.

The trend towards greater recognition of functional capacities of people who were conventionally denied legal capacity has not done away with the status categories. That being the case, a plausible question is why does law still ascribe status? Obviously there remains some truth underlying the assumptions that are used in ascribing status and consequent legal capacity or incapacity. Thus despite the recognition of the rights of the child and reliance on the functional capacities test, the legal category of 'minor' or 'child' has not disappeared. This points to the undeniable reality that children lack certain capabilities and maturity and the mere finding of a relevant functional capacity does not necessarily entail full maturity. Therefore, the continued use of the status category of 'child' (or 'intellectually disabled') indicates an acceptance in law that the child may require 'different' treatment than an adult person. However, the exact scope of this different treatment remains to be determined and justified.<sup>30</sup> It is therefore, not surprising that even when the child is given specific 'new' rights the exercise of those rights is constrained by the overarching authority of the court to accept or override the choices made by the child<sup>31</sup>.

Evidently with the move towards using the functional capacities test the only thing that has changed is that the test of classifying children is now more fluid and flexible. This flexibility shifts the onus of making the call about capacity to the court rather than leave it for the legislature. The question however is whether the judiciary is equipped to discharge this responsibility? Secondly, it remains the case that a determination about functional capacities may not necessarily translate into attaching moral or legal responsibility to the person.

It is a missed opportunity in that the SC relied so heavily on the technical point that the MTPA makes a distinction between mental illness and mental retardation. One just needs to state it to realize that a different judge occupying the bench could have as easily reached a conclusion that allowed the state administrators to proceed with the termination of pregnancy in this instance. However that is not a guarantee of a fundamental right for a woman with intellectual

<sup>30</sup> See also Bernadette McSherry, 'Protecting the Integrity of the Person: Developing Limitations on Involuntary Treatment' in Bernadette McSherry Ed *International Trends in Mental Health Laws*, Sydney, The Federation Press, 2008, 111-124.

<sup>31</sup> See my 'Equality and the Child' pp. 70-71 above n 27 for examples of such actions by the judges in family disputes in the Australian context.

disability. For a realistic guarantee what is required is an articulation of how the rights of persons with mental disabilities can be safeguarded and upheld in routine decisions that are made at all levels of governance. For that it is essential to articulate a norm of human dignity that is equally available to all persons with mental disabilities and the SC is uniquely placed to perform this task. When the SC decided the appeal in favor of allowing Kajal to bear her pregnancy to full term, it demonstrated empathy for her, and that is desirable.<sup>32</sup>

However, it should have also formulated the principles that would serve as the standard for all subsequent decision makers. In its decision the SC ignored the developing trend of assessing functional capacity of persons formerly considered to lack legal capacity. It ignored the obvious issue that someone would need to assess the capacities of persons with intellectual disabilities. In not formulating any useful guidelines for subsequent decision makers it failed to protect the rights of persons with intellectual disabilities.

The trend in international norm development with regard to the rights of persons with disabilities provides a sound basis for the SC to develop a link between the bases of granting legal capacity and certain rights. The formulation and widespread acceptance of the Convention on the Rights of People with Disabilities has managed to create a discourse of legal capacity for persons with disabilities. Amita Dhanda argues that the novel feature of this Convention is that it reaffirms that people with disabilities have the right of recognition of personhood in law but also that they enjoy legal capacity on an equal basis with others in all aspects of life.33 This right to legal capacity is designed to remove formal legal barriers to the full participation of people with disabilities and paragraph (3) of Article 12 further requires that the state should provide all necessary support for people with disabilities to be able to exercise their legal capacity. This legal model was available to the SC to articulate a jurisprudence of human rights and dignity for people with intellectual disabilities but it declined to engage with the issues.34

<sup>32</sup> For an argument that reason and passion are not antithetical to each other and judging requires both see Martha Minow and Elizabeth Spelman, 'Passion for Justice' 1988, 10 Cardozo Law Review, 37-76.

<sup>33</sup> Article 12 of the *Convention on the Rights of People with Disabilities;* analyzed by Amita Dhanda in the UN Study above n 18.

<sup>34</sup> For an argument that developments in International law are relevant for interpreting domestic constitutions see Michael Kirby, 'International Law – the Impact on National Constitutions' 2005, 21 American University International Law Review 327-364.

In conclusion I believe that I have established that it is incumbent upon the SC judges as the interpreters of the constitution to develop an interpretation of legal capacity that would uphold a basic human right for women with mental or intellectual disabilities. The question that arises is why the SC judges should be told what they ought to do and more importantly why would they feel inclined to listen. These questions invoke ideas about judicial independence and the nature of the judicial task as one requiring legal reasoning that I aim to address in the following section.

#### Part Three

Judges and Responsible Exercise of Judgment

Judicial independence is supposed to be a corner stone of 'rule of law' societies.35 It is commonly asserted that the apolitical judges are responsible for applying the law in an impartial manner and it follows that they are not to be dictated to by anyone as to how to perform this job. In this context it becomes problematic to suggest that the judges ought to pursue a specific goal (worthy though it might be). Moreover, as Mark Tushnet has argued, legal academics have very little influence on shaping judicial opinion.<sup>36</sup> However, the following discussion is based on the assumption that the academic task is a broader task than that of influencing individual judges. The importance of this task lies in analyzing how the judicial task is conceptualized. For it is this analysis that can yield alternative ways of formulating the theoretical bases of judicial authority and the nature of the interpretive task performed by the judges.<sup>37</sup> Moreover, in the present context it is imperative that the judges, who claim the authority to be the final arbiters of the issue of whether to uphold or override

<sup>35</sup> Ian Shapiro Ed, Rule of Law, New York, New York University Press, 1994; Richard Bellamy Ed The Rule of Law and the Separation of Powers, Ashgate, Dartmouth, 2005.

<sup>36</sup> Mark Tushnet, 'Academics as Law Makers?' (2010) 29(1) University of Queensland Law Journal 19-28; in this article Tushnet also cites Pierre Schlag, 'Clerks in the Maze' (1993) 91 Michigan Law Review 2053 and Richard Posner, 'The Decline of Law as an Autonomous Discipline' (1987) 100 Harvard Law Review 761 as works that make similar arguments.

<sup>37</sup> Cf Cass Sunstein, Legal Reasoning and Political Conflict, Oxford University Press, New York 1996 is referred to for the argument that judicial activity can and should proceed with the help of incompletely theorized agreements. He is responding to Dworkin's theory and makes a nuanced argument that I cannot detail here. However, I do wish to emphasize that any conception of judicial activity is ultimately based in a theory of the nature of that task and often in a theory of the nature of law. Simply not articulating those ideas does not make the role of theory irrelevant. Moreover it is the contemporary dominant theories of judicial activity that inform the worldviews of the judges themselves.

human rights of persons with diminished capacity to make decisions, should be self reflective as well as accountable for their decisions.

The common law judges enjoy immense authority to interpret and develop law. They constantly develop precedents and are the final arbiters of the meaning of any legal rule. However, in a democratic polity such authority of the judges runs the risk of attracting the counter-majoritarian charge.<sup>38</sup> The conventional understanding in Common Law is that such authority of the judges is justifiable, as they remain constrained by legal reasoning.<sup>39</sup> That is, under the doctrine of separation of powers judicial authority extends only to applying the law, as it is not for them to decide whether the outcome is just or unjust. In this way it follows that the jurisdiction of courts for interpretation and judicial development of doctrine is legitimate. It is in this context that I wish to argue that a reconceptualization of the judicial task that emphasizes the choice exercised by the judges can reconnect law and justice. In so arguing I disagree with both the mainstream understanding of 'legal reasoning', and the post-structural understandings of the nature of the judicial task. A brief identification of the shortcomings of both provides the basis to re-conceptualize the judicial task as one of making responsible choices.

The concept of legal reasoning, used extensively to denote the idea that the interpretive task of the judiciary is a legitimate task in a democratic polity<sup>40</sup> is equally relevant in understanding the nature of the task both in interpreting legal rules in legislative instruments or in previous precedents. For statutory (and constitutional) provisions, there are of course rules of interpretation that purport to guide judges in understanding the meaning of any legal rule<sup>41</sup>. For identifying precedents and more importantly in developing them the judicial task is not so easily constrained. Nevertheless it is expected that the judges remain within the constraints imposed by the injunction that they apply the law (rather than make it). It is a particular characteristic of

<sup>38</sup> See for a collection of essays M Tushnet et al, 'Symposium on "Democracy and Distrust": Ten Years On' 1919, 77 Virginia Law Review 631.

<sup>39</sup> The concept of legal reasoning is a highly debated concept. For an introduction to these debates see Julie Dickson, 'Interpretation and Coherence in Legal Reasoning' in Stanford Encyclopedia of Philosophy at <a href="http://plato.stanford.edu/entries/legal-reas-interpret/">http://plato.stanford.edu/entries/legal-reas-interpret/</a>

<sup>40</sup> See for an introduction to the literature Aulis Aarnio and D. Neil MacCormick Eds *Legal Reasoning*, Aldershot, England, Dartmouth, 1992.

<sup>41</sup> Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston Eds, *Interpreting Constitutions: Theories, Principles and Institutions*, Federation Press, Sydney, 1996, 13-30.

Common Law that the judges straddle the disparate tasks of applying the law and yet developing precedent.<sup>42</sup> It is however, more readily understandable if the history of the development of Common Law is kept in view.

Historically the basis of judicial authority came from the early idea that Common Law is the expression of natural reason. Just as the legislation was giving expression to natural reason so were the judges upholding this reason in giving their judgments<sup>43</sup>. Early on the judges claimed the authority to develop precedent or give judgments as they had proficiency in understanding the artificial reason of common law.<sup>44</sup> Their particular expertise combined with the understanding of law as expression of morality led to legitimizing of judicial authority for interpretation and developing of precedents. However, the ascendance of legal positivism in legal theory and scholarship has eclipsed the idea of law as an expression of natural reason. While natural law theories exist and are discussed by scholars, the actual practice of law officials(read judges) predominantly tends to be positivistic in its orientation<sup>45</sup>. One consequence of this ascendance of positivistic theory, for the purposes of my argument in this paper, is that the basis of judicial authority for interpretation or developing precedents has become more and more untenable.

The usual concept of separation of powers between the legislature and the judiciary is deployed but the artificiality of reasons put forward to justify judicial authority is epitomized in the concept of legal reasoning. <sup>46</sup> In brief the claim is that the judges can be trusted because they are not free to interpret the law as they like and they have to reason in a specifically constrained manner. Various theories (and rules) of interpretation set the parameters of the judicial task. The vast legal

<sup>42</sup> See for example, Julius Stone, Precedent and Law: Dynamics of Common Law Growth, Sydney, Butterworths, 1985; see also Alastair McAdam and J Pyke, Judicial Reasoning and the Doctrine of Precedent in Australia, Butterworths, Sydney, 1998.

<sup>43</sup> Roger Cotterrell, 'The Theory of Common Law' in Politics of Jurisprudence: A Critical Introduction to Legal Philosophy, Butterworths, 1989, 21-51.

<sup>44</sup> A R Blackshield and G Williams, Australian Constitutional Law and Theory: Commentary and Materials, 4th edition, Sydney, Federation Press, 2006, p. 82.

<sup>45</sup> For an interesting effort at linking the interpretation preferences and the particular theory of law adopted by the judges of the High Court of Australia see Rachel Gray, *The Constitutional Jurisprudence and Judicial Method of the High Court of Australia*, Presidian Legal Publications, Adelaide, 2008.

<sup>46</sup> There is vast literature on the nature of judicial task but I will not discuss it here. For an introduction see A. Marmor, *Interpretation and Legal Theory*, 2nd edition, Oxford, Hart Publishing, 1995.

scholarship addressing the issue of the nature of interpretation exists but it is not my focus here.<sup>47</sup> In brief, the mainstream theories of judicial task extend from endorsing textualism or formalism to functionalism or purposivism, but they are all various versions of intentionalism.<sup>48</sup> That is, all of them are eventually trying to ascertain what is the intention of the legislature and whether it is expressed in the literal language or found in the function or purpose of the particular law.<sup>49</sup>

At the same time there exists vast legal literature broadly described as critical theory that challenges the mainstream view suggesting that meaning of any rule is discernable from the language used.<sup>50</sup> The post-structural insight, that meaning is constructed and attributed rather than discovered has no doubt created a space for arguing that the task of legal interpretation should be reconceptualized.<sup>51</sup> What is remarkable about the mainstream legal scholarship however is that it is able to ignore the wider developments in the fields of hermeneutics or critical theory. While there are serious drawbacks in the post structural critique it nonetheless needs to be addressed.<sup>52</sup> The most obvious argument against post structural analysis of the judicial task is that it is necessarily relativistic. It allows no scope for criticizing an interpretation as inappropriate because there

<sup>47</sup> See for an introduction A. Marmor Ed, *Law and Interpretation*, Clarendon Press, Oxford, 1995; see also JJ Spigelman, *Statutory Interpretation and Human Rights*, St Lucia, University of Queensland Press, 2008.

<sup>48</sup> For an overview of mainstream theories of interpretation see William N Eskridge Jr and Philip P Frickey, 'Statutory Interpretation as Practical Reasoning' 1990, 42, Stanford Law Review, 321-384; see also Adrienne Stone, 'Constitutional Interpretation' in Tony Blackshield, M Coper and G Williams Eds The Oxford Companion to the High Court of Australia, Oxford University Press, Sydney, 2001, 137-139.

<sup>49</sup> I develop this argument in greater detail elsewhere; see A Parashar, 'Responsibility for Legal Knowledge' in Amita Dhanda and A Parashar Eds *Decolonisation of Legal Knowledge*, New Delhi, Routledge, 2009, 178-204.

<sup>50</sup> See for an overview Ian Ward An Introduction to Critical Legal Theory, Cavendish Publishing, London, 1998.

<sup>51</sup> As a representative argument see Stanley Fish, Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies, Durham, Duke University Press, 1989, 87-102.

<sup>52</sup> It is no doubt the case that contemporary legal theory is post-structuralist in orientation and most of the literature in legal journals is critiquing the mainstream understandings of law. However, it is a testament of the tenacity of the mainstream view that it continues to be the dominant view of legal knowledge. As a result the overall message in legal education also continues to be that real law and real judging is about principles and applying the law respectively. It is therefore no surprise that the judges, who are the products of this training and education, think the same. The imperviousness of legal education to the challenges posed by contemporary legal theory is in turn addressed in legal scholarship but remains unable to change the dominant versions of legal knowledge.

are no final or universal standards of appropriateness that can be used as a measure. The judicial task thus potentially becomes completely subjective.<sup>53</sup>

While it is necessary to explore theoretically whether this total relativism of critical theory can be avoided, the response in the mainstream legal scholarship as well as the self-understanding of the judges about the nature of their interpretive task, as if all this critique never happened, is clearly inadequate. One way of avoiding the relativism of post structural conception of interpretation is to acknowledge that the judges have to make a choice between the available alternatives. It is this fact of choice that allows for pinning the responsibility for the consequences of a decision on the decision maker, the judge. It is this connection between choice and responsibility that is missing from both mainstream and critical analyses of the nature of judicial task. The mainstream theory tries to establish the choice is a constrained and therefore legitimate choice while the post structural theory explains it as a free choice and thus no different from any other political choice. Both of these alternatives, the mainstream theories or the critical theories, are inadequate accounts of the judicial task.

The fact that judges are so central in attributing meaning to the laws requires a more concerted effort by theorists to link the exercise of power with responsibility. The views of Gadamer can be useful in this endeavor.<sup>54</sup> His view of hermeneutics is very influential but is also subject to trenchant critiques.<sup>55</sup> Despite these critiques I believe that Gadamer, who is not primarily addressing the subject of legal interpretation, captures the complexity of the task of interpretation but more importantly provides for the linking of responsibility with choice. Eskridge has used Gadamer's ideas to propose a 'dynamic statutory interpretation' theory. He endorses Gadamer's starting point that truth is not reached by simply following a method and I agree that this is a particularly relevant corrective for the mainstream legal

<sup>53</sup> Elsewhere I have argued against this outcome; see my 'Responsibility for Legal Knowledge' above n 47.

<sup>54</sup> In the following discussion I rely on Eskridge's understanding of Gadamer; see William N Eskridge Jr, 'Gadamer/Statutory Interpretation' 1990, 90 Columbia Law Review 609-681; see also J Weinsheimer, Gadamer's Hermeneutics: A Reading of "Truth and Method", Yale University Press, New Haven, 1985.

<sup>55</sup> See Gayle Ormiston and A Schrift Eds *The Hermeneutic Tradition*, SUNY Press, Albany, 1990 for a collection of essays on Gadamer's writings.

theories' confidence in keeping the judges constrained to 'apply the law'.

The main elements of Gadamer's hermeneutics relevant for the present argument are that interpretation is a process that seeks the truth of a text. The meaning or truth is not so much the intended meaning or the interpreter's view of the text as a result of the interaction between the text and the interpreter. The interpreter is not disconnected from the text as it forms part of the tradition that constitutes the interpreter's being that makes her or his ontology intelligible. So too the viability of the text is maintained through the interpretive activity. It is pointless to try to capture the original meaning of any text through historical reconstruction of the conditions in which it was made because when we try to reconstruct the original meaning we do it from our current standpoint that is to a large extent constituted by our contemporary conditions. The meaning of the text is a product of the interaction between the interpreter and the text that mediates between the past and the contemporary context.

Our understanding is historically conditioned by our 'horizon'. Moreover, our horizons change with the passage of time and as a result of interpretive encounters with texts that challenge our preunderstandings; similarly a text's horizons shift with the passage of time as a result of the text's presuppositions being challenged through its encounter with interpreters. An interpretation is the 'fusion of horizons' and necessarily dynamic in nature. In conclusion as Eskeridge argues interpretation in addition to being ontological and dialogical is also critical. *Inter alia* the interpreter has to decide which of the various possible interpretations to choose.

If this understanding of interpretation were to inform the SC judges' decision in Kajal's case it is very likely that they would have reached the same decision but by a very different manner of reasoning. It must be noted that it is the manner of reasoning that is crucial in developing a jurisprudence of the rights of people with disabilities. In keeping with the insights about the nature of interpretive task the judges would need to develop an understanding of what does it mean to have a constitutional right to personal liberty, encompassing privacy, dignity and bodily integrity for a person with intellectual disability. It is an integral aspect of the constitutional interpretation task of the highest court that it has to attribute meaning to the rather cryptic language of the articles on fundamental rights. In doing so the SC

judges have to make a choice about the interpretive approach they will adopt.<sup>56</sup>

It is not plausible to portray this task as one determined by reference to technical criteria or in Gadamer's terms. That is not the method that leads to the true meaning. The difficulty of course is that if legal theory accepts this fact that the legitimacy of the judges, and of the law as being impartial and objective come under severe strain. However, this does not have to mean that the legal realists and many critical legal theorists stand vindicated that law is no different to politics and the decision makers are totally subjective. But neither are the judges automatons simply performing a mechanical task. It is possible and I suggest desirable to abandon the binary description of the judicial task as either perfect constraint or complete freedom. Instead it is time to acknowledge the very real choice exercised by the judges but at the same time also accept that interpretation is an act of judgment that requires explicit justification.<sup>57</sup>

For instance, if the interpreter (the judge) is necessarily in a dialogical relation with the text, he cannot but explore why the category of mental retardation is included in the MTPA. The answer to this question in turn requires one to grapple with the concept of rights in the context of the developing discourse of the significance of legal capacity for persons with disabilities. The judge would need to take notice of the international law developments in this regard but acknowledge that their task is not a simple one but requires them to choose between various alternatives. Once the fact of choice making is openly acknowledged the judge would be expected to justify the choice and should not simply repeat the incantation that they are applying the law.<sup>58</sup>

<sup>56</sup> For an introduction to the literature on constitutional interpretation see Jeffrey Goldsworthy Ed *Interpreting Constitutions: A Comparative Study, Oxford University Press, Oxford, 2006.* 

<sup>57</sup> See also Sandra Berns, 'Constituting a Nation: Adjudication as Constitutive Rhetoric' in Charles Sampford and Kim Preston Eds, Interpreting Constitutions: Theories, Principles and Institutions, Federation Press, Sydney, 1996, 84-120; Sandra Berns, To Speak as Judge: Difference, Voice and Power, Ashgate, Aldershot, 1999.

<sup>58</sup> In particular this is entirely different from Dworkin's conception of the law and the judicial task because his definition of the law as a combination of rules and principles makes the judge the final arbiter of what these principles are and what weight to attach to them. As a result the choice made by the judge keeps them within the law and thus constrained. There is in effect no way the judge can be criticized or scrutinized for their choice. Ronald Dworkin, *Taking Rights Seriously*, Duckworth, London, 1978, chapter 4; also his *Law's Empire*, Harvard University Press, Cambridge, 1986.

This way of reaching a decision is much superior to the present recourse of the SC that involves latching on to a technicality in the legislation. It acknowledges that judges in the process of decision-making are necessarily making choices, but more importantly it attaches responsibility for those choices to the judges and not the impersonal and ephemeral law.<sup>59</sup> The law does not exist waiting to be applied and the very task of the judges is to give meaning to the law. The SC judges thus must give meaning to the Constitutional guarantee of personal liberty in a manner that every subsequent decision maker will be able to uphold the dignity and rights of persons who are unable to make the decision themselves.

<sup>59</sup> See also J T Noonan and K I Winston Eds., The Responsible Judge: Readings in Judicial Ethics, Praeger Publishers, Westport, 1993.

# CLAIMING A 'FUNDAMENTAL RIGHT TO BASIC NECESSITIES OF LIFE': PROBLEMS AND PROSPECTS OF ADJUDICATION IN BANGLADESH

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#### 1. Prelude

The debate on whether socio-economic rights can or should be adjudicated upon and enforced by courts is ongoing since the 1960s, when the rights in the Universal Declaration of Human Rights (UDHR) were separated into two covenants. Though the International Covenant on Civil and Political Rights (ICCPR) 1966 and the International Covenant on Economic Social and Cultural Rights (ICESCR) 1966 differ from each other in many respects, the key point which makes the ICESCR drastically weaker than and subservient to the ICCPR1 is Article 2(1), which stipulates that State parties are required to work towards the progressive realization of socio-economic rights subject to the availability of resources. On the other hand, Article 2 of the ICCPR imposes an immediate and justiciable obligation upon the State. Since civil political rights figured prominently in the west while socioeconomic rights were propagated by the socialist block, ideological cleavages between socialism and capitalism shadowed the necessity of integration of socio-economic rights among justiciable fundamental rights and they were thereby avoided practically.<sup>2</sup> After the World War II most of the third world countries emerging free from capitalist colonial legacy adopted this formula of segregating the human rights and hence socio-economic rights remained the poor cousins of their civil and political counterparts. In the sub-continent, Indian (1950) and Pakistani (1973) constitutions adopted this model and later so did the Constitution of Bangladesh in 1972.

## 1.1. Socialist illusions of the Constitution of Bangladesh

One of the fundamental principles inspiring our forefathers to lay down their lives in the Liberation War of 1971 was the emancipation

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<sup>1</sup> Yubaraj Sangroula, Right To Adequate Standard of Living, Development and Social Respect and Dignity in SOCIAL RESPONSIVE HUMAN RIGHTS LEGAL EDUCATION (A Compendium of Conference Proceedings and Papers) SALS Forum, 2004, pp.62-73, at p.70

<sup>2</sup> Abdullah Al Faruque, Realization of Economic, Social and Cultural Rights: A Survey of Issues in HUMAN RIGHTS AND EMPOWERMENT, 85, 85 (Mizanur Rahman ed., 2002).

of working class, peasants and toiling masses from all sorts of oppression and economic deprivations.<sup>3</sup> Accordingly, the Preamble of the original constitution (1972) adopted 'socialism' as one of the guiding philosophies of the new state which was to be a scheme of social security from cradle to grave.<sup>4</sup> The motto was to eliminate inequality in income, status and standard of life by providing adequate shelter, education and medical care to all. Article 10 also approved the assertion by pledging, 'A socialist economic system shall be established with a view to ensuring the attainment of a just and egalitarian society, free from exploitation of man by man.'

However, half-heartedness on the part of the framers regarding the exact capability of the State to take the burden in this regard prompted them to relegate socio-economic 'Rights' to mere 'Principles.' Accordingly, the sunny promises of its Preamble faded in the very first Article (Article 8) of Part II. Here the constitution creates a dichotomy between civil and political rights on the one hand, and economic, social and cultural rights on the other by making the former enforceable by the court and the latter non-enforceable.<sup>5</sup> Economic, social and cultural rights included in Part II under the head 'Fundamental Principles of State Policy, includes the provision of basic necessities of life including food, clothing, shelter, education and medical care, etc.<sup>6</sup> While the 'Fundamental Rights' in Part III are justiciable.<sup>7</sup>

To make the situation worse, after the 1975 killing of the Father of the Nation, Article 10 of the Constitution harboring 'socialism' was substituted with something new: 'Steps shall be taken to ensure participation of women in all spheres of national life' 'Socialism' in the Preamble was amended to mean *economic and social justice*. Thereby a political agenda was relegated to a mere economic program and a

Bangladesh Italian Marble Works Ltd v. Bangladesh, 14 BLT (Spl) 1 p. .230-231.

<sup>4</sup> A.K.M SHAMSUL HUDA, THE CONSTITUTION OF BANGLADESH (VOL. 1) 206 (Rita Court, 1997).

BAN. CONST. art 8 (2), Sri Suranjit Sen Gupta, the lone opposition member from *National Awami Party* (pro-Moscow) in the Constitution Drafting Committee of 1972 alleged that the draft did not adequately provide for the establishment of socialism. He suggested that the words 'shall not be judicially enforceable' should be deleted. Ultimately he refused to sign the Constitution on demand that at least the right to receive education upto Class 8 be accepted as Fundamental Right. See: Abul Fazl Huq, *Constitution-Making in Bangladesh*, PACIFIC AFFAIRS, Vol. 46, No. 1 (Spring, 1973), pp. 59-76, University of British Columbia, Stable URL: http://www.jstor.org/stable/2756227 (Accessed: 24/02/2010).

<sup>6</sup> Id., Art. 15.

<sup>7</sup> Id., Arts. 44 & 102.

socialist economy turned into a bourgeoisie one.<sup>8</sup> A welfare state became a *laissez faire* and the fortune of the millions of dying destitute fell upon the mercy of cruel and rampant God of market.

#### 1.2. In search of reform

Quite happily, the Supreme Court in a recent case<sup>9</sup> has given Bangladesh her socialist complexion back by reviving the original Preamble and Article 10. This is the case where the 'ill-legacy' of military rule was condemned.<sup>10</sup> The invalidation of the 1975-79 military regime resulted in the auto invalidation of the constitutional amendments effected by the regime and hence the original constitution, especially the Preamble and state policy related articles, got much of their original look back. Thereafter the 15<sup>th</sup> Amendment to the Constitution of Bangladesh that came into effect in July 2011 accommodated most of the observations of the Supreme Court. It also introduced some other vital changes regarding which the Court had no observations at all. However, the legislature did not take a chance at reconsidering the confusions of 1972 regarding the affordability of the fundamental right to basic necessities of life holds. Hence the original equation of principles versus rights remains intact.

Given the situation, I take the chance to argue for placement of 'basic necessities of life', which now resides in Article 15 of Part II of the Constitution (Fundamental Principles), within the ambit of Part III (Fundamental Rights) to re-install and further invigorate the socialist

<sup>8</sup> In the original Constitution, it was 'Socialism' unqualified and simple. Later on the qualifying phrases *meaning economic and social justice* were included. The rationale behind the change was obviated due to the emergence of capitalist forces having a strong US leaning to the power. The socialistic inspirations of the revolutionary leadership were in marked distinction with the free-market de-regularized economy professed by the erstwhile Pakistani military elite. The military establishment usurping power in Bangladesh in 1975 was in no way comfortable with a 'basically socialist' Constitution. Hence it was thought better to concoct the original socialism to a mere socialism in ink and paper. An individualist capital economy was given priority over the greater purpose of social and political justice. Consequently, in a bid to attract direct foreign capital most of the nationalized industries were de-nationalized. State-owned banks, financial institutions, trading concerns fall to private hands. The shares until recently held by the government in many enterprises were sold to the private individuals or companies. See - REHMAN SOBHAN, BANGLADESH PROBLEMS OF GOVERNANCE 36 (UPL Dhaka, 1995).

<sup>9</sup> Khandker Delwar Hossain v. Bangladesh Italian Marble Works Ltd (Civil Leave to Appeal Petition No 1044/2009) commonly known as the 5th Amendment Case (Dec. 12, 2010) http://supremecourt.gov.bd/judgement C.P.%20Nos.%201044%20&% 201045 %20of%202009%20(5th%20Amendment).pdf (Accessed: May 12, 2010).

<sup>10</sup> Dr. Shah Alam, Constitutional Issues are political as well as legal: Implementing the SC 5th Amendment Judgment, THE DAILY STAR, LAW & OUR RIGHTS, August 28, 2010.

promises of the Preamble. Answering the questions regarding the Court's suspected inability to judge a fundamental right to 'basic necessity' is the focus of this exercise.

After briefly addressing the widely professed 'problems' relating to the justiciability of Socio-economic Rights (Para 2), the paper proceeds to unveil the 'smuggling' that Bangladeshi courts are doing now-a-days under the umbrella of Fundamental Rights (Para 3). Then, the inadequacies of the indirect and minimum enforcement regime developed through judicial activism are explained as part of a preliminary justification of a 'fundamental right' claim (Para 4). Thereafter, for a comfortable linguistic formulation of the proposed 'fundamental' right to basic necessities of life, I have taken the South African Bill of Rights as a model (Para 5). Then, to ease the hesitation regarding the resultant judicial activism, I've tried to chalk out the patterns of probable orders and judgments that the judiciary may render in a future claim to basic necessities as of right. At the same time I've tried to show that the judiciary of Bangladesh is already in the habit of making such orders and judgments in course of its engagement with Public Interest Litigations (PILs) and obviously they have done it with a considerable amount of success (Para 6). Lastly, the question as to whether Bangladesh is ready enough, economically and politically, to adapt herself with the proposed drastic change in 'rights' regime is dealt with, briefly though (Para 7). The ultimate attempt is to establish that we don't need to be worried of the court's 'institutional capacity' to adjudicate such fundamental rights claims.

# 2. Justiciability 'concerns' and the Replies

The key 'problems' rooted in the traditional perceptions of progressive and resource dependent ESC rights, their violations and resultant remedies may be summed up in two major points: *Firstly*, that their realization is progressive and therefore more difficult to assess, e.g. a right to education as compared to a right to vote; and being subject to the available resources, and therefore more difficult for States to guarantee to every citizen unconditionally, the theory of separation of power is inherently against their justiciability. *Secondly*, the courts do not have the institutional capacity to appreciate and attend to all the polycentric interests involved therein.<sup>11</sup>

<sup>11</sup> CHRISTOPHER MBAZIRA, LITIGATING SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: A CHOICE BETWEEN CORRECTIVE AND DISTRIBUTIVE JUSTICE 17 (Pretoria University Law Press, 2009).

In fact, already settled responses to these readily preached 'problems' are so well known that a short assemblance of points should suffice. Lack of resource as an excuse fails in its totality when we see a violation of socio- economic rights as a problem of governance, not of resource. 12 A rights claim may not be 'reasonably' discharged simply on the basis of a bald assertion of resource constraints. Resource consideration is not totally ignored by the court judging a violation. What the court does is question the 'reasonableness' of resources already allocated to see that decisions and their implementation remain fair, rational, 13 balanced, flexible, coherent, proportional, 14 progressive and purposeful.<sup>15</sup> It also takes care that the program pays appropriate attention to the crises, short, medium and long-term needs. 16 Under the doctrine of separation of powers, it is the job of courts, not legislatures, to consider allegations of rights violations. The ever present potential for an on-going tussle between the courts and the government should be seen as part of the process of constitutional dialogue rather than a threat to the constitutional order.<sup>17</sup> The institutional capability of the court to adjudge socio-economic rights litigations becomes undoubted in the sense that such litigations focus on structural or systemic violations requiring the weighing of competing interests in the scale of reasonableness and proportionality. 18 Institutionally, no other organ of the State is better equipped than the Judiciary to adjudicate the proportionality concern objectively.

## 3. Smuggling Socio-economic Rights through the backdoor

While in spite of having similar constitutional disposition, the Indian judiciary appeared as a vanguard of social justice, <sup>19</sup> the Supreme Court of Bangladesh remained adamant not to change its stance over the non-justiciability of socio-economic rights finding place within the Principles of State Policy until recently.

<sup>12</sup> Md. Zakir Hossain, Good Governance: Road to Implementation of Human Rights in HUMAN RIGHTS AND GOOD GOVERNANCE, 107-118, 115 (Mizanur Rahman ed., 2004).

<sup>13</sup> Soobramoney v. Minister of Health, KwaZulu-Natal, 1998 1 SA 765 (CC).

<sup>14</sup> Khosa and Others v Minister of Social Development, 2004 6 BCLR 596 (CC).

<sup>15</sup> TAC v Ministers of Health, 2002 (10) BCLR 1033 (CC).

<sup>16</sup> Grootboom v Ostenberg Municipality and Others, 2000 3 BCLR 277 (CC).

<sup>17</sup> Sandra Liebenberg, South Africa's Evolving Jurisprudence On Socio-Economic Rights (Jan. 2, 2011) http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/research/socio-economic-rights-jurisprudence.

<sup>18</sup> MBAZIRA, supra note 11, at 43.

<sup>19</sup> Anirud Prasad, Human Rights and Socio-Economic justice: A Study with Special reference to India, 12 Civil & Military L.J., 84, 85 (1976).

In *Re Wills Little Flower School*<sup>20</sup> the High Court Division negated a requisition of land in favor of an English Medium Private School on the ground of its being not in 'Public Purpose.' Relying on Article 17 of the Constitution which mandates the State to work for the 'massoriented uniform system' of education, the Court held that use of governmental power for private English medium school having little interest in the culture and heritage of Bangladesh would never be an action aimed at 'mass oriented' 'universal' education. Unfortunately the Appellate Division turned down the effort by holding that Fundamental Principles of State Policy (where Art. 17 belongs) were not to be judicially enforced and thereby refused to use them even as aid to interpretation.<sup>21</sup>

Again, Kudrat-E-Elahi Panir and Others v. Bangladesh<sup>22</sup> concerned a challenge to Ordinance No. XXXVII of 1991 (that subsequently became Act No. II of 1992) which abolished the elected Upazila Parishads (the third tier of the local government) and vested in the government all rights, powers, authorities and privileges of the dissolved *Upazilla Parishads*. The appellants, some chairmen of dissolved Upazilla Parishads, unsuccessfully challenged the law in the High Court Division and then appeared before the Appellate Division by obtaining leave to appeal. One of the grounds was that the Ordinance being inconsistent with Articles 9 (as it was before the 15th Amendment) and 11 ran against the spirit of the Constitution and became void by operation of Article 7(2). It was clear that the Ordinance was clearly against the gist of Articles 9 and 11.23 But the problem was that the Articles 9 and 11 were in the Part II containing the Fundamental Principles. In the main judgment Shahabuddin Ahmed CJ held that Articles 9 and 11 being located in Part II of the constitution were not judicially enforceable. If the State does not or cannot implement these principles the Court cannot compel the State to do so.<sup>24</sup>

Interestingly, the Article 8(2) has five parts – The principles: a) shall be fundamental to the governance of Bangladesh; b) shall be

<sup>20</sup> Wnifred Rubie v. Bangladesh, 1 BLD 30.

<sup>21</sup> Bangladesh v. Mrs. Winifred Rubie and Others, 2 BLD (AD) 34.

<sup>22</sup> Kudrat-E-Elahi Panir and Others v. Bangladesh, 44 DLR (AD) 319.

<sup>23</sup> Article 9 and 11 emphasized on maintaining democratically elected local government institutions

<sup>24</sup> Kudrat-E-Elahi Panir and Others v. Bangladesh, 44 DLR (AD) 319, para 22; Two other important cases where the non-justiciability was mechanically preached are – Dr.Ahmed Hussein v. Bangladesh, 44 DLR (AD) 109 and Farida Akter v. Bangladesh, 57 DLR (2005) 201.

applied by the State in making of laws; c) shall be a guide to the interpretation of the Constitution and other laws of Bangladesh; d) shall form the basis of the work of the State and its citizens; and e) shall not be judicially enforceable. It seems that while strictly asserting that principles are not judicially enforceable, judiciary is ready to enforce the fifth criteria only and not the other four criteria set out in article 8(2). It may be asked whether article 8(2) binds the judiciary only and leaves the executive and legislature out of its ambit. Once Justice Badrul Haider Chowdhury of the Appellate Division of the Supreme Court got almost near to the point but the vital question of justiciability remained unanswered and the Court ended in a mere general observation:

Though the directive principles are not enforceable by any court, 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. .... This alone shows that the executive cannot flout the directive principles. The endeavour of the Government must be to realise these aims and not to whittle them down.<sup>25</sup>

However, there are some instances of judicial enthusiasm and of late the trend has gained momentum. This part of the write-up explores the possibilities 'to smuggle (if not possible to claim) the socioeconomic rights through the backdoor and down the chimney or through the window' within the constitutional framework of Bangladesh.<sup>26</sup> While courts are using some of the lee-ways, others remain yet to be explored. The first strategy is in asserting socioeconomic rights under the umbrella of prominent Fundamental Rights like right to life and liberty, freedom of association, expression and opinion, right to information, equality and non-discrimination, etc.<sup>27</sup> Second, is to emphasize the domestic application of ICESCR to enforce socio-economic rights.

# 3.1. Resorting Fundamental Rights to claim Socio-economic Rights

The 'right to life' has been widely utilized by courts to ensure medical services, food, shelter, a healthy work environment and

<sup>25</sup> Anwar Hossain v Bangladesh, 1989 BLD(Spl) 1, para 53.

<sup>26</sup> Albie Sachs, Social and Economic Rights: Can They Be Made Justiciable? in HUMAN RIGHTS AND EMPOWERMENT, 77, 79 (Mizanur Rahman ed., 2002).

<sup>27</sup> GHULAM RABBANI, CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH: EASY READER (BANGLA), 49 (Samunnoy, 2008).

housing etc. of the people.<sup>28</sup> Stumbled by the plea of non-justiciability of Directive Principles, the Indian Supreme Court has shown its dire determination to enforce the socio-economic rights of the people by following this line. Article 21 of the Indian Constitution ensuring right to life has been interpreted to cover right to necessary conditions of life,<sup>29</sup> right to livelihood,<sup>30</sup> right to get adequate relief in starvation crisis,<sup>31</sup> right to receive timely medical aid,<sup>32</sup> right to live in healthy environment,<sup>33</sup> right to education<sup>34</sup> and even the access to better road communication facilities.<sup>35</sup>

In Bangladesh as well, the right to life has been resorted to in addressing a wide range of welfare concerns such as slum dweller's legitimate expectation to not be evicted without alternative settlement,<sup>36</sup> protection and preservation of environment and ecological balance,<sup>37</sup> prohibition of advertisement of cigarettes,<sup>38</sup> ban on imposing VAT in case of health treatment at hospitals, clinics and doctors' chamber,<sup>39</sup> development of children, maternity benefits, creation and sustenance of conditions congenial to good health<sup>40</sup> etc.

Right to equality and non-discrimination has been another area of great strategic value. The activist judges around the world rely greatly on the principle of non-discrimination to strike at the roots of socio-economic inequality. The Supreme Court of Bangladesh has done the same whenever the opportunity came.<sup>41</sup>

- 28 Kamal Hossain, Interaction of Fundamental Principles of State Policy and Fundamental Rights in PUBLIC INTEREST LITIGATION IN SOUTH ASIA: RIGHTS IN SEARCH OF REMEDIES, 50 (Sara Hossain and Ors ed., 1994).
- 29 Francis Coralie v. Union of Delhi, AIR 1981 SC 746.
- 30 Olga Tellis v. Bombay Municipal Corporation, AIR 1981 SC 180.
- 31 Orissa Starvation Death Proceedings, National Human Rights Commission of India (HRC), Case No. 37/3/97-LD, (17 January 2003) and People's Union for Civil Liberties v. Union of India & Ors (Rajstan Starvation Death Case, 2003) (Jan. 11, 2011) http://www.communitylawcentre.org.za/ser/casereviews.php.
- 32. Paschim Bang Khet Mazdoor Samiti v. State of WB, (1996) 4 SCC 37; Consumer Education and Research Centre v. Union of India, (1995) 3 SCC 42; Parmanand Katara v. Union of India (1989) 4 SCC 286.
- 33 Ratlam Municipality v. Vardichand, AIR 1980 SC 1622
- 34 Mohini Jain v. Štate of Karnataka, (1992) 3 SCC 666; Unni Krishnan J.P v State of Andra Pradesh, AIR 1933 SC 2187.
- 35 State of Himachal Pradesh v. Umed Ram Sharma, (1986) 2 SCC 68.
- 36 Ain O Shalish Kendra and Others v. Govt. of Bangladesh, 4 MLR (HC) 358.
- 37 Dr. Mohiuddin v. Bangladesh and Ors., 49 DLR 1997 (AD) 1 (FAP 20 Case), Dr. Mohiuddin (BELA) v. Bangladesh, 55 DLR (HCD) 69 (Environment Pollution Case).
- 38 Professor Nurul Islam v Govt. of Bangladesh & Others, 52 DLR 413.
- 39 Chairman, NBR v. Advocate Julhas Uddin, 15 MLR (AD) 457.
- 40 Dr. Mohiuddin Farooque v. Bangladesh, 48 DLR (1996) 438 (Radio Active Milk powder case)
- 41 Retired Government Employees Welfare Association v. Bangladesh, 46 DLR 426.

## 4. The Inadequacies of the Piecemeal Protection

While the judiciary has developed a piecemeal protection for socio-economic rights using fundamental rights, it is in no way sufficient in protecting socio-economic rights. Rather it will be beneficial to explicitly recognise socio-economic rights as capable of judicial enforcement. The problems prevailing in the minimal protection trend are manifold.

First, it is ironic, that though the courts have developed this protection using the concept of human 'dignity', they intervene only in cases of *extreme* and *exceptional* degradation. In overlooking the other less severe cases of destitution, they contravene the value they are trying to uphold. Moreover, a practical question that arises from this is - how are authorities to determine when an individual's situation meets the requisite level of severity, requiring them to redistribute resources to eliminate the disadvantage?<sup>42</sup>

Secondly, courts face fundamental difficulties in protecting civil rights where they are inextricably bound up in socio-economic issues that are held to be non-justiciable. Therefore, courts are reluctant to intervene in the resolution of resource allocation disputes even where civil and political rights are in issue, and the result is that both sets of rights go unprotected.

Thirdly, for the present level of justiciability, recognition of socioeconomic rights in the Constitution in any format is not necessary at all. For example, the US Bill of Rights or the Canadian Charter of Rights and Freedoms do not contain express guarantees of socioeconomic rights. Even in such countries, protection for such rights is indirectly derived from the protection given to civil and political rights such as the right to life or the right to equal protection of the law. Hence without clear recognition of socio-economic rights as 'rights', the present scheme of our constitution makes no difference at all.

Fourthly, the use by courts of Directive Principles and other forms of open-ended constitutional rhetoric is often only possible in societies where there is general acceptance of the legitimacy of judicial activism. Judicial activism being a fluid and fluctuating concept, it makes the enforceability of socio-economic rights an uncertain issue.

<sup>42</sup> Asha P James, The Forgotten Rights - the Case for the Legal Enforcement of Socio-Economic Rights in the UK National Law, 7; Available Online: http://www.ucl.ac.uk/opticon1826/archive/issue2/VfPLAW\_SE\_rights.pdf, (Accessed: November 20, 2011).

It is significant that the Irish courts have not followed the approach of courts in the sub-continent in relation to the very same set of Directive Principles shared by both the Irish and Indian Constitutions. The Irish Supreme Court has taken the view that the limited role of the courts in a system based upon a firm adherence to separation of powers prevents them making use of the non-legally binding Principles.<sup>43</sup>

Fifthly, the present scheme narratives of social justice, redistribution, economic efficiency, development and growth compete, clash and combine with the principles of *laissez-faire* economic libertarianism and individual self-realization. Hence socio-economic rights remain largely on the sidelines of the political, social and economic debates. As Alicia Yamin has commented, "perhaps the greatest obstacle to advancing ESC rights—on both the external and internal level—is that there is a lack of consciousness about ESC rights as rights, and a concomitant lack of indignation at their systematic violation."<sup>44</sup>

Therefore more direct judicial enforcement is needed instead of hitching socio-economic entitlements on the backs of political and civil rights. Such an action would transform the 'target duties' into 'specific duties'. A programmatic model of socio-economic rights enforcement, which is elaborated by reference to the South African Constitution, may be incorporated in the Constitution. These 'target duties' coupled with aspects of the 'programmatic' model would require that socio-economic entitlements be considered in the process of policy making, local authority decisions and legislation. It would require public authorities to target available resources on groups of greatest socio-economic need. <sup>45</sup> Additionally the 'severity test', aided by the reasonableness approach, developed in relation to the right to life would be applied to these explicit socio-economic rights. Extreme rights-denial would convert the 'target duty' into a 'specific duty' that is enforceable by the individual affected by the breach of the right/duty. <sup>46</sup>

<sup>43</sup> Colm O'Cinneide, Bringing Socio-economic Rights Back into the Mainstream of Human Rights: The Case-law of the European Committee on Social Rights as an Example of Rigorous and Effective Rights Adjudication, 8; Available at SSRN: http://ssrn.com/abstract=1543127 (Accessed: November 20, 2011).

<sup>44</sup> A. E. Yamin, The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social, and Cultural Rights into the Mainstream Human Rights Agenda, 27(3) HUMAN RIGHTS QUARTERLY, 2005, pp. 1200-1244, at 1242.

<sup>45</sup> Asha P James, supra note 41, at 8.

<sup>46</sup> Alicia Ely Yamin, & Oscar Parra Vera, *The Role of Courts in Defining Health Policy: The Case of the Colombian Constitutional Court*, HARVARD WORKING PAPER SERIES, Available Online: http://www.law.harvard.edu/programs/hrp/documents/Yamin\_Parra working\_paper.pdf (Accessed: October 15, 2011).

## 5. Promoting 'Principles' to 'Rights': The South African Model

In spite of their indirect enforcement by the Supreme Court, there is a dire need to elevate the status of basic necessities of life from mere aspirational goals to concrete fundamental rights. To this end, assistance may be drawn from the South African Constitution which is groundbreaking in entrenching protection of socio-economic rights under the umbrella of judicial review.<sup>47</sup> The language applied therein crystallizes the normative content of the otherwise 'vague' socio-economic rights.

The Constitution of Bangladesh nowhere acknowledges any 'right' to any social security benefits. She is full of promises having fine literary value. In terms of placing legal burden or enforceable duties upon the State, Articles 15-19 of the Constitution remain completely nugatory. The whole socio-economic rights talk, on the excuse of resource constraint, dwells on a charity-based approach. The language applied in Article 15 of the Constitution, for example, delineates the content of the basic necessities of life as charitable largess. It is accepted to be a 'fundamental responsibility' of the State 'to attain', through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens the provision of the basic necessities of life, including food, clothing, shelter, education and medical care, etc.' Article 16 – 19 also are full of vague terms hardly specifying any concrete right holder or duty bearer.

Conversely, while not brushing aside the same resource constraints, the South African Constitution has adopted a 'Rights Based Approach' to socio-economic rights. The Bill of Rights enshrined in Chapter 2 of the South African Constitution (Act 108 of 1996) protects three categories of socio-economic rights: rights with internal limitations, rights without internal limitations and negative rights.

The *first category* of rights includes the right of all persons to have access to adequate housing, <sup>48</sup> health care services, including reproductive health care, sufficient food and water and social security, including appropriate social assistance if they are unable to support themselves and their dependents. <sup>49</sup> All these rights are all subject to

<sup>47</sup> Mark Tushnet, Enforcing Socio-Economic Rights Lessons from South Africa, 6:3 ESR REVIEW. 3-4 (2005).

<sup>48</sup> S.A. CONST. § 26.

<sup>49</sup> Id. § 27.

an internal limitation by which the state is required to take reasonable legislative and other measures, within its available resources, to achieve their progressive realization.<sup>50</sup>

The *second category* of rights includes children's rights to basic nutrition, shelter, basic health care services and social services.<sup>51</sup> It also includes the right of all persons to basic education including adult education<sup>52</sup> and the rights of detained persons to adequate accommodation, nutrition, reading materials and medical treatment.<sup>53</sup> Their realization is immediate and not subject to reasonable legislative and other measures within the state's available resources.

The *third category*, the negative rights, prescribes a number of prohibitions which include prohibition of refusal of emergency medical treatment to anyone,<sup>54</sup> eviction from or demolition of home without an order of court and permissive legislation.<sup>55</sup>

The South African mode of linguistic formulation dispels the much feared vagueness, separation of power and institutional suitability concerns. The rights in the second and third category are not any less concrete than any of the civil and political rights enshrined in the fundamental rights part of our constitution. Had we adopted the formula, only the first category of rights may pose some, if any, 'problems'. However, the next part of my article endeavours to demonstrate why there is still little cause for worry.<sup>56</sup>

# 6. Developing Remedies for Violation of 'Fundamental' Socio-Economic Rights

To deal pragmatically with the perceived problems of polycentric decision making, the courts usually give some creative remedies such as damages, declaratory orders (prohibitive or mandatory) and structural interdicts.<sup>57</sup> The appropriateness of such remedies, alone

<sup>50</sup> Id. § 26(2) & 27(2).

<sup>51</sup> Id. § 28(1)(c).

<sup>52</sup> Id. § 29(1).

<sup>53</sup> Id. § 35(2)(e).

<sup>54</sup> Id. § 27(3).

<sup>55</sup> Id. § 26(3).

<sup>56</sup> Tara Usher, *Adjudication of Socio Economic Rights: One Size Does Not Fit All*, UCL HUMAN RIGHTS REVIEW, vol. 1, no. 1, 2008 pp. 154-171, p. 166, Online at <a href="http://www.uclshrp.com/review">http://www.uclshrp.com/review</a>, (Accessed: October 25, 2011).

<sup>57</sup> Marius Pieterse, Coming to terms with Judicial Enforcement of Socio-Economic Rights, 20 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS, 383 -417, 385 (2004).

and in combination, depends on a range of contextual factors discussed below:

#### 6.1. Damages

In socio-economic rights cases, damages present themselves as an attractive remedy. Though the damages awarded to an individual may deprive the state of resources that could have been used to provide services for the general good of society as a whole, damages serve the ends of distributive justice as well.<sup>58</sup> In most cases it appears to be the most appropriate remedy due to poverty, disability or the disadvantaged socio-economic position of the victim.<sup>59</sup> The High Court Division of the Supreme Court of Bangladesh has already developed a practice of giving palliative remedy of damages in its Special Original Writ Jurisdiction to try fundamental rights cases. The court's extraordinary and inherent jurisdiction to pass any order as it deems fit and proper<sup>60</sup> has duly empowered it to award costs of the case as well as monetary compensation considering the facts and circumstances in each case. 61 The assertion of the Court's power to do complete justice by giving appropriate, just and equitable relief has been so emphatic that there have even been cases in which entities not parties to the original suit have been required to personally disburse damages to the victim.<sup>62</sup> Hence, the grant of damages will not amount to the invention of a remedy for socio-economic rights cases.

## 6.2. Declaratory Relief

Declaratory relief presents itself as appropriate when the government is committed to the rule of law and thus respectfully complies with the court order. Here the court simply declares that the

<sup>58</sup> In Modderklip Boerdery (Pty) Ltd and Others v President of RSA and Another, 2005 8 BCLR 786 (CC) eviction of illegal occupants of a private property posed a complicated scenario. The occupant's right not to be evicted without alternative settlement and the plaintiff's right to hold and acquire property were in direct conflict. The Court adjudged the conflicting claims by awarding damages in favor of the plaintiff. The distributive effect of the judgment lies in the fact that both the plaintiff's right to property and the occupant's right against eviction without resettlement were upheld at the same time. The State on the other hand benefited from not having to provide alternative accommodation instantaneously. MBAZIRA, *supra* note 11, at 160.

<sup>59</sup> MC Mehta and another v. Union of India and Others AIR, 1987 SC 1086.

<sup>60</sup> BAN. CONST. Art. 104.

<sup>61</sup> Bilkis Akter Hossain v. Bangladesh and Others, 17 BLD (1997) 395 at p. 407.

<sup>62</sup> Shah Azhar Uddin Ahmed v. Government of Bangladesh, 33 DLR 171; Here the Court *suo moto* proceeded to require a delinquent Minister who was not party to the original suit and against whom no remedy was claimed pay damages out of his personal account.

state has defaulted in discharging its constitutional obligation. Its strength lies in its deferential nature which gives the state the latitude to choose the most appropriate way of undoing a constitutional violation.

In Ain O Shalish Kendra & ors v. Government of Bangladesh,<sup>63</sup> the petitioner argued that wholesale eviction of slum dwellers without prior notice and alternative rehabilitation was violative of their fundamental right to life which included the right to a livelihood.<sup>64</sup> The court, even with due acknowledgment of the the poverty alleviation schemes claimed to be undertaken by the government, declared eviction in any circumstance without alternative settlement illegal.<sup>65</sup> The immediate result of the order was that the eviction process was stopped.

However, on the face of executive recalcitrance, mere declaration of state delinquency may be ineffective and the courts may need to explore the appropriateness of other remedies. For instance, the *Upazila Parishad* case<sup>66</sup> concerned a challenge to an Ordinance which abolished the elected *Upazila Parishads* (the third tier of the local government) and vested all rights, powers, authorities and privileges of the dissolved *Upazilla Parishads* in the government. The Court declared any sort of local governance by non-elected actors to be inconsistent with the constitution. The court opined that the government 'should' replace the non-elected persons by election 'as soon as possible – in any case within a period not exceeding six months from date.'<sup>67</sup> Unfortunately this was not paid heed to by the State and was ultimately forgotten. The case evidences the colossal failure of a mere directory declaration in absence of a mandatory order. This leads us to explore other remedies like interdicts.

## 6.3. Mandatory Interdict

Where there is evidence of likely non-compliance, it would be appropriate for the court to render a mandatory interdict. The nature of a mandatory interdict may be examined in light of *Campaign for Fiscal Equity* case<sup>68</sup> where the plaintiffs challenged New York State's

<sup>63 4</sup> MLR (HC) 358.

<sup>64</sup> Id., para 4.

<sup>65</sup> Id., para 17.

<sup>66</sup> Kudrat-E-Elahi Panir and Others v. Bangladesh, 44 DLR (AD) 319.

<sup>67</sup> Id., para 41

<sup>68</sup> Campaign for Fiscal Equity v. State of New York, 36 719 N.Y.S.2d 475.

funding of New York City's public schools. In January 2001, Justice Leland DeGrasse of the State Supreme Court of New York in his decision, found that the defendants' method of funding education in New York violated the Education Article of the New York Constitution because it fell below the *constitutional floor* set by that article. He did not prescribe a detailed remedy at that point; instead, he ordered the State Legislature and Governor to devise and implement necessary reform of the State's public school financing system. The State failed to devise and implement necessary reform and, on 14 February 2005, Leland DeGrasse J proposed his own solution after receiving a report from a panel of special referees. He ordered that an additional US\$ 5.6 billion in annual operating expenses be provided within four years to ensure that the city's public school children will be given the opportunity to obtain the sound basic education. DeGrasse J's decision was subsequently upheld by the Court of Appeal.<sup>69</sup>

Such examples of judicial assertiveness in issuing directives to the legislature and the executive are not unknown in Bangladesh. In Fire Accidents in Garment Industries case, 70 the petitioner prayed for appropriate directions to address the frequent fire incidents in various garments factories claiming lives of hundreds of garments workers. The Court found negligence on the part of the authorities concerned including the owners of garments factories and ordered the formation of a National Committee comprising various Ministries and representatives of garments factory owners and workers. Quite interestingly BGMEA, the organization of the owners of garments factories, was ordered to fund the office and the necessary staff, including a full-time secretary of the committee.

It is not only private organizations or individuals against whom the court issues mandatory directions. The State itself may be subject to such mandatory directions. In the *Two Stroke Motor Vehicle* case<sup>71</sup> the petitioner sought to reduce environmental hazards from the smoke of motor vehicles and audible signaling giving unduly harsh, shrill, loud and alarming noise endangering the people's right to live in a

<sup>69</sup> Campaign for Fiscal Equity v. State of New York 100 N.Y. 2d 893.

<sup>70</sup> Salma Sobhan, Executive Director, Ain o Salish Kendra (ASK) v. Government of Bangladesh and others, W/P No. 6070/1997; Judgment delivered on 31 May, 2001 (Unreported). A short description of the judgment is available in Tanim Hossain Shawon, Role of the Judiciary in Ensuring Rule of Law and Justice in HUMAN RIGHTS IN BANGLADESH 2001, 45 (ASK, 2002).

<sup>71</sup> Dr. Mohiuddin Farooquee v. Bangladesh, 55 DLR (2003) 613.

healthy environment. Considering the scale of environmental pollution, the Court found *ad interim* directions necessary. Accordingly it ordered the government to - enforce the laws relating to control of hydraulic horns, conduct tests of vehicles and convert all government vehicles into CNG operated ones within six months and establish more CNG stations, phase out exiting two stroke wheelers and replace them by alternative transport within December 2002. Quite interestingly the writ petition was kept pending for the purpose of monitoring<sup>72</sup> and the respondents were asked to submit report of actions and results once every six months.<sup>73</sup> This seems clearly to be something more than the judicial role as understood in its traditional sense.

#### 6.4. Prohibitory Interdict

Prohibitory interdict is most appropriate as a remedy for infringements of negative obligations shown in the third category of the South African Model. It is utilized to prohibit either the government, or any other person, from actively depriving the applicants and similarly situated people of their existing socio-economic rights. It is also very effective in preventing future infringements where the plaintiff shows a likelihood of violating protected rights. In this sense it becomes a preventive interdict. The High Court Division of Bangladesh has already taken the stance that the declaration that the directives are 'not enforceable by any court' only means that the state cannot be legally mandated to carry them out. However, this lack of legal enforceability does not imply that the directive can be thrown to the winds, by the enactment of laws in open opposition to them. The former cannot be objected to, but the latter cannot be permitted.<sup>74</sup> So the tendency to issue at least a writ of prohibition in non-justiciable socio-economic rights claims is an already known remedy.75 Supplying justiciability to the right to basic necessities of life will simply bolster the tendency.

#### 6.5. Structural Interdicts

Remedies such as declaratory orders, prohibitory or mandatory interdicts and damages are inappropriate to remedy 'systemic failures or the inadequate compliance with constitutional obligations' arising

<sup>72</sup> Id., para 14.

<sup>73</sup> Id., para 15.

<sup>74</sup> Ahsan Ullah and Others v. Bangladesh, 44 DLR 179 para 68s.

<sup>75</sup> BLAST v. Bangladesh, 13 BLC (2008) 384 para 14.

especially out of institutional or organizational behavior.<sup>76</sup> Adequate response to systematic failures of institutional actors requires something more than deterrence or compensation. To this end structural interdicts warrant special attention. Here the court disregards the traditional *functus officio* doctrine which stipulates that the end of the litigation signals the end of the dialogue between the Court and the parties. Instead, retention of jurisdiction over the case propels the government to act more cautiously because of the knowledge that any wayward conduct would easily be brought to the attention of the Court and might also spark the electorate frenzy. The Court arrives at more specific and detailed directions on the basis of the evidence brought to it by parties and by the attitude of the government.<sup>77</sup>

Monitoring compliance with its order by keeping a suit pending is not uncommon in Bangladesh. Bangladeshi courts have done it with great success by a device known as continuing mandamus.78 Some examples will clarify the wrangle the Court had to fight to enforce its continuing mandamus. In the Separation of Judiciary case<sup>79</sup> around 441 judicial officers of Bangladesh sought separation of Subordinate Judiciary from the Executive as per Article 22 of the Constitution which happens within Part II Principles. They prayed for a mandamus on the government to frame necessary Rules facilitating the separation. The High Court Division upheld the contention and ordered framing of rules. The government preferred an appeal. The Appellate Division meticulously examined various provisions of the Constitution and issued a number of directions to achieve the desired separation,80 including, inter alia, the framing of Rules, creation of a separate Judicial Service Commission and a separate Judicial Pay Commission and the maintenance of financial independence of the Supreme Court from the executive. 81 It was in May 1997 that the High Court Division issued the directives to be implemented within eight weeks. The decision was upheld by the Appellate Division in November 2000 and reconfirmed upon review in June 2001.82 The government's reluctance

<sup>76</sup> Grootboom v Ostenberg Municipality and Others, 2000 3 BCLR 277.

<sup>77</sup> Sibiya and Others v DPP, Johannesburg High Court and Others [2006] ZACC 22.

<sup>78</sup> Maj. Gen (Rtd) K M Shafiullah v. Bangladesh, W.P 4313/2009 (HCD) 340; (Dec. 25, 2010) http://supremecourt.gov.bd/judgement/WRIT%20PETITION%20NO.%204313 %20OF%202009.pdf.

<sup>79</sup> Masder Hossain v. Secretary, Ministry of Finance, 18 BLD 558.

<sup>80</sup> Secretary, Ministry of Finance v. Masdar Hossain, 52 DLR(AD) 82.

<sup>81</sup> Id para 49

<sup>82</sup> M Rafiqul Islam, Apex Court Ruling on Separation of Judiciary: A Case of Enforcer Becoming Violator, THE DAILY STAR, LAW & OUR RIGHTS, October 7, 2006.

to separate the judiciary was evidently noticed from the very beginning Three successive governments sought and were granted as many as 22 time extensions over a period of 8 years. Finally another Caretaker Government coming to office made necessary arrangements and the lower judiciary was separated from the clutches of the executive on 1st November, 2007.

This is a classic example of relentless court involvement resulting in fruition of the court's ordered directives. It is evidence of the fact that where the government fails to act in a timely manner in the face of a structural interdict, the Court is prepared to continue to engage the government until full compliance is obtained. If a structural interdict can buy independence for the judiciary, it can also ensure socio-economic rights for the people.

#### 6.6. Various Models of Structural Interdicts

Courts have adopted different models of structural interdict in different cases. The most commonly used models of structural interdicts, as suggested by Susan P Sturm, include the *bargaining or consensual remedial formulation model*, the *legislative or administrative hearing model*, the *expert remedial formulation model* and the *report-back-to-court model*.<sup>83</sup>

# 6.6.1. Bargaining or Consensual Remedial Formulation Model

The bargaining model involves making remedial decisions through negotiation by the parties involved in the case. The biggest advantage of this model is that it produces a remedy that is acceptable to all the parties, thereby easing its implementation. An independent third party may be appointed to help the parties reach consensual agreement on the remedy. If the parties fail to agree, or if the agreement reached fails to conform to the requirements of the substantive law in issue, the judge may intervene and fashion the remedy.

In Bangladesh, the Code of Civil Procedure (Amendment) Act  $2003^{84}$  and a large number of other statutes  $^{85}$  incorporate the

<sup>83</sup> Susan P Sturm, A Normative Theory of Public Law Remedies, (1991) 79 GEORGE TOWN LAW JOURNAL, 1368-1375; Available Online http://www.changecenter.org/research-publications/sturm-publications/A%20Normative %20Theory% 20of%20Public%20 Law%20Remedies.pdf/at\_download/file (Accessed: October 18, 2011).

<sup>84 §§ 89</sup>A, 89B & 89C, THE CODE OF CIVIL PROCEDURE, 1908

<sup>85</sup> The Bank Companies Act 1991, The Acquisition and Requisition of Immovable Property Ordinance 1982, The Family Courts Ordinance 1985, The Muslim Family Laws Ordinance 1961, The Industrial Relations Ordinance 1969 and The Cooperative Societies Rules

bargaining or consensual remedial formulation model in civil, family, industrial, financial and labour matters. This type of mediation, negotiation and conciliation may be undertaken at any stage – trial or appellate – of a suit. Regarding the Supreme Court's opportunity to use such devices, it is boldly asserted that the Special Original Writ Jurisdiction being an extra-ordinary one, the High Court Division has got extra ordinary and inherent jurisdiction to pass any order as it deems fit and proper. Again, considering the widest possible latitude of discretion allowed to the High Court Division in regulating its own procedure, there is no reason why the Court would hesitate to adopt a bargaining or consensual model if if the facts and circumstances of the case merit it.

## 6.6.2. Legislative or Administrative Hearing Model

The legislative or administrative hearing model resembles a legislative committee process providing for public hearings and direct informal participation by interested parties. This model allows persons not originally party to the litigation to participate in the formulation of the remedy. The informal nature of the process also makes accessibility much easier especially for the weak and vulnerable. In Bangladesh as well, the courts frequently permit voluntary organizations to place their findings and reports before it and take into account their suggestions and recommendations while formulating its decision. The Court sometimes welcomes the opinions of the experts and asks for their suggestions.86 In the Post Divorce Maintenance case, 87 for instance, given the Islamic importance of the question involved, almost 18 individuals and NGOs were allowed as interveners. Individuals included some renowned lawyers, two Professors from the University of Dhaka and even an ordinary housewife, while the Khatib (Chief Imam) of the National Mosque and Editor of a renowned Islamic monthly were invited as amicus curie. The court specially relied on the opinion of the Khatib of the National Mosque in formulating its decision.

<sup>2004</sup> etc are a few of the many statutes empowering the court to render a bargaining or consensual model of structural interdict.

<sup>86</sup> Naim Ahmed, PUBLIC INTEREST LITIGATION IN BANGLADESH CONSTITUTIONAL ISSUES AND REMEDIES, 151 (BLAST, 1999)

<sup>87</sup> Hefzur Rahman v. Shasun Nahar Begum and Another, 51 DLR (AD)(1999) 172.

## 6.6.3. Expert Remedial Formulation Model

The expert remedial formulation model involves the appointment of either an individual expert or a panel of experts with a mandate to develop a remedial plan. The court-appointed experts in structural litigation differ from those we usually see in fundamental rights cases.

In Bangladesh the Code of Civil Procedure 1908 allows commissions to be formed for the purpose of examining witnesses, making local investigations, examining accounts and making partitions. However, this list is not exhaustive and does not limit the inherent power of the High Court Division to appoint commissioners in a writ petition for the ends of justice. The petitioner in a constitutional rights case may not be able to produce enough evidence in support of his case. When impartial assessment of facts is needed swiftly, the official machinery of the state becomes unreliable, inefficient and probably biased. Again, reporting in most cases has to be done against the state machinery and given that the court possesses no investigative machinery of its own, must take resort to a commission of experts lest the disadvantaged sections of the community have their petitions rejected and fundamental rights continue to be violated.<sup>88</sup>

## 6.6.4. Report-back-to-court Model

This is the most commonly-used model implemented by requiring the defendant to report back to the court with a plan on how he intends to remedy the violation. Usually a fixed date is set for the filing of the plan and the other party is given an opportunity to comment. It is only when the court is satisfied with the plan that it will concretize and incorporate it as part of its decree. In fact, the court reserves the right to reject the plan if it is found to be inadequate.

The *S v. Zuba*<sup>89</sup> case arose from the absence of juvenile reform schools in the Eastern Cape. The Court ordered the Department of Education to file a report disclosing its short, medium and long term plans for the incarceration of juvenile offenders. It was also ordered that a task team, to work on the establishment of a reform school, be identified and its reports be submitted on a regular basis to the inspecting judge as regards progress until the school is established.

<sup>88</sup> SK Agarwala, PUBLIC INTEREST LITIGATION IN INDIA: A CRITIQUE, 26 (Tripathi & Indian Law Institute, 1985).

<sup>89 (2004) 4</sup> BCLR 410 (E).

The Bangladeshi brand of Report-back-to-court Model is a little more intrusive than the one discussed above. The instances we have in Bangladesh shows that here the Court itself has defined the plan of action, requiring the government to report back on the progress of implementation. Though the Bangladeshi judgments exhibit a slight variance in the use of the report-back-to-court model, these are nonetheless persuasive in the sense that seeking reports on the government's efforts towards fashioning appropriate remedies is less intrusive than seeking reports on the degree of compliance with court formulated remedies. In Faustina Perera v. State90 a suo moto rule was issued on the basis of a letter written by Dr. Faustina Perera. There attention of the Chief Justice was drawn to the fact that 29 foreigners were languishing in different jails of Bangladesh for about five years even after serving out their sentence. The regional representative of International Organization for Migration was invited to share his experience. The realistic problem regarding the release of the prisoners is that if they are immediately released they will be unable to produce the necessary documents. Most importantly there are no shelter centres in Bangladesh to give necessary protection to them. The Court ordered the Government to increase its engagement with International Organizations working with migrants and to establish a separate cell in the Ministry of Foreign Affairs to deal with foreign prisoners. 91 The Jail Authority was ordered to facilitate their release and make necessary arrangement for their safety and shelter at best within 2 months. The Superintended of Central Jail was to report the Court within 3 months about the release of the 29 prisoners. The IG Prison was to report within 7 days with full particulars of the remaining 822 foreign prisoners across the country and of the steps taken regarding their release.92

In the *Environment Pollution Case*<sup>93</sup> Dr. Farooque sought a writ of *mandamus* upon 1176 industries to enforce their duties under the Environment Pollution Control Ordinance 1977 and the Bangladesh Environment Conservation Act 1995. Quoting Krishna Iyer J. with approval the Court asserted that it would not 'sit idly by and allow the government to become a statutory mockery'. The Director General Directorate of Environment was ordered to classify 'red'

<sup>90 53</sup> DLR 414.

<sup>91</sup> Id., para 10.

<sup>92</sup> *Id.*, para 11.

<sup>93</sup> Dr. Mohiuddin Farooque (BELA) v. Bangladesh, 55 DLR (HCD) 69.

<sup>94</sup> Id., para 56.

industries and adopt sufficient control mechanisms within one year and report compliance within six weeks thereafter. Some factories and industries were ordered to take measures within 2 years and report to the court soon thereafter. The petitioner was ensured the liberty to bring further violations of law to the Court and to approach the Court for directions wherever necessary.

Very recently in the *Pure Food Case*<sup>97</sup> the High Court Division directed the government to set up a food court in every district and to appoint sufficient food analysts and food inspectors in all districts within one year in order to prevent food adulteration. It observed that necessary rules and regulations should be framed in order to ensure safety, purity and proper nutrition values of foods. The court also directed the government to inform the court by July 1, 2010, about its progress in complying with the directions.

## 7. Is Bangladesh Ready to Take the Burden?

As to the question whether Bangladesh is ready yet for the dramatic regime change I propose in here in this paper, the my foremost response is already an argument that is oft repeated. This is to view the poor implementation of socio-economic rights as a problem of 'governance' and not of 'resources'. This proposition may be exemplified by the simple question: is the unavailability of food the defining reason for famine? The classic example of 1974 famine acts as an eye opener. The availability of food produce was much greater in 1974 than in any preceding year between 1971 and 1976. Yet Bangladesh suffered a famine. All four of the famine districts were among the top five in terms of food availability per head. This evidences the proposition that the availability of food is not the problem so much as access to food to the marginalized.98 Considering these rights as contingent on economic development results in the suppression of economic and social rights in the wait for its realization. The pain in the present is guaranteed; the gain in the future is speculative and illusory. Few worlds freely opt for such a bargain.99

<sup>95</sup> Id., para 59.

<sup>96</sup> Id., para 61.

<sup>97</sup> Human Rights and Peace for Bangladesh v. Bangladesh, (W/P No 324/20090), 30 BLD (HCD) 125.

<sup>98</sup> R. Kunnemann, *The Right To Food: The Twelve Misconceptions* in HUMAN RIGHTS SUMMER SCHOOL MANUAL (Mizanur Rahman, ed.) 2001) 129-144, 131.

<sup>99</sup> David Beetham, *Democracy and Human Rights: Civil, Political, Economic, Social and Cultural* in HUMAN RIGHTS AND EMPOWERMENT (Mizanur Mizanur ed., 2002) 19-39, 30.

Secondly, it may emphatically be asked whether the doubt in the minds of the founding father regarding the economic strength of the newly independent Bangladesh remains valid even today. Is Bangladesh not ready to take at least a 'minimum' 'reasonable' burden of socioeconomic rights? In fact, the economy of Bangladesh has come a long way since 1971. The most basic achievement relates to economic growth, which is a necessary pre-condition for achieving progressive realisation of rights as expeditiously as possible. Bangladesh's rate of growth is not spectacularly high, especially in comparison with the rates achieved by the high-performing countries of East and South-East Asia. From an average of 1.7 per cent in the 1980s, the growth of per capita income jumped to 3.0 per cent in the 1990s and jumped again to 4.4 per cent in the 2000s. Since 2005, per capita income has been growing at more than 5 per cent per annum, representing a three-fold increase compared to the 1980s. The end result of all this is that the current generation of Bangladeshis is almost exactly twice as rich as was the preceding one. 100

Thirdly, the basic problems in the welfare management of Bangladesh lie not in the availability of welfare benefits, rather it is predominantly in the accessibility of those benefits for the poor. Take the Right to Food, for example. For much of the period in the first two decades after independence, overall food grain availability just about kept pace with population growth, so that per capita availability has remained virtually stagnant. 101 However, a large share of budgeted resources appears not to reach the intended beneficiaries, indicating serious accountability problems. As per the World Bank estimation of 2003, as much as 35 per cent of the food grains allocated to the VGF (Vulnerable Group Feeding), 41 per cent of the VGD (Vulnerable Group Development), and an overwhelming 75 per cent of allocations to the FFE (Food-for-Education) did not reach any household-eligible or otherwise. Diversion of resources at such a massive scale detracts from the success the government can otherwise claim in fulfilling its duty "to provide" by pursuing a pro-poor public food distribution system. 102

Fourthly, in Bangladesh specially, what we need to emphasise on is spending capability of the government which is the basic

<sup>100</sup> SR Osmani, Realizing the Right to Development in Bangladesh: Progress and Challenges, THE BANGLADESH DEVELOPMENT STUDIES Vol. XXXIII, March-June 2010, Nos. 1 & 2, 25- 90, 35-37.

<sup>101</sup> SR Osmani supra note 99, 45- 46.

<sup>102</sup> Id., 52

challenge. The National Budget for the financial year 2009-10 allocated a total of Tk.7,561.41 crore for social sector development, which is about 19 per cent higher than the allocation for the financial year 2008-09 (Tk. 6,346.96 crore). However, ADP utilisation statistics for this sector over the first five months of the financial year 2009-10 (July November 2009) paints a rather gloomy picture (29% total expenditure as percentage of ADP allocation) when compared to the financial year 2008-09 when 87 per cent of the budgeted allocation was spent. The poor implementation scenario is evident in the health sector as well. Although the National Budget for the financial year 2009-10 allocated Tk.70 crore for the purpose, only about 26% has so far been utilised till November 2009. The financial year 2009. The purpose of the

Lastly, while judging the 'fundamental right to basic necessities of life', the Court will concern itself, as already shown, more with questioning the reasonableness of the already allocated resources rather than requiring excess resources to be allocated. What the Court ought to try to uphold, in particular, in the process of progressive realization include the following propositions. First, the State must begin immediately to take steps to fulfill the rights as expeditiously as possible by developing and implementing a time-bound plan of action. The plan must spell out, *inter alia*, when and how the State hopes to arrive at the full realization of rights. Second, the plan must include a series of intermediate— preferably annual—targets. These intermediate targets will serve as benchmark, against which the success or failure of the State will be judged. <sup>105</sup>

## 8. Concluding Remarks

On reading this article, a legitimate question may arise regarding the appropriateness of the Bangladeshi decisions cited herein, given that all of the decisions are not related to claims of socio-economic rights. One may thus question the assumption that these judgments shall be 'appropriate' precedent for the enforcement of the potention'fundamental right to basic necessities of life'? My response to this is simple. The central attempt of this paper is to dispel the

<sup>103</sup> Independent Review of Bangladesh's Development (IRBD), State of the Bangladesh Economy in FY2009-10: From Stability to Accelerated Growth, CENTRE FOR POLICY DIALOGUE (CPD), Dhaka, 11 January 2010; 69 Available:www.cpd.org.bd/downloads/ IRBD\_FY10\_1stInterim.pdf, (Accessed: October 22, 2011).
104 Id., 70-71.

<sup>105</sup> SR Osmani, supra note 99, 35.

dogmatic perception of socio-economic rights by demonstrating that the court is 'institutionally capable' of dealing with resource issues in the attempt to realize the fundamental right to basic necessities and that the principle of 'separation of powers' does not pose a hindrance to the court in doing so. If the courts can deal with resources and engage in tussles with the executive in civil-political rights cases, then there is little to prevent them from exploring the path to enforcing the claim to basic necessities. Therefore, it is my submission that socio-economic rights that comprise the basic necessities of life ought to be recognized as constitutionally protected fundamental rights in Bangladesh.

# Indian Medical Association v. Union of India<sup>1</sup>: The Tablet of Aspir(in)ation

Karishma D Dodeja\*

"Where will this stop? How will this nation take the burden of such walled and divided portals of knowledge?"<sup>2</sup>

This comment seeks to examine the controversy surrounding reservations in private educational institutions post the decision in Indian Medical Association v. Union of India, in light of the freedom to carry on any occupation and the constitutional guarantee of Article 15(5). As the former has been inadequately addressed by the Court, this comment delves into the availability of Article 19(1)(g) to juristic persons vis-à-vis the elevated status of Article 15(5) as a Fundamental Right and as part of the Basic Structure.

#### THE DECISION

The Army Welfare Education Society (AWES) established the Army College of Medical Sciences (ACMS) in order to admit wards of army personnel (WOAP), disadvantaged due to their lack of access to education and economic hardship. Regimental funds<sup>3</sup> were utilised for its functioning; land for the college and access to the Army Hospital was provided by the Ministry of Defence. ACMS claimed exemption from the application of the reservation policy mandated under the Delhi Act<sup>4</sup> on the basis of a notification by the Government worded in favour of the Army.

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<sup>1 2011 (6)</sup> SCALE 86. [IMA]

<sup>2</sup> IMA ¶ 67

<sup>3</sup> Regimental funds are not public funds, Union of India v. Chotelal, (1999) 1 SCC 554  $\P$  6.

<sup>4</sup> The Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and other Measures to Ensure Equity and Excellence) Act, 2007.

The Court examines two preliminary issues, first, whether ACMS is an instrumentality of the State or an aided institution and second, whether the exemptions granted by the Delhi Government are valid. The Court declined over-ruling the negative finding of the High Court on the first issue. The second issue was also answered in the negative as the power to claim exemption was not statutorily provided.

On the substantial question of whether ACMS can admit only WOAP, the Court distinguished between the regulation of minority and non-minority educational institutions in light of *P.A.Inamdar* v. *State of Maharashtra*<sup>5</sup>, the difference between Article 19(1)(g) and Article 30 and noted the State's power to determine backward classes under Article 340.. The Court clarified that minority institutions do not determine their source for the intake of students; hence this right to choose a source cannot be made available to non-minority unaided institutions and that this proposition would lead to the "gated communities". It thus held that, ACMS can choose only from the general pool of candidates and cannot have 100% reservation for WOAP.<sup>6</sup>

The second issue addressed by the Court deals with the constitutional validity of Article 15(5) in light of Dalveer Bhandari J.'s opinion in *Ashok Kumar Thakur* v. *Union of India*<sup>7</sup> in which the majority had left the question regarding private unaided institutions unanswered. Expounding on the Basic Structure doctrine, the Court provides the much needed clarification to the ratio in *I.R.Coelho* v. *State of Tamil Nadu.*<sup>8</sup> Applying the 'essence of the rights' test of *M. Nagaraj* v. *Union of India*<sup>9</sup> the Court holds that since the essence of the freedom of occupation is not infringed, Article 15(5) is valid. The Court further cites the repercussions of the LPG regime, highlights the Egalitarian Code and the importance of fair opportunity in education to all.

<sup>5 (2004) 8</sup> SCC 139. [P.A.Inamdar]

<sup>6</sup> Similar observations in *Army Institute of Higher Education* v. *State of Punjab*, MANU/PH/ 0380/2007 though the Court doesn't make any mention of the same.

<sup>7 (2008) 6</sup> SCC 1. [Ashok Kumar Thakur]

<sup>8 (2007) 2</sup> SCC 1. [I.R.Coelho]

<sup>9 (2006) 8</sup> SCC 202. [Nagaraj]

## CRITIQUE OF THE JUDGMENT

My critique shall not be confined to a re-examination of the above mentioned issues but shall be to analyse three particular aspects of the judgement from a different perspective, while, nevertheless, agreeing with the decision of the Court. This shall be done, first, by questioning the fundamental assumption of the availability of Article 19(1)(g) to juristic persons; second, by expounding on the present status of Article 15(5) in context of the broader constitutional scheme and third, by examining the effect of enforcing such a provision, a potential ramification of the judgment.

## FOUNDATIONAL INCONSISTENCIES: ARTICLE 19(1)(G) V. THE LAW OF CITIZENSHIP

The Army Welfare Education Organisation (AWEO) was registered as AWES under the Societies Registration Act, 1860 on April 29, 1983 as a purely non-profit welfare organisation, 10 which the Court believes to be a trust. The fundamental right under Article 19(1)(g) to practice any profession or to carry on any occupation, trade or business is available only to citizens thus exempting juristic persons, in this case, societies registered under the Societies Registration Act, 1860.11 If, as recognised by T.M.A.Pai v. State of Karnataka<sup>12</sup>, the right to establish and administer educational institutions is located within the freedom to carry on any occupation, it is pertinent to note that, first, the requirement of establishing / administering educational institutions by a society was laid down in 199313 (wherein the Court left the question of education as occupation unanswered) and second, the Court in 2002 found it difficult to hold that 'education' was outside the ambit of the four expressions in Article 19(1)(g) and hence deemed occupation to be the most feasible and applicable expression (as they had to locate the right to establish/administer educational institutions somewhere in the Constitution and Part III).

<sup>10</sup> Brief History, Aims and Objectives of Army Welfare Education Society (AWES), http://www.awes.nic.in/circulars/blue%20book.pdf, accessed August 2011.

<sup>11</sup> State Trading Corporation of India Ltd. v. Commercial Taxes Officer, [1964] 4 SCR 99 ¶ 9. Held inapplicable in R.C.Cooper v. Union of India, (1970) 1 SCC 248 ¶ 18 (upheld in Bennett Coleman & Co. v. Union of India, 1972 SCC (2) 788 ¶ 20-22; See also, Excel Wear v. Union of India, (1978) 4 SCC 224 ¶ 35.) in case of companies / corporations, held otherwise in State of Gujarat v. Shri Ambica Mills, (1974) 4 SCC 656 ¶ 25-26.

<sup>12 (2002) 8</sup> SCC 481 ¶ 243. (T.M.A.Pai)

<sup>13</sup> Unnikrishnan P.J. v. State of Andhra Pradesh, (1993) 1 SCC 645 ¶ 210. [Unnikrishnan]

A judgment of the High Court wherein it was held that BITS, Pilani registered under the Rajasthan Societies Registration Act, 1958 could not avail of Article 19(1)(g)14 may be of persuasive value, however, resort was then taken to Article 26. The guestion that arises then is whether Article 19(1)(g) be applied in cases where Article 26 is not applicable? This question can be answered keeping in mind first, that the availability of an Article 19(1)(g) right to juristic persons has never been conclusively answered by the Court<sup>15</sup> and second, that the circumstances that merit the lifting of corporate veil and the nature of rights that are available to such corporate bodies and their constituent individuals remain in a state of flux. A viable solution to the question will entail re-examination of the law since T.M.A.Pai and enquiry into the necessity of locating the right to establish / administer educational institutions in Part III, given that educational institutions are in any case governed and administered by their respective state acts and University Grants Commission (UGC) guidelines. Most importantly, the text of Article 15(5) specifically excludes the operation of Article 19(1)(g) even if availed of by a citizen.

Even assuming that Article 19(1)(g) is available, it is highly questionable, first, whether the truncation of one activity of many activities of one occupation of the many occupations infringes the right, second, its relative importance in the constitutional scheme visà-vis equality and freedom<sup>16</sup> and third, whether Article 15(5) can be brought within the reasonable restrictions in Article 19(6). Further, if the theory of inter-relationship of rights was to be applied; Article 21 was to be considered a repository of the above mentioned right as part of the larger scheme of life and personal liberty; first, the debate centres around the availability of the right to juristic persons and not to citizens / non-citizens, second, taking into account the wide interpretation of Article 21, it is capable of being applied in almost every single factual matrix which remotely deals with life and personal liberty and third, on a holistic appraisal of judicial precedents, the

<sup>14</sup> The Coordinator, All India Engineering / Pharmacy / Architects Entrance Examination (AIEEE), Central Board of Secondary Education, New Delhi v. Union of India, RLW 2005 (3) Raj 1700 ¶ 44.

<sup>15</sup> Supra n. 11.

<sup>16</sup> R.K. Garg v. Union of India, AIR 1981 SC 2138. Article 31-A and Article 31C (in respect of laws made under Article 39(b) and (c)) excluded application of Articles 14 and 19, upheld in Waman Rao v. Union of India, (1981) 2 SCC 362 and Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625. See also, Mahendra P. Singh, Ashoka Thakur v. Union of India: A Divided Verdict on an Undivided Social Justice Measure, 1 NUJS L. Rev. (2008).

Supreme Court has brought education singularly within the ambit of Article 21<sup>17</sup>, not the right to establish / administer educational institutions.

#### "RESERVE" YOUR LOVE18

The social directive to promote educational and economic interests of the weaker sections of the society in particular Scheduled Castes and Scheduled Tribes<sup>19</sup> finds voice and enforceable status through Article 15(5). This incorporation of access to education as a "fundamental" right<sup>20</sup> is also in tandem with the understanding that the subject lies in the domain of the State - i.e. both the Centre and the State.<sup>21</sup> This is furthered by the fact that even private unaided educational institutions are required to apply for such recognition / affiliation from the State or the body empowered to do so in order to award degrees, grant certificates<sup>22</sup> and conduct examinations. In such cases, the institution is bound to comply with conditions as are necessary for the maintenance of the requisite standards of education; to accord fair and equal treatment in the matters of admission of students and in the matter of regulation of conditions of service of teachers due to the creation of an element of public interest, through the performance of a public function of imparting education or supplementing the effort of the State in educating people. As the central authority granting affiliation / recognition is subject to obligations arising from Articles 14 and 15, the same equally applies to bodies carrying out such supplemental activity. The State thus cannot grant immunity to such affiliates<sup>23</sup> especially when it is granting aid to the institution.24

<sup>17</sup> Miss. Mohini Jain v. State of Karnataka, (1992) 3 SCC 666 ¶ 12, 14, 17, Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 ¶ 14 brings in "educational facilities" within the ambit of Article 21 albeit in the context of Bonded Labour.

<sup>18</sup> Prakash Jha, "Aarakshan", http://aarakshanthefilm.com/, accessed August 2011.

<sup>19</sup> Constitution of India Art. 46.

<sup>20</sup> Mahendra P. Singh, The Statics and the Dynamics of the Fundamental Rights and the Directives Principles - A Human Rights Perspective, (2003) 5 SCC (Jour) 1.

<sup>21</sup> India Const. List III, Entry. 25.

<sup>22</sup> THE UNIVERSITY GRANTS COMMISSION ACT, 1956, § 22. In the present case, ACWS is affiliated to the Guru Gobind Singh Indraprastha University.

<sup>23</sup> Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717. See also, Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691.

<sup>24</sup> *T.M.A.Pai*, ¶ 71, 72. See also, *Ashok Kumar Thakur*, ¶ 63. *IMA*, ¶ 9. For an understanding of the term "aid", refer to the opinion in *Unnikrishnan*, ¶ 213. (Some parts of this judgment are quoted with approval in T.M.A.Pai though in not so many words, for instance, in relation to this proposition.)

Article 15(4) inserted by the Constitution (First Amendment) Act, 1951 enables the State to make any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. It is indubitable that access to education<sup>25</sup> is one, if not the most important aspect of advancement of an individual and society. While primary education is guaranteed through the Right to Education, 26 barriers restricting entry into the tertiary education sector - professional / technical education, identified as a prime-mover of the "second wave of nation building", 27 not only exclude the option to study in a particular institution but also give rise to "gated communities".28 Moreover, Article 16(4) was deemed to preserve a power untrammelled by the other provisions of the article<sup>29</sup> and as an illustration of a constitutionally sanctified classification.<sup>30</sup> If it was so regarded, the obvious corollary to this is that of carving out an exception for backward classes of citizens with the intelligible differentia being that of historical and political exclusion and underdevelopment in nexus with the objectives of the modern Indian State stipulated in the Preamble and the Directive Principles of State Policy. Article 15(4) can similarly be considered as an empowering provision and an exception<sup>31</sup>, a subset of which is Article 15(5),<sup>32</sup> unquestionably, both, being a part of the broader vision of Article 14.33 It is thus submitted that Article 15(5) can be seen an aspect or an exposition of Article 15(4), this mode of affirmative action varying considerably from the measures prevalent in the United States of America 34

<sup>25 &</sup>quot;The expression "education" in the articles of the Constitution means and includes education at all levels from the primary school level up to the postgraduate level. It includes professional education. The expression "educational institutions" means institutions that impart education, where "education" is as understood hereinabove." – *T.M.A.Pai*, B. N. Kirpal, C.J.I. (Majority view) ¶ 9.

<sup>26</sup> Constitution of India Art. 21A.

<sup>27</sup> Ashok Kumar Thakur, ¶ 48, 70.

<sup>28</sup> *IMA*, ¶ 67.

<sup>29</sup> T. Devadasan v. Union of India, (1964) 4 SCR 680 ¶ 35.

<sup>30</sup> State of Kerala v. N.M. Thomas, 1976 SCR (1) 906  $\P$  136.

<sup>31</sup> M.R.Balaji v. State of Mysore, AIR 1963 SC 649 ¶ 19.

<sup>32</sup> Observe the similar wording of Articles 15(4) and 15(5).

<sup>33</sup> Indra Sawhney v. Union of India, 1992 Supp (3) SCC 212 ¶ 640.

<sup>34</sup> Ashwini Deshpande, "Affirmative Action in India and the United States", Equity & Development World Development Report 2006 Background Papers, http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Affirmative\_Action\_India\_Ashwini.pdf, accessed August 2011.

## "STAT(E)" ING THE OBVIOUS

The consequence of rendering compliance with Article 15(5) or as a *sine qua non* leads to a situation where, in order to enforce the right, petitions have to be filed against the private institution (in conjunction with the State organ, in most cases) which leads to the anomalous situation of treating private bodies as State. The effect of the judgment today is the transcendence of Article 15(5) as an enabling provision to that which holds binding force, almost elevating its status to that of a Fundamental Right. This transcendence is significant given that there have been instances where the Court has granted relief to the aggrieved individual by enforcing Article 15(4)<sup>35</sup> though it has been observed (albeit by the High Court) that no person can claim any right of reservation in favour of a class or category.<sup>36</sup>

In the present context, a slew of cases have held that AWES and respective army colleges are not "State" within the meaning of Article 12.<sup>37</sup> It is to be noted that these judgments broadly deal with service matters of administration and employment, not admissions to educational institutions. Further, it is pertinent to note that writ petitions are maintained against private bodies including societies on the basis of Article 226 predominantly.<sup>38</sup> The proposition of enforceability of Fundamental Rights only against the State finds no explicit mention

38 The registered society Army Welfare Housing Organization Society was brought within the purview of Article 226 as it was performing a public function having a public character, Smt. Saroj Devi (Widow) v. Union of India, 156 (2009) DLT 429 ¶ 17-19. Allahabad High Court Judgment dated 16.5.2002 - Anoop Kumar Pande v. Union of India, held, the Air Force School, Allahabad, is State. Generally, Arun Narayan v. The State of Karnataka, AIR

1976 Kant 174.

<sup>35</sup> Dr. (Miss) Ritupurna Dash v. State of Orissa, AIR 2010 Ori 177, Dr. Kashyap Surendrabhai Naik v. Dr. D.N. Shah or his Successor Dean, Vadodara Medical College, (2002) 1 GLR 517, Shrivas Rajeshkumar Satyanarayana v. Chairman, Selection Committee, AIR 1987 Guj 4, Gurinder Pal Singh v. State of Punjab, AIR 1974 P&H 125.

<sup>36</sup> Atyant Pichra Barg Chhatra Sangh v. State of Jharkhand, 2003 (51) BLJR 941 ¶ 10.

<sup>37 &</sup>quot;Any institute which is being run by Army Welfare Educational Society (AWES) cannot be termed to be a state within the definition of Article 12 of the Constitution of India and therefore, cannot be subjected to the writ jurisdiction." - Abha Dave v. Director, Army Institute of Management and Technology, MANU/DE/2226/2009 ¶ 10, 11. (The AWES has established both Professional Colleges and Army Public Schools, mentioned in the following judgments. Refer to: Army Welfare Education Society, http://www.awes.nic.in/, accessed August 2011.) Punjab and Haryana High Court judgment dated 20.2.2009 - Smt. Sudha Soin v. Government of India, held, Army School, Ferozepur, is not a State in terms of Article 12, Smt. Asha Khosa v. Chairman, Army Public School, Northern Command, MLJ 1997 J&K 71 held, Army School, Udhampur, is not a State, Army College of Medical Sciences v. Union of India, LPA No. 606/2008, held, that to be classified as an aided institution, an overwhelming percentage of the day to day recurring and maintenance expenses would have to be borne by the Government on a regular basis.

in the Constitution. The Courts have been applying rights horizontally without explicitly acknowledging them and are steadily moving from the decision in Vidya Verma v. Dr Shiv Narain Verma<sup>39</sup> towards enforcing rights against private bodies. 40 As rightly observed by Reddy J., the economics of imparting education today has brought in private players. As they are recognised by the State, it is reasonable to expect compliance with the welfare goals of the State, not obviously to the extent of complete abrogation of private autonomy. Therefore, the dangers of the P.A.Inamdar ratio of recognising autonomy of a private educational institution by allowing them to prefer a particular class or group of students according to the objects and purposes of their institutions, like SC/ST in Ambedkar Medical College, students from backward area in Bijapur college and transport employees' children in Madras State Corporation Employees' College or the children of employees of Larson & Turbo Company in a college established by that company41 while identified as the problem of creating "gated communities of exclusion" leading to each institution defining its own source, will still be curtailed by the requirement to fulfil the test of Article 14.

To rebuff other possible arguments against reservations, the decisions in *Ashok Kumar Thakur* and *Nagaraj* have clearly established that reservations are not anti-merit though it is significant that the term merit does not find any mention in the Constitution. Further, as per the observations in *I.R.Coelho*, Article 15 has been established as part of the Basic Structure, constituting one of the core values along with the Golden Triangle, which, if allowed to be abrogated, would change completely the nature of the Constitution.<sup>42</sup>

#### AND THE WALLS STAND DEMOLISHED

Much needs to be lauded in IMA, particularly, the strong emphatic case made out for an Egalitarian society in light of the contemporary times. John Rawls would be proud.<sup>43</sup> However, what

<sup>39</sup> AIR 1956 SC 108 ¶ 6-8.

<sup>40</sup> National Campaign for Dignity and Rights of Sewerage and Allied Workers v. MCD, 155 (2008) DLT 136 ¶ 9, MC Mehta v. Union of India, AIR 1987 SC 1086 ¶ 26, Sudhir Krishnaswamy, Horizontal Application of Fundamental Rights and State Action in India in HUMAN RIGHTS, JUSTICE AND CONSTITUTIONAL EMPOWERMENT 47-73 (C.Raj Kumar et al. eds. 2007).

<sup>41</sup> P.A.Inamdar, ¶ 42.

<sup>42</sup> I.R.Coelho, ¶ 75, 77.

<sup>43</sup> John Rawls, A THEORY OF JUSTICE 566-571 (2nd Rev. ed. 1999).

issues most judgments dealing with reservations have failed to address, I have merely sought to highlight. These are as follows, first, while recognising the continual expansive interpretation of the term 'person', whether juristic persons can avail themselves of the Article 19(1)(g) freedom. On a closer examination, the Court's inconclusive answers douse us in a cloak of obscurity; though it is noted that educational institutions are governed and administered by their respective state acts and University Grants Commission (UGC) guidelines. Second, it is argued that analogous to Article 16(4), Article 15(4) seeks to constitutionally sanction a classification in favour of the weaker sections of the society and that Article 15(5) be seen as a mere extrapolation of the same. Given the nascent yet scarce discourse on the enforceable status of Article 15(4) by the courts, this argument can be seen as a justification for the Court's attempt to advance the status of Article 15(5) to that of a Fundamental Right<sup>44</sup>. The consequence of this is tying all State regulated bodies with the knot of constitutional imperatives which include, first and foremost, its affirmative action policies. Third, since the "right" now has to be recognised / enforced in a court of law, we see that most often in the educational sector, State regulated bodies are from the private sector which brings in the issue of applying rights horizontally. It is contended that though these bodies cannot be brought within the ambit of the business of direct state action, since they are recognised by the State, it is reasonable in the interests of justice and wider public policy to expect compliance with the welfare goals of the State while not tampering with the privilege of private autonomy.

Several colleges reserve seats for defence personnel<sup>45</sup> *inter alia* in fulfilment of the aim of providing equal education opportunities and in the interests of efficiency,<sup>46</sup> while, on the other hand, reserving seats on grounds of occupation and geographical location<sup>47</sup> have been rejected. It is possible to justify any new ground for reserving seats in educational institutions on satisfying the Rational Classification Test under Article 14. The Court acknowledges this danger, recognises its

<sup>44</sup> Also refer to *I.R.Coelho's* recognition of Article 15 as part of the Basic Structure. Supra n. 46.

<sup>45</sup> Chanchala D.N. v. State of Mysore, (1971) 2 SCC 293 ¶ 42-43.

<sup>46</sup> Reservation of seats for in-service candidates in post graduate medical course upheld in *Pre-P.G. Medical Sangarsh Committee* v. *Dr. Bajarang Soni*, (2001) 8 SCC 694. See also, *Dr. Rajesh Garg* v. *State of Punjab*, (1995) 111 PLR 450.

<sup>47</sup> State of Uttar Pradesh v. Pradip Tandon, (1975) 1 SCC 267 ¶ 42.

repercussions and strikes a note of caution by highlighting the issue of creation of "gated communities". This, I submit, is the most remarkable aspect of this judgment. By confining such recognition of classes to the domain of the State, the Court has prevented the fissuring of this country which anyway hangs in a delicate divided balance. Steeped in practical realities, it seeks to unify and equip every Indian with the indispensable tool of education and thus seeks to relieve the pain and rejection of the many bygone years. The right to development of these classes is not disputed, however, when economic conditions determine the kind of coaching one avails of for appearing in an entrance examination and when it is known that the private sector is not free from its "influence(s)", one understands the importance of the judgment. It has already created a furor.<sup>48</sup>

<sup>48</sup> Abraham Thomas, "SC Notice to Centre, UP on Quota in Private Institutes" *The Pioneer*, June 22, 2011. http://www.dailypioneer.com/344545/SC-notice-to-Centre-UP-on-quota-in-private-institutes.html, accessed August 2011.

## Union of India v. R Gandhi: Hard Case, Soft Law

Rishabh Shah and C. Nageshwaran\*

#### BACKGROUND AND THE DECISION

In a modern society the nature of disputes that come before Courts is multifarious. However as a result of specialization of economic relations and increase in litigation, Courts often lack technical expertise in certain matters, and are also unable to cope with the heavy load of cases. It is for the said reason that constitution of tribunals becomes necessary as they offer advantages of speed, cheapness, informality and expertise. Furthermore since tribunals need not follow the tedious codes of procedure and rules of evidence, adjudication is speedy and thus cost effective.

The National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) were established for the abovementioned reasons upon the recommendations of the "Eradi Committee Relating to Insolvency of Companies."<sup>3</sup>

## Eradi Committee Relating to Insolvency of Companies

They were to take over the functions which are being performed by CLB, BIFR, AAIFR and High Courts as the committee found that multiplicity of court proceedings was the main reason for the abnormal delay in dissolution of companies. The committee also identified and highlighted several areas which contributed to inordinate delay in finalization of winding-up/dissolution of companies. These were mainly caused due to the existence of tedious procedural rules and regulations which could be done away with if an independent tribunal was established. It was expected that setting up of NCLT will have the beneficial effects of first, reducing the pendency of cases and the period of winding-up process from 20-25 years to about two years, and second, confining the role of the High Court to judicial review within Art. 226/227, thus reducing its burden.

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<sup>1</sup> Phillips & Jackson,, CONSTITUNAL & ADMINSTRATIVE LAW, (8th Edition. 2001), p. 32.

<sup>2</sup> Union of India v. R Gandhi, 2010 (5) SCALE 514, (¶ 18).

<sup>3</sup> Eradi Committee Relating to Insolvency of Companies <a href="http://pib.nic.in/focus/foyr2000/foaug2000/eradi2000.html">http://pib.nic.in/focus/foyr2000/foaug2000/eradi2000.html</a> (last accessed on 28/2/2011).

<sup>4 2010 (5)</sup> SCALE 514, (¶ 4).

However, of late, there has been dissatisfaction among the members of the Bar who feel that such a tribunal is not an effective remedy to resolve the structural problem that courts are facing. lawyers fear that the judges of such tribunals are not unbiased adjudicators as most of them have been a part of the administrative machinery prior to appointment. This has also made the NCLT a retirement haven, as officers who were on the verge of retirement could be appointed to such tribunals. This created a sense of distrust, and lawyers felt that important functions of amalgamation, restructuring and winding up that were traditionally discharged by the Courts should not be transferred in their practical entirety to the NCLT and NCLAT. It was in the light of these events that the President of the Madras Bar Association filed a petition challenging the constitutionality of Government and Company (Second Amendment) Act, 2002 that provided for the establishment of National Company Law Tribunals. It must be noted that similar petitions have also been filed by the Madras Bar Association challenging the constitutionality of the National Tax Tribunal.<sup>5</sup> The latter matter sub-judice before the Supreme Court.

The main grounds for challenging the Act in the present case were lack of legislative competence and violation of the basic structure of the Constitution of India. The Madras High Court by its order dated 30.3.2004 held that the creation of the tribunals and the vesting of powers hitherto exercised by the High Courts in the tribunals was not unconstitutional.<sup>6</sup> However it pointed out various defects in the provisions of Part IB and IC of The Companies Act, 1956 (inserted by Companies Act 2002) and held them to be violative of the basic constitutional scheme.<sup>7</sup> The Union agreed to correct some of the defects pointed out by the High Court. However the Central Government continued to hold that some provisions of the Parts IB and IC were not defective and hence appealed the decision in the Supreme Court.

<sup>5</sup> In Madras Bar Association v. Union of India, 2010 6 AWC 6381 SC the following Sections of the National Tax Tribunal Amendments Act, 2002 were challenged:- Section 13 which permitted "any person" duly authorized to appear before the National Tax Tribunal was challenged as it was vague; Section 5(5) of the Act gave the Government to transfer a member of such a tribunal, and Section 7 which provided for a Selection Committee comprising of 2 executive and one judicial members were challenged as being violative of the separation of powers principle. This matter was initially clubbed with R Gandhi v. Union of India but the Supreme Court has now put the matter for separate hearing.

<sup>6 [2004] 120</sup> CompCas 510 (Mad).

<sup>7</sup> *Ibid*, (¶ 123).

It must be noted that the grounds of challenge in both these matters were quite similar, further indicating dissatisfaction by the members of the Bar against the functioning of such tribunals. However since the abovementioned case<sup>8</sup> is *sub-judice* the authors do not wish to comment on the same.

The following Table indicates the impugned parts of the Act and the disputes therein

Issue	High Court's Recommendations
Retention of Lien with Parent Cadre	Period of lien in regard to the members of NCLT should be restricted to only one year instead of three years.
Appointment of President	Must confine the choice of persons for President those who have held the position of a Judge of a High Court for a minimum period of five years.
Technical Member to NCLT	NCLT should have two divisions, that is an Adjudication Division and a Rehabilitation Division and Technical members should only be part of the latter.
Qualification for appointment Technical Member	In regard to presiding officers of labour courts and industrial tribunals or the national industrial tribunal, a minimum period of three to five years experience should be prescribed. Clause (h) referring to the category of persons having special knowledge of and experience in matters relating to labour, for not less than 15 years is vague possess.

Section 10FR(3): Appointment of members of the Appellate Tribunal	A member of the Appellate Authority should be a person who is or has been a judge of a High Court or who is or has been an officer not below the rank of a Secretary to the Government who has been a member of the Board for not less than three years.
Section 10FX - Selection Process for Chairperson	Selection of the President/Chair- person should be by a committee headed by the Chief Justice of India in consultation with two senior Judges of the Supreme Court.

The Union contended that the impugned provisions provided sufficient discretion to selection committee headed by the Chief Justice of India to appoint the best talent for members of the NCLT and NCLAT. Furthermore it contended that the observations of the High Court were uncalled for as they amounted to judicial legislation.

The issues before the Court were thus, whether the legislature has the competence to create tribunals in matters other than those provided in Art.323A and Art.323B of the Constitution of India and, whether judicial functions can be transferred to tribunals headed by persons who are unqualified and incompetent to discharge such judicial powers, or whose independence is suspect.9 The Court ruled that the Parliament was competent to create the NCLT; consequently a wholesale transfer of the Company Court's power to adjudicate insolvency matters was held to be permissible. The Court however declared that the procedure of selection of members of the Board laid down in Parts 1B and IC of the Act, "as presently structured" is unconstitutional. The Court then went on to take a similar view taken by Madras High Court and held that the invalid provisions may be made operational by incorporating the suggestions given by the Court. Thus the Court implicitly said that the laws will be eclipsed by constitutional limitations till its defects are removed.

The Judges however did not strike down the impugned legislation on the ground that it was violative of the Basic Structure.

<sup>9 2010 (5)</sup> SCALE 514, (¶ 8).

The reasons given by the Court for holding the impugned provisions unconstitutional were, first, erosion of the independence of the judiciary, second, violation of the principle of separation of powers, third, violation of the rule of law by way of non-independent tribunals. It also held that the right to have an impartial and independent hearing before Court being a part of Article 14 of the Constitution rendered "the legislative act open to challenge." <sup>10</sup>

#### **C**RITIQUE

Ronald Dworkin in his book *Taking Rights Seriously* refers to certain cases before judges as "Hard Cases". <sup>11</sup> The impact of such cases is often beyond the rights of the two parties in question. Some believe that such cases are "open textured" as they allow judges to exercise their discretion, as they feel fit, due to the existence of legal indeterminacy, <sup>12</sup> and thus they advocate that there is no unique answer to such problems.

Dworkin to the contrary limits the extent of such indeterminacy. He argues that when a judge decides a case, he is not limited only to rules. He can also find the answer in other standards. Thus he most controversially contends that judges can find the right to answer to a problem<sup>13</sup> by searching through the moral fabric of the society.

Dworkin further elaborates his arguments by introducing the hypothetical ideal judge, Hercules who has superhuman power that most judges lack<sup>14</sup>. He has the ability to find out the correct answer to a problem by developing his theory of the constitution with references to policy and institutional detail. Thus he builds the 'soundest theory' of law that portrays law as a seamless web of legal rules, principles and other legal standards. Such a theory must be justified on principle, constitutional and statutory provisions.<sup>15</sup> Thus he advocates that the discretion vested in the Judges cannot be exercised to lay down decisions without being bound by any standard.

The authors endeavor to argue that the Courts in *R Gandhi* by giving a carte blanche for tribunalization of commercial matters and

<sup>10 2010 (5)</sup> SCALE 514, (¶41).

<sup>11</sup> Ronald Dworkin, TAKING RIGHTS SERIOUSLY, (4th rep., 2008), p.81. This was a term originally used by legal positivists.

<sup>12</sup> HLA Hart, THE CONCEPT OF LAW, (2nd ed., 1997), p. 23.

<sup>13</sup> Dworkin, supra n. 11.

<sup>14</sup> Ibid, p. 105.

<sup>15</sup> Ibid, p. 117.

through application of the "due process" approach have handed down their decision without being bound by a concrete standard. The authors believe that though the judgment may turn out to be fair, the means employed in rendering the same smack of vagueness. Hence the authors through this Article seek to advocate a "more Herculean approach" to arriving at the final decision.

## Re: Legislative Competence

Legislative competence refers to the employment of source of power as is envisaged by the document granting such power. Thus in the present the case the question would be whether Article 323-B authorizes the Parliament to create a National Company Law Tribunal. To analyze the ascription of legislative competence to the Parliament it is important to trace the judicial history of Articles 323-A and 323-B, after the 42<sup>nd</sup> Amendment and the Administrative Tribunals Act, 1985 were passed. The quandary began in S. P. Sampath Kumar v. UOI<sup>16</sup> wherein the constitutional validity of the Administrative Tribunals Act, 1985 was challenged on the ground that it was violative of Articles 226 and 227 of the Constitution. The Supreme Court held that Section 28 of the Administrative Tribunals Act, 1985 which excludes the jurisdiction of High Courts is constitutional, as it sets up an alternative institutional mechanism for judicial review.<sup>17</sup> Thus administrative tribunals under the 1985 Act were held to be substitutes to High Courts and, were even held to be competent to decide service matters pertaining to fundamental rights.<sup>18</sup> However the Court said that Chairman of an administrative tribunal should be or should have been a Judge of a High Court, or he should have for at least two years held office as Vice-Chairman. It held that a person who merely held the post of a Secretary to the Government could not be appointed to the post. 19 Hence Section 6(1) of the abovementioned Act was struck down as invalid. As a result, the Act was further amended in 1987. In M.B. Majumdar's v. Union of India20 the Supreme Court clarified that tribunals had been equated with High Courts only to the extent that the former were to act as substitutes for the latter in adjudicating matters. Tribunals could not seek parity for all other purposes. Thus the salary of the Chairman of the tribunal need not be the same as

<sup>16</sup> AIR 1987 SC 386.

<sup>17</sup> Ibid. (¶ 4).

<sup>18</sup> J.B. Chopra v. Union of India, AIR 1987 SC 357.

<sup>19</sup> Supra n. 16.

<sup>20 (1990) 4</sup> SCC 501.

that of a High Court Judge. Subsequently in *Amulya Chandra v. Union of India*<sup>21</sup> the Court held that all benches of tribunals must have at least two members i.e. a judicial member and a technical member. However in subsequent cases it was also held that a single member with the consent of the parties could adjudicate a dispute provided that there was substantial question or law or legal issues involved.<sup>22</sup>

The constitutionality of Article 323A came for the first time before a full bench of the Andhra Pradesh High Court in Sakinala Harinath v. State of AP.<sup>23</sup> The High Court held sub-clause 2(d) of Article 323-A to be unconstitutional. It further held that the ruling in Sampath Kumar is per incuriam as it is contrary to the ruling of the Supreme Court in Kesavananda Bharati v. State of Kerala<sup>24</sup> as it took away the power of Judicial Review of the High Court.<sup>25</sup> This matter along with several other similar petitions culminated in a bench of seven judges of the Supreme Court examining the debated issues in a wider perspective, including the constitutionality of article 323A (2) (d) in L Chandra Kumar v. Union of India.26 The Supreme Court, (contrary to the position in Sampath Kumar) held that the role of tribunals is not that of substitution but supplementation of the High Courts.<sup>27</sup> It also held that the power of judicial review is a part of the basic structure of the Constitution.<sup>28</sup> The Court further declared that the decisions of such tribunals shall be appealable before a bench of two judges in the High Court under whose jurisdiction the tribunal falls. Thus clause (2)(d) of Article 323A, clause (3)(d) of Article 323B, section 28 of Administrative Tribunals Act ousting jurisdiction of Supreme Court under Article 32 and of High Courts under Articles 226 and 227 were held to be constitutionally invalid as the offended the basic structure of the constitution.<sup>29</sup> However tribunals were said to have quasi-equal status of High Courts in restricted areas. Thus, the tribunals established under Article 323A could still examine the constitutionality of an enactment however that would not take away the power of the Courts

<sup>21 (1991) 1</sup>SCC181.

<sup>22</sup> Dr. Mahabal Ram. v. Indian Council of Agricultural Research, [1994] 2 SCC 401.

<sup>23 1993 (3)</sup> ALT 471.

<sup>24</sup> AIR 1973 SC 1461.

<sup>25</sup> Ibid, (¶54) and (¶103).

<sup>26</sup> AIR 1997 SC 1125.

<sup>27</sup> Ibid, (¶80).

<sup>28</sup> Fertilizer Corporation Kamgar Union v. Union of India, (1981) ILLJ 193 SC and Delhi Judicial Service Association v. State of Gujarat, AIR 1991 SC 2150. Indira Gandhi v. Raj Narain, AIR 1975 SC 2299.

<sup>29</sup> AIR 1997 SC 1125, (¶100).

under Article 226. The Court also held similar power will vest in the tribunals created under the authority of Article 323B.

The issue of the affiliation between a Tribunal and a Court creeps up once again in *R Gandhi*. However, the case is unique as it involves setting up a tribunal on grounds (revival/rehabilitation/regulation/ winding up of companies) which are not mentioned in Article 323-B. The Supreme Court quoted several cases to show that the grounds mentioned in Article 323-B are illustrative and not exhaustive.<sup>30</sup> It held that since Article 323-B is only an enabling provision, a tribunal could be created under a ground that was not mentioned in the said Article. It then traced the legislative competence of Parliament to provide for creation of tribunals can be traced to Entries 77, 78, 79 and Entries 43, 44 read with Entry 95 of List I, Item 11A read with Entry 46 of List III of the Seventh Schedule. Furthermore the Court held that the setting up of such a tribunal would inevitably involve a wholesale transfer of powers but that could in no way invalidate the setting up of a particular tribunal<sup>31</sup> However, it is submitted, with due respect, that the Court has failed to observe the larger question in the present case, which is, the elasticity of the contours of tribunalization. This is because the mushrooming of tribunals across India has often fed upon the original jurisdiction of the Courts. Due to the existence of arbitration Tribunals, National Tax Tribunals and the NCLT and NCLAT, the domain of the High Courts in matters of commerce stands highly limited. Such erosion may eventually make High Courts mere courts of correction. According to the Apex Court's Judgment in *IB Chopra v. Union of India*<sup>32</sup> even issues regarding violation of fundamental rights can be adjudicated upon by Administrative Tribunals. To vest such immense responsibility of exercising rights in rem into the hands of members who are neither as experienced nor paid as much as a High Court may prejudice the consumer of justice. Such a possibility could not have been envisaged by the seven Judge Bench in L Chandra Kumar wherein the Court held that Tribunals could not substitute the High Courts.

A contrary view has been taken by Dr. A K Lakshmanan in the 215<sup>th</sup> Law Commission Report<sup>33</sup> wherein he opines that the position

<sup>30</sup> Union of India v. Delhi High Court Bar Association, 2002 (4) SCC 275 and State of Karnataka v. Vishwabharathi House Building Cooperative Society and Ors, 2003 (2) SCC 412

<sup>31</sup> R Gandhi, 2010 (5) SCALE 514, (¶ 32). The Supreme Court held, "If jurisdiction of High Courts can be created by providing for appeals, revisions and references to be heard by the High Courts, jurisdiction can also be taken away by deleting the provisions for appeals, revisions or references."

<sup>32</sup> AIR 1987 SC 357.

<sup>33 &</sup>lt;http://lawcommissionofindia.nic.in/reports/report215.pdf> (last accessed on 1/3/2012).

in *L Chandra Kumar* must be revisited to wrest away the jurisdiction of High Courts as Courts of second appeal, thus leaving the aggrieved party with the sole remedy of a petition under Article 136. He says that as a result of the Apex Court judgment, the status of a tribunal is lowered and there is an inordinate delay caused due to multiple appeals. However the authors feel that fairness must not be traded off for efficiency as the latter would be meaningless without the former<sup>34</sup>. Furthermore neither a constitutional nor a practical approach supports this argument for the abovementioned reasons.

## Re: Need to Apply the Basic Structure Doctrine

The Court in *R Gandhi*, while refusing to apply the basic structure doctrine to invalidate legislation<sup>35</sup> advocates an indirect application of the doctrine relying on general broad constitutional principles like rule of law, independence of the judiciary and the doctrine of separation of Powers to invalidate a statute. Thus the Court uses the "due process approach" to invalidate parts of the Act. The closest the Court comes towards the application of a constitutional principle is when it makes a passing reference to Article 50 and when it reads the right to an independent and impartial judiciary within Article 14.<sup>36</sup> However it does not make any effort to proceed on those lines.

In this part of the chapter the authors submit that the best way to skin the proverbial cat of Part 1B and 1C is through the application of the basic structure doctrine by showing that it is the best possible alternative available.

In the context of the case at hand, it is reasonable to presume that the NCLT and NCLAT may become retirement havens of biased officials. The authors opine that such a colourable tribunalization amounts to substituting administrative adjudication in judicial matters. This is impermissible irrespective of however loosely the doctrine of separation of powers is followed in the Indian context.<sup>37</sup> To challenge this proposition it would be safe to assume as can be inferred from Justice Raveenderan's judgment that Article 14 would be the touchstone of evaluation. Thus the question to be asked is does an overhaul of the existing system and its replacement with a "lesser tribunal" compromise the right of an individual to seek adjudication

<sup>34</sup> Upendra Baxi, INTRODUCTION TO IP MASSEY' ADMINISTRATIVE LAW, 7th ed., 2005. 35 2010 (5) SCALE 514, ( $\P$  40).

<sup>36</sup> *Ibid*, (¶ 41).

<sup>37</sup> M. P. Singh, SECURING INDEPENDENCE OF JUDICIARY, 10 Ind. Int'l & Comp. L. Rev. 245 (1999-2000).

from an impartial and independent tribunal?

This question of change of procedure leading to a violation of Article 14 was answered in Maganlal Chhaganlal v. Municipal Corporation of Greater Bombay.<sup>38</sup> The main and relevant principle enunciated in this case was that a possibility for abuse of power cannot be the sole ground for striking down a statute.<sup>39</sup> The Court in Maganlal then held that only when a procedure drastically different from the ordinary procedure, i.e. when an entire field covered in ordinary procedure is overhauled without any guidelines of application will the Statute be hit by Article 14. The question for decision in Maganlal was whether the provision of Chapter V-A of the Bombay Municipal Corporation Act, as also of the Bombay Government Premises Eviction Act, 1955, which provided a special procedure for evicting an unauthorized occupant from Municipal premises and for evicting a person from Government premises violated Article 14 because it was open to the prescribed authorities either to resort to the special procedure for eviction or to file a suit.<sup>40</sup> Justice Aligarswami then classified similar matters relating to change in procedure into three heads -:

- a. A statute providing for a more drastic procedure different from the ordinary law but covering the whole field covered by the ordinary procedure without any guidelines as to the class of cases in which either procedure is to be resorted to.
- b. In such cases as mentioned above if from the preamble and surrounding circumstances as well as the provisions of the statute, explained and amplified by affidavits, necessary guidelines could be inferred.
- c. Where the statute itself covers only a class of cases.<sup>41</sup>

The Court then held that unless case falls in the first category, there will be no violation of Article 14. The mere availability of two procedures will not by itself vitiate the other or violate Article 14, as long as the executive is guided in its action under the statutes (that is categories (b) and (c)). In other words, the proposition in *Maganlal* relies on hope that any individual instance of bias or impropriety by the executive can be separately held as invalid.<sup>42</sup>

<sup>38</sup> AIR 1975 SC 648.

<sup>39</sup> Magganlal Chagganlal v. Greater Bomabay Municipality, (1974) 2 SCC 402.

<sup>40</sup> H. M. Seervai, CONSTITUTIONAL LAW OF INDIA, 4th ed., vol. 1, p.529.

<sup>41</sup> Magganlal Chagganlal v. Greater Bomabay Municipality, (1974) 2 SCC 402, ¶ 15.

<sup>42</sup> Vasantkumar Radhakisan Vora and Ors. v. Board of Trustees of the Port of Bombay, AIR 1984 Bom 96.

In the case under comment, the policy of the legislation with regard to parts 1B and 1C which were under challenge, is that the legislature intended that both the NCLT and the NCLAT would result in speedy and efficient adjudication of disputes by providing for both judicial and technical members. 43 Further it also provides for a minimum qualification for appointment of technical and judicial members to the tribunal along with those of the President. Thus with respect to appointments to the Appellate Tribunal, the selection committee has been given wide discretionary powers to decide on its composition. Parts IB and 1C also provide a sufficient policy to satisfy the test as in Maganlal. The directions to the executive can be inferred from the purpose for which the NCLT was to be constituted and also reflects the policy of the Union.44 Thus the argument that the executive or the selection committee may appoint a person who is not qualified enough, is a possibility for abuse of power and it cannot be the sole ground for striking down a statute.45

At the same time, the existence of a policy with regard to appointments and the conferral of discretion on the concerned appointing authorities, fettered with guidelines from the provisions as well as the object of NCLT also satisfy the reasonable classification test for Article 14. Thus the application of the 'reasonable legislative classification test' may actually produce results contrary to which the Court has reached.

Alternatively the Court could investigate Part IB and IC for their constitutionality by applying the principle of arbitrariness as done in *Mardia Chemicals*<sup>46</sup> on the ground that the remedy available in case of bad appointments will become illusory. However that approach has its own criticisms<sup>47</sup> that fall outside the scope of this comment.

Thus existing/defined tests of Article 14 thus create a void when it comes to cases like these and hence a challenge to the law under

<sup>43</sup> See R Gandhi, 2010 (5) SCALE 514 (¶18): The Judicial Member will act as a bulwark against apprehensions of bias and will ensure compliance with basic principles of natural justice such as fair hearing and reasoned orders. The Judicial Member would also ensure impartiality, fairness and reasonableness in consideration. The presence of Technical Member ensures the availability of expertise and experience related to the field of adjudication for which the special Tribunal is created, thereby improving the quality of adjudication and decision-making.

<sup>44</sup> Eradi Committee Report, supra n. 3.

<sup>45</sup> Magganlal Chagganlal v. Greater Bomabay Municipality, (1974) 2 SCC 402.

<sup>46 (2004) 4</sup> SCC 311.

<sup>47</sup> See Abhinav Chandrachud, How legitimate is Non-arbitrariness? Constitutional Invalidation in the Light of Mardia Chemicals v. Union of India. INDIAN J. CONST. L.179.

Article 13 also fails. The result of using such an argument would result in the examination of individual cases of bias and conflict of interest with meagre evidence or relying upon a diamond bright, diamond hard approach. Such a consequence cannot be admitted in the public interest as the mere idea of disparaging the quality of justice is abhorrent to the idea of democracy.

## Re: Understanding the "basic structure":

The transition from viewing it as 'predominance of legal spirit' to viewing it as the 'grundnorm'

The authors opine that it only when other approaches fail does the 'basic structure doctrine', come to the aid of the courts. Since an administrative substitution of the judiciary strikes at the very roots of an established principal of fair and independent adjudication, the authors feel that it would be fit to look at the case through the lens of the this doctrine.

To determine whether such an approach is justified or not we have to look at the evolution of the doctrine and the possibility of applying it to legislations in the current context.<sup>48</sup>

The basic structure theory's origins can be traced back to *Kesavananda Bharti v. State of Kerala*<sup>49</sup> wherein the prevailing opinion was that even though amendments under Article 368 are not law under Article 13(4), the basic features of the constitution are un-amendable and form the identity of the constitution. The Court, rejecting the theory of implied limitations<sup>50</sup> held that certain principles were in existence even before the constitution came into force and that, the makers of the constitution framed it with certain objectives and principles in mind which found face in the various constitutional provisions.<sup>51</sup>

<sup>48</sup> To show the evolution of the principles of Basic Structure in this context the author relies on the analysis by Pathik Gandhi, *Basic Structure And Ordinary Laws (Analysis Of The Indira Gandhi & The Coelho Case)*, Indian Journal of Constitutional Law. However the author differs with the article when it comes to the application of the Grundnorm in the Indian Context.

<sup>49</sup> AIR 1973 SC 1461.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid, Sikri CJ: It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state (¶ 307). Hegde and Mukherji JJ: Now that we have set out the objectives intended to be achieved by our founding fathers, the question arises whether those very persons could have intended to empower the Parliament, a body constituted under the

The judgement is but a product of its time. The manner in which the Parliament was using its power under Article 368 necessitated the argument that the basic structure was something that existed independently of the constitution. An inference to such a proposition could be in retrospect considered a diceyean reiteration of the principle of "predominance of legal spirit."<sup>52</sup>

The principle is further illustrated by Justice Khanna's dissent in *ADM Jabalpur v. Shivakant Shukla*<sup>53</sup> where he held that Article 21 was not the sole repository of the right to life and personal liberty.<sup>54</sup> Thus even if Article 21 had not been drafted and inserted in Part III, the state could not deprive a person of his life and liberty without the authority of law.<sup>55</sup> These two cases indicate an initial line of judicial reasoning that advocates that basic structure doctrine as an extraconstitutional tool imported into Indian constitutional jurisprudence.

A year before this case was decided, the Supreme Court in *Indira Gandhi v. Raj Narain*<sup>56</sup> rejected the argument that a democratic way of life through parliamentary institutions based on free and fair elections as a part of the basic structure can be used to invalidate a legislative measure. The majority gave the following reasons for doing so<sup>57</sup>:

1. The amending power unlike the power to legislate, is a constituent power of the Parliament which follows a different

Constitution to destroy the ideals that they dearly cherished and for which they fought and sacrificed. (¶ 688); We find it difficult to accept the contention that our Constitution-makers after making immense sacrifices for achieving certain ideals made provision in the Constitution itself for the destruction of those ideals. (¶690).

<sup>52</sup> A.V Dicey, *INTRODUCTION TO THE* STUDY OF THE LAW OF THE CONSTITUTION, (Indianapolis: Liberty Fund 1982) p.195. Dicey describes the predominance of legal spirit as general principles of the constitution that determine the rights of parties. He also says that such rights existed even before the Constitution came into being through Judicial Decisions.

<sup>53</sup> AIR 1976 SC 1207.

<sup>54</sup> While holding that even in the absence of Article 21 of the Constitution, the state cannot deprive a person of his life and personal liberty, Justice Khanna observed: The principle that no one shall be deprived of his life or liberty without the authority of law is rooted in, the consideration that life, and liberty are priceless possessions which cannot be made the plaything of individual whim and caprice and that any act which has the effect of tampering with life and liberty must receive sustenance from and sanction of the laws of the land. Ibid. ¶168.

<sup>55</sup> Ibid.

<sup>56</sup> AIR 1975 SC 2299.

<sup>57</sup> For a detailed analysis of this issue see Pathik Gandhi, *Basic Structure and Ordinary Laws*, Indian Journal of Constitutional Law, Vol. 4, 2010, p. 56. The authors rely on the analysis of Mr. Pathik Gandhi with respect to the majority position enunciated in *Indira Gandhi v. Raj Narain*.

- procedure.58 Hence the two cannot be equated.
- 2. The basic structure cannot be defined whereas plenary power can defined using the Articles incorporated in the constitution.<sup>59</sup>
- 3. Application of basic structure to ordinary laws will result in rewriting the constitutional limitations to legislation.<sup>60</sup>

Subsequently cases like *State of Karnataka v. Union of India*<sup>61</sup> Justice Beg speaking on behalf of the majority held that the basic feature in question was required to be located in one of the provisions of the constitution.<sup>62</sup> The Court thus shunned the approach of looking at basic features as transcendental to the constitution or being merely abstract principles with no specific link or location in the constitution.<sup>63</sup> In *Waman Rao v. Union of India*<sup>64</sup> and *I.R. Coelho v. State of Tamil Nadu*,<sup>65</sup> the Court held that Ninth Schedule was violative of basic structure doctrine as it took away the Courts power of judicial review. The Court thus made an effort to locate certain basic features within

<sup>58</sup> Justice Chandrachud's opinion in Indira Gandhi v. Raj Narain, (¶692).

<sup>59</sup> Justice Matthews opinion in Indira Gandhi (¶346).

<sup>60</sup> See Justice Ray's opinion in the Indira Gandhi (¶38): To accept the basic features or basic structures theory with regard to ordinary legislation would mean that there would be two kinds of limitations for legislative measures. One will pertain to legislative power under Articles 245 and 246 and the legislative entries and the provision in Article 13. The other would be that no legislation can be made as to damage or destroy basic features or basic structures. This will mean rewriting the Constitution and robbing the legislature of acting within the framework of the Constitution.

<sup>61</sup> AIR 1978 SC 68. It must be noted that Justice Beg who dissented in *Indira Gandhi v. Raj Narain* by citing Kelsen's theory followed the majority opinion laid down in Indira Gandhi in *State of Karnataka v. Union of India*.

<sup>62</sup> See State of Karnataka v. Union of India, AIR 1978 SC 68 (¶ 128): I do not think that what those learned Judges who, in Kesavananda Bharti's case (Supra), found a narrower orbit for the legislative power of amendment of the Constitution itself to move in cant to lay down some theory of a vague basic structure floating, like a cloud in the skies, above the surface of the Constitution and outside it or one that lies buried beneath the surface for which we have to dig in order to discover it. I prefer to think that the doctrine of "a basic structure" was nothing more than a set of obvious inferences relating to the intents of the Constitution makers arrived at by applying the established canons of construction rather broadly, as they should be so far as an organic Constitutional document, meant to govern the fate of a nation, is concerned.

<sup>63</sup> Ibid (¶121): But, in every case where reliance is placed upon it, in the course of an attack upon legislation, whether ordinary or constituent (in the sense that it is an amendment of the Constitution), what is put forward as part of "a basic structure" must be justified by references to the express provisions of the Constitution. That structure does not exist in vacuo. Inferences from it must be shown to be embedded in and to flow logically and naturally from the bases of that structure. In other words, it must be related to the provisions of the Constitution and to the manner in which they could indubitably be presumed to naturally and reasonably function.

<sup>64 (1981) 2</sup> SCC 362.

<sup>65 (2007) 2</sup> SCC 1.

the fundamental rights themselves and using them as a ground for constitutional validity.<sup>66</sup>

Usually the basic structure doctrine has been applied to legislations only when they have emanated from unconstitutional amendments.<sup>67</sup> An exception to this case was that of *SR Bommai v. Union of India*<sup>68</sup> wherein the doctrine was applied to test the executive action of Governor under Article 356. Thus as a general rule it is only applied to constitutional amendments.

However, what can be surmised from the above cases is that the basic structure doctrine is usually discussed when other means to engender justice fail and a more holistic approach is required to curtail the actions of the State.

Here it would be relevant to refer to Hans Kelsen's jurisprudence of the *grundnorm* to understand the concept better. Kelsen propounded "a hierarchy of norms and a procedural relationship between them where the validity of a particular legal norm determined by a higher order norm, with the latter norm representing the validity of the former one". <sup>69</sup> In Kelsen's analysis the process of determination of a positive legal norm results in this sort of regression leading to the constitution as the source of validity of all the positive norms and the *grundnorm* as the source of validity of the constitution itself. <sup>70</sup> This is the highest norm in the hierarchical legal system which derives its own validity from a direct

<sup>66</sup> This aspect in *IR Coehlo* was succinctly explained in the *Glanrock Estate (P) Ltd. vs The State Of Tamil Nadu,* (2010) 10 SCC 96 (¶8). The Court held that General overarching principles are not required in a case in which an unreasonable classification violates the principle of equality before law. In cases like those involving preservation of forests we refer to inter-generational equity and sustainable development and not formal equality or equality enshrined in Article 14 but on a much wider platform of an egalitarian equality which includes the concept of "inclusive growth". However the Court also held that this illustration applies and is for purposes with reference to Constitutional Amendments. We differ from the Court here as the abovementioned statement extends the illustration to cases where formal equality and the reasonable classification test are not enough.

<sup>67</sup> Also see *Chandra Kumar v. Union of India*; Section 28 of Administrative Tribunals Act along with clause (2)(d) of Article 323A, Clause (3)(d) of Article 323B were struck down for ousting Jurisdiction of the High Court Power under Articles 226 and 227 which was considered to a part of the basic structure.

<sup>68 [1994] 2</sup> SCR 644.

<sup>69</sup> Hans Kelsen (translated by Bonnie Litschewski Paulson, Stanley L. Paulson), INTRODUCTION TO PROBLEMS OF LEGAL THEORY, 1997, p. 64. This hierarchy was observed and accepted by Ray CJ in *Indira Gandhi* and Beg CJ in *State of Karnataka v. Union of India.* 

<sup>70</sup> Andreas Kalyvas, *The Basic Norm and Democracy in Hans Kelsen's Political Theory*, Philosophy and Social Criticism, Vol. 32, No. 5, http://www.constitutionalism.gr/ast/cov/AL/ALYVASBasicNormKelsen2372010.pdf, accessed on 27/2/2012, p. 577.

appeal to the constitution. Thus the validity of the constitution can only be derived from a non-positive or non legal norm which is the *grundnorm*.<sup>71</sup>.

In *Kesavananda Bharti* when the basic features of the constitution were categorised as unamendable, the Court referred to a higher norm that limited the power under Article 368 of the Constitution. This norm thus validates the constitution and provides it with an identity, in the sense that if it is violated (i.e. basic structure is violated) the constitution would lose its identity and the change would be invalid.

If a rule is framed under a parent act, the Court not only sees whether the rule is consistent with the policy in the enabling act but also determines whether it withstands the tests of fundamental rights of the constitution. Similarly when a legislation is made under the aegis of a right or value enshrined in the constitution it must also be tested against the basic rules which have actually led to the creation of the right or value, and have shaped its interpretation.<sup>72</sup> This must be done irrespective of whether it is a constituent or legislative exercise of power to ensure that the hierarchy of norms is maintained.<sup>73</sup> Neither exercise can violate the *grundnorm*. Hence when the constitutional limitations for an ordinary law fail, there is no reason why the basic structure doctrine cannot be extended to such statutes.

Secondly, the practice post *Kesavananda Bharti* has been to locate the basic structure in the provisions of the constitution. This approach is inherent to the concept of a *grundnorm* as once a positive constitution is in place, the search for the *grundnorm* begins from the bare text of the Constitution itself as per the accepted norms of statutory interpretation.<sup>74</sup> Thus while both the power to amend and the power

<sup>71</sup> See Kelsen, *supra* n. 68: This *grundnorm* is: 1) Not a human made positive norm 2) Nor is it created by any legal authority and 3) its validity is presupposed.

<sup>72</sup> An argument to the contrary could be that it will eventually advocate viewing original provisions of the Constitution with the Basic Structure. To this we have two submissions-1. Since the original provisions were made keeping in mind the Grundnorm there cannot be a possibility of inconsistency with it. 2. On the positive side by locating general principles of the Constitution within its Articles will give them a more purposeful interpretation.

<sup>73</sup> See H. M. Seervai, CONSTITUTIONAL LAW OF INDIA, 4th ed., Vol. 3, p. 3119: In a rigid Constitution, law making power is the genus of which legislative and constituent power are the species, the differentia being found in the different procedure prescribed for making ordinary laws. Whereas the power to frame a Constitution is a primary power the, power to amend the Constitution is a derivative power, derived from the Constitution.

<sup>74</sup> It is in this sense that the approach taken by Ray CJ in *Indira Gandhi v. Raj Narain*, is correct when he says that the "the Constitution generates its own validity."

to legislate come from the constitution itself, the limitation on both these powers comes from the constitution as well. In other words, the anvil on which the validity of a higher level norm (amendment) is tested would be applicable to a lower level norm (legislation) especially when both the power and the limitations come from the same source. The authors opine that three main reasons given in *Indira Gandhi v. Raj Narain* for non-application of the basic structure doctrine to ordinary legislation seem rebuttable on the basis of the above analysis -

- 1. Even though there is a difference between constituent and plenary powers both powers are derived from a higher norm and can be challenged on a higher principle. As per Kelsen's theory the mode of creation of a higher or a lower norm may differ from each other although they derive their validity from the same source.
- 2. Cases post-Kesavananda Bharti have expressly required the basic structure to be based in the explicit provisions of the constitution thus making the doctrine discernable and unambigious.<sup>75</sup>
- 3. It is not re-writing of constitutional limitation to ordinary laws, but a logical extension of the principle of hierarchy that Ray CJ himself enunciates in his judgement in *Indira Gandhi v. Raj Narain*.

#### RE: DUE PROCESS VERSUS BASIC STRUCTURE

The Court in *R Gandhi* instead of applying the basic structure doctrine to legislation opts to apply general constitutional principles to invalidate legislation. The Court does not expressly say why a law creating the scope for abuse of power has been struck down. Also, whether the guidelines should have been given to the executive with discretionary power remains a moot question. The problem with this approach is that such application of general principles is akin to the "predominance of law"<sup>76</sup> approach. It suffers from the problems pointed out in *Indira Gandhi v. Raj Narain*, as it is indefinable and could subject ordinary laws to a third criteria of "due process of law".

The Court while adjudicating in the instant case has implicitly applied the old yet inchoate due process doctrine.<sup>77</sup> "Due process"

<sup>75</sup> State of Karnataka v. Union of India, AIR 1978 SC 68, (¶121).

<sup>76</sup> Dicey, supra no. 51.

<sup>77</sup> In *Selvi v. State of Karnataka* the Supreme Court expressly recognized the right to substantive due process in the India Constitution. Though this proposition was rejected in *AK Gopalan v. State of Madras*, AIR 1950 SC 27, it has been read into Article 21 post *Maneka Gandhi v Union of India*, AIR 1978 SC 597.

refers to an exertion of the powers of government as the settled maxims of law sanction, and such safeguards for the protection of individual rights those maxims prescribe.<sup>78</sup> Thus the due process doctrine advocates the application of general concepts which are existent in the judicial process and also in the statute under consideration. Seeing the reasoning of the court in the light of the understanding of due process as given above it is evident that silently the court treads the same path.

It is necessary to note that the due process approach was rejected by the Constituent Assembly.<sup>79</sup> Its adoption by the Supreme Court is contrary to an originalist reading of the Constitution *which advocates that the* constitution be interpreted according to the intent of those who drafted and adopted it.<sup>80</sup> Thus a statute or a constitution has to be construed as on the day after it was enacted. This rule is qualified by an exception known as 'generic interpretation'.<sup>81</sup>

However as stated in *Eastman Photographic Materials Co.* v. *Comptroller of General Patents, Designs and Trademarks*<sup>82</sup>, in all cases, the object is to see what is the intention expressed by the words used. But from the imperfections of language, it is impossible to know what that intention is without seeing what the circumstances were with reference to which the words were used and what was the object appearing from those circumstances, which the person using them had in view.<sup>83</sup>

<sup>78</sup> Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, p. 356.

<sup>79</sup> Sir B. N. Rau, the constitutional advisor, on being advised by United States Supreme Court Justice Felix Frankfurter against due process, successfully removed the due process clause from the draft and replaced it with 'procedure established by law'. Frankfurter's position was that that that the power of judicial review implied in the due process clause was both undemocratic and burdensome to the judiciary, because it empowered judges to invalidate legislation enacted by democratic majorities: See Manoj Mate, *The Origins of Due Process in India*, <a href="http://www.boalt.org/bjil/docs/BJIL28.1\_Mate.pdf">http://www.boalt.org/bjil/docs/BJIL28.1\_Mate.pdf</a>, (last accessed on 1.3.2012),.

<sup>80</sup> A. Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849.

<sup>81</sup> H. M. Seervai, CONSTITUTIONAL LAW OF INDIA, 4th Ed., Vol. 1, p. 176. As per this interpretation, suppositions as to what the framers might have done if their minds had been directed to future developments are irrelevant and the question whether a novel development is or is not included in the terms of the Constitution finds its solution in the ordinary principles of interpretation namely, what is the meaning of the terms in which the intention has been expressed. [Waynes, LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA, 5th Ed., p. 26; as quoted in H. M. Seervai, CONSTITUTIONAL LAW OF INDIA, 4th Ed., Vol. 1, p. 176].

<sup>82 (1898) 15</sup> RPC 476.

<sup>83</sup> Ibid.

Going by the principles of originalism, hedged with those of generic interpretation, it is evident that the basic structure doctrine was first laid down and later on evolved as an expression of the intention of the makers. Although this was sourced not from the bare words of the provisions factors including the prevailing conditions at the time of drafting, the nature of the provisions and their intended immutability sculpted the doctrine.

As against this the due process test is an insolent judicial concept that has evolved by expressly disregarding the intention of our framers. Thus it is submitted that the application of the basic structure doctrine in cases like the instant one is far more viable, constitutionally valid and rooted over abstract principles in the due process clause. This difference has become more pronounced especially after the development of the tradition of locating the basic features in specific provisions of the constitution. The authors thus favor the basic structure doctrine to be closer to the "soundest theory of law" developed by Hercules. The basic structure doctrine as explained above is actually an application of the intention of the makers and is thus closer to the theory of originalism or original intent rather than due process which actually represents situations that do not creatively redress silences in the constitutional text but performances that retrospectively deny the constitution maker's speech.<sup>84</sup> The authors are aware the mere dispersion of the traditional objections to the application of basic structure does not negate the practical considerations in question. The authors by no means intend to argue that all legislations must satisfy this threshold. The frequency of its application is solely a function of the discretion of the Judges and must be exercised most sparingly. Yet in cases like the instant one, where the regular tests of legislative competence and fundamental right violation fail, the application of basic structure doctrine clearly becomes a viable option.

#### CONCLUSION

We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch and not their terror. (Measure for Measure 2:1)

These phrases from Shakespeare's play best sum up the approach to be taken by the Courts in *R Gandhi versus Union of India*. A palpable

<sup>84</sup> Upendra Baxi, "A known but an indifferent judge": situating Ronald Dworkin in contemporary Indian jurisprudence", International Journal of Constitutional Law, 2003, p. 575.

"attempt at encroachment" whether it be at rights or at jurisdiction of the High Court is looked at most lightly by our *sentinel de qui've*. The Supreme Court does well to move away from the position in *Maganlal* but what comes out of *R Gandhi* is only a correctional dictum that checks only the penumbral evils of tribunalization. The true ambit of such encroaching tribunalization yet remains unknown. The authors submit that it would be dangerous to assume that a sympathetic stand towards tribunals, as such a stand will mere lead to.

More adjudicatory outsourcing rather than actual structural reform. Hence the scope of Article 323-B and the ambit of tribunalization therein is something that must most certainly be earmarked especially since the independence and quality of such tribunal have come into question. Furthermore the authors believe that the reasoning of the judgment prays to extra constitutional forces to come to its aid for the purpose of adjudication thus rendering itself subject to the criticisms in *Indira Gandhi v. Raj Narain*. If the courts had employed the basic structure doctrine to introduce concepts like 'independence of the judiciary' and 'separation of powers' by locating them in specific provisions of the constitution and read them together to create a right to have a fair and proficient adjudication (under the grundnorm that there exists limitations to power), the courts would have been on terra firma. Such an approach would have been the "more Herculean one to take." One fails to comprehend why amendments that are out of abundant caution are subject to the basic structure doctrine while legislations are not. Such a concretization of the basic structure doctrine will only lead to attrition of law, as it will become customary to pass Acts that are tentatively violate our basic rights. It is imperative that such encroachment be curbed through sound judicial principles.

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