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The M.K. Nambyar SAARCLAW Chair in Comparative Constitutional Studies

Nalsar University of Law

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

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EDITORIAL

The Indian Journal of Constitutional Law has since its inception attempted to reflect a style of scholarship that tackles the core constitutional issues with specific thrust on comparative constitutional law. The contributions to the journal reflect an ingenious yet academic approach to examining the law on constitutional issues, thus making for a highly refreshing read. They reconcile and analyse core constitutional concepts across multiple jurisdictions and attempt to discern a pattern, a form of instructive analysis, or mere guidelines that enable us to comprehend domestic issues and constitutional law itself in a more nuanced manner. In pursuance of this goal, the 6th edition of the journal critically examines: 1) the right to fair hearing in European Union law-making; 2) the problems with judicial review and justifications for coup-de-états across nations; 3) a critical-comparative analysis of the Equal Opportunity Commission Bill; 4) the treatment of sodomy laws by the judiciary and the politics behind the struggle for LGBT rights in India, Nepal and Singapore; 5) and an attempt to determine the creation and the development of a common identity of the Indian Constitution.

This editorial has been divided into three sections. The first section highlights the major constitutional developments in India in the year 2013. The second section provides an overview of the contributions to the journal. The third section contains an expression of gratitude to all those people who have made the publication of this journal possible.

Constitutional Developments

The Supreme Court in a concerted effort to uphold the Constitution often plays the role of "sentinel on the qui vive"[1] by exercising its powers of judicial review or constitutional interpretation

[1] *State of Madras* v. *V.G. Row*, AIR 1952 SC 196.

in order to maintain a system of checks and balances that is integral to our legal structure. This power of judicial review enables the Supreme Court to maintain a semblance of rationality in our legal system and thwart flagrant violations of rights and obligations. However, the problem with judicial review is that since its inception in *Marbury* v. *Madison*[2] it has always been coloured by the prevailing political and social landscape, or a judicial perception of the same. The position of a judge in a case where she must decide whether to cross the "Laksman Rekha" of judicial review is best described by Justice Handy's opinion in Lon L Fuller's hypothetical Speluncean Explorers case.[3] Justice Handy set aside the conviction of the accused as he believed that judges must comply with what he considered to be the "popular opinion". This opinion was gathered from his reading of newspapers and opinion polls. Aside from the fact that such sources could be unreliable, a judge's opinion is undoubtedly shaped by his personal experience and what he considers the prevailing public opinion to be. Such considerations play out more expressly in a country like the United States wherein a judge's ideology and perception determine an opinion in a more visible manner. However in a country like India, the deep-seated nature of such considerations inevitably leads to "legal indeterminacy" which often shocks the conscience of the public or the government in certain cases. As a result, the evolution of constitutional law and the development of the nation suffer due to recurring meanderings between progressive and regressive judicial review. In light of this over-arching theme, we have proceeded to analyze the constitutional developments in 2013.

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2 Much of the judge's decision in *Marbury* v. *Madison*, 5 U.S. 137 (1803) was based on the probability that the executive might disregard the appointment of Mr.Marbury if it was done in accordance with the law.

3 Lon L. Fuller, *The Case Of The Speluncean Explorers*, HARV. L. REV., Vol. 62, No. 4, February 1949.

Undoubtedly the most awaited decision of the Supreme Court in 2013 was that of *Koushal* v. *Naz*.[4] The Supreme Court overturned the decision of the Delhi High Court that had read down Section 377 of the Indian Penal Code in order to decriminalize sexual relations between consenting adults of the same sex. Justice G.S. Singhvi who delivered the judgment decided to exercise judicial restraint and noted that it was the duty of the Parliament to amend or repeal the provision. He ruled that since the Parliament had the opportunity to do so and did not take any action despite the Delhi High Court decision or the Law Commission's recommendation, the Court had to respect the legislature's intention. In doing so he failed to consider the fact that the Government had not decided to file an appeal to the Supreme Court from the High Court. This decision was in stark contrast to his controversial judgment in the 2-G case[5], and *Abhay Singh* v. *State of UP*[6] which was delivered on the same day as *Naz*. In the former, the judge cancelled the allotment of telecom licences and mandated that allotment of all natural resources be done only by auction, thereby expressly going against the will of the Government. In the latter, he limited the use of red-lights in cars to those holding constitutional posts, expressly directing the legislature to amend the Motor Vehicle Rules, 1989. Yet most peculiarly, in the absence of any strong reason or even a temporal frame the judge drastically altered his understanding of judicial review in the Naz Judgement.

In addition to the above, the court's findings with respect to Article 14 and 15 were tenuous. Though the court said that Section 377 creates an intelligible differentia between those who indulge in carnal intercourse and those who do not, it did not attempt to

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4 *Suresh Kumar Koushal* v. *Naz*, Civil Appeal No.10972 of 2013.
5 *Center for Public Interest Litgation* v. *UOI*, AIR 2013 SC 3725.
6 2013 (15) SCALE 26.

determine the nexus between the object and such differentia. Furthermore, throughout the judgment the Court has skirted the issues relating to violation of Article 21 and has not made a finding with respect to the same. It also went to the extent of stating that there is not enough material on record to prove a clear case of discrimination against the LGBT community. These reasons coupled with the attitude and comments of the judges during the hearings which have been made publicly available all suggest that the predilections of the judges inevitably played a major role in the determination of the outcome of the case.

If that were the case then there ought to have been express disclosures and further justifications made by Justice Singhvi in the judgment. This is because unreasoned flip-flops in the understanding and exercise of judicial review are dangerous in that they can damage the stability of the Judiciary and raise questions as to its legitimacy. In such situations the burden falls upon the Indian scholastic community to deconstruct such judicial opinions and expose their inconsistencies. This problem is of a systemic nature and must thus be critically examined to prevent a confused understanding of judicial review.

In *Christian Medical College* v. *Vellore*,[7] the apex court held that the Medical and Dental Council of India's notification[8] providing for a National Eligibility Entrance Test for M.B.B.S, BDS and post-graduate courses was ultra vires the provisions of Articles 19(1)(g), 25, 26(a), 29(1) and 30(1) of the Constitution. In particular the majority, drawing from the *T.M.A Pai case*,[9] held that such an entrance test infringed

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7 2013 (9) SCALE 226.

8 Regulations on Graduate Medical Education (Amendment) 2010 (Part II) and the Post Graduate Medical Education (Amendment) Regulation, 2010 (Part II).

9 *T.M.A. Pai Foundation* v. *State of Karnataka,* (2002) 8 SCC 481.

upon the right of state-run and minority universities to administer themselves. These rights were said to be infringed despite the fact that the MCI argued that it has legislative competence under List I Entry 66 to make such laws. The Court held that the power conferred by the entry could only extend to prescribing minimum standards of qualifications and eligibility. Furthermore, it also held that the MCI is required to furnish any proposed amendments in its rules to the State Government for its comments.[10] Since it did not undertake such consultation the amendment provisions introducing the entrance test were held to be invalid.

The dissenting judge, Justice Dave, emphasized that it is necessary to take the interests of the students appearing for such exams into account. He stressed upon the fact that the NEET would only regulate admissions in order to determine the quality of a student entering into an institution. This would inspire confidence in the admission procedure and lead to merit based selections and would not go against the spirit of the abovementioned fundamental rights. He also said that the policy of reservations for certain classes would still be implemented as the NEET only determines eligibility criteria and not the actual admission of students. Hence, the MCI has only imposed a reasonable restriction on the right to admit students of an institution's choice. In relation to legislative competence, the Judge held that because education is in the concurrent list the state can only legislate if the field is unoccupied by the Union. Since the MCI has the power under List I Entry 66, it has the competence make laws with respect to determination of standards in higher education. Thus, states can only prescribe standards in the absence of any laws to the contrary.

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10 Section 19(2) and 20 of the Medical Council of India Act, 1948.

This decision goes against the trend of favouring central admission tests and an enquiry into the situation around the matter has to be undertaken. However, on a more fundamental level it confirms our fear of unreasoned flip-flops and concealed judicial predilections. The MCI has already filed a review petition before the Supreme Court in order to undo the effect of the judgment.

Fortunately, such predilections did not play out in *State of Maharashtra* v. *Indian Hotel and Restaurants Association and Anr.*[11] in which the Supreme Court struck down Section 33A and Section 33B of the Bombay Police (Amendment) Act of 2005. The provisions were held to be violative of Articles 19(1)(g) and 14 of the Constitution as they prohibited any type of dancing in an "eating house, permit room or beer bar" to the exclusion of certain elite establishments like three star hotels. The Court held that the ban is based on the "unacceptable presumption" that elite establishments possess certain standards of morality and decency that other establishments do not, and that these standards make otherwise objectionable dances acceptable. Recognizing dancing as a profession, the Court also held that the width of the ban impairs the livelihood of many bar dancers who have no other option but to turn to prostitution in order to support their families. Much to the relief of the parties involved the Court's opinion was not coloured by their personal or perceived public opinion of bar dancers.

The decision in *Lily Thomas* v. *Union of India*,[12] decided by a Bench comprising Justices A.K. Patnaik and Sudhansu Jyoti Mukhopadhaya was another landmark decision that incited mixed reactions. The judges declared Section 8(4) of Representation of

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11 (2013)8SCC51.

12 AIR 2013 SC 2662.

People's Act, 1951 to be ultra vires Article 101 and 191 of the Constitution. The said provision saved a convicted MP or MLA from disqualification if she could obtain a stay on her conviction from an appellate court within three months.

The Court observed that Articles 102 and 191 of the Constitution only allow the Parliament to lay down the law to disqualify an MP or an MLA. They do not confer the power to make a provision protecting sitting members from the disqualifications. Hence, the Parliament was held to lack the legislative competence to enact Section 8(4). Thus, the moment a sitting member is not eligible to be elected as an MP or an MLA, she is immediately disqualified from holding her seat. Subsequently, fresh elections are required to be contested. However, the logical inconsistency in relation to this argument is that the power to stay a conviction of an appellant is available to a higher court not only under the said provision but also under Section 389 of the Criminal Procedure Code. The effect of a stay under Section 389 would be that the judgment of a lower court would temporarily cease to have effect. This creates a legal anomaly because in the event the lower court judgment is not in effect, it is not clear whether a member can retain her seat or would fresh elections need to be conducted. Unfortunately, though the intentions of the judges were good, they did not take such a possibility into account.

In *State of Gujrat* v. *RA Mehta*[13], the Supreme Court put to rest a controversial dispute between the Governor and the Chief Minister relating to the appointment of the local Lokayukta. The issue in the said case was whether the Governor could appoint a Lokayukta in consultation with the Chief Justice without the aid or consultation of

13 (2013) 3 SCC 1.

the Council of Ministers. The Court held that the Governor is bound to act as per the Council's opinion only in those situations specified by the Constitution and not when the Governor is acting in the capacity of a statutory authority or is acting under the exceptions in Article 163(1). However, when it determined the import and scope of the word 'consultation' contained in Section 3 of the Lokayukta Act, 1986, it came to the conclusion that the Governor acts in her capacity as the Head of the State and hence ought to have taken the aid and advice of the Council of Ministers.

Nevertheless the Court, having observed the fact that the Lokayukta had not been appointed for nine years, said that the Act prescribed that the appointment of the Lokayukta must be free from any political influence[14] and this makes the Chief Justice of the High Court the most apt authority to judge the suitability of a candidate, thereby giving primacy to the recommendation of the Chief Justice. Since in this case such recommendation was regarded, the Court interpreted Section 3 of the Act in a purposive manner. Thus, it held that the requirement to consult was fulfilled as three out of the four statutory authorities had been consulted and because there was correspondence regarding the appointment between the Chief Justice and the Chief Minister. Hence, the appointment of Mr Mehta was saved. Such a pragmatic exercise of judicial power and regard to the facts and circumstances by the Supreme Court is commendable. In a complicated situation of political conflict it was not only able to lay down the law correctly but also did so in the interests of justice.

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[14] Sections 4 and 6 of the Lokayukta Act, 1986.

Bills

The 120th Constitution Amendment Bill was introduced on 24th August 2013 in the Parliament. It seeks to amend Article 124(2)(a) and introduce Article 124A into the Constitution. The new Article provides for a Judicial Appointments Commission and delegates the composition and function of its members to a law made by the Parliament. The amendment to Article 124(2)(a) provides for presidential appointment of Judges in the High Court to be made after consultation with Judges of the Supreme Court and High Courts. The Bill seeks to allow for the legislative overruling of Justice Verma's judgment in *SCAORA* v. *UOI*[15].

The Judicial Appointments Commission Bill, 2013 introduced in conjunction with the above, provides for the establishment of a collegium comprising of the Chief Justice, two senior-most Judges of the Supreme Court, the Union Minister for Law and Justice, the Prime Minister and the Leader of Opposition, and two eminent nominees of the collegiums. Such a Bill proposes to promote equal participation of the executive and judiciary in the appointment of Judges. If passed, it could be interpreted to have jeopardized the independence of the judiciary and its separation from the executive. Given that these are basic features of the Constitution, it will be interesting to see whether the Bills survive constitutional scrutiny.

Contributions

This year's edition begins with Aditya Sondhi's tribute to Late Justice J.S. Verma and his contribution to Constitutional Law. Mr.Sondhi reminisces the manner in which Justice Verma "*pushed the*

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15 (1993) 4 SCC 441.

contours of law" to settle controversial constitutional issues. In particular, he discusses how Justice Verma introduced the concept of continuing mandamus in *Vineet Narain and Others* v. *Union of India and Others;*[16] creatively interpreted Article 124(2) of the Constitution in *SCAORA* v. *UOI* to introduce the concept of a 'collegium of judges'; and ingeniously relied on international conventions in order to lay down binding guidelines that dealt with sexual harassment in the workplace. He concludes by remembering Justice Verma as a "conscientious dissenter" who was willing to "forge new tools" to fill the lacunae in law and uphold fundamental rights.

Alexander Turk has presented an erudite piece on the right to fair hearing in a parliamentary context in the landscape of the European Union becoming a legislative forum. He argues that the right to be heard is not merely an administrative law principle and that it has become a fundamental right. Subsequently, after an overview of appertaining decisions of the Union Courts in Europe he advocates that they have excluded participation rights in the legislative process based on an incorrect perception of the legal system in which such rights have been applied. The author notes that law-making in the European Union is already constrained due to unequal representation. He thus argues that there is a need to enhance the democratic legitimacy of the European Union through the principle of participatory democracy. Thus, when the process of rule-making involves individualised determinations that affect people, the Court must not shy away from granting participation rights.

Such a piece becomes extremely relevant from the standpoint of the controversy surrounding the Lokpal Bill. As of now there is no

16 AIR 1998 SC 889.

binding obligation on the Parliament to consider a meaningful contribution to law-making from any member of society. However, to not give effect to overwhelming public opinion questions the legitimacy of an incumbent government thus underscoring the importance of such contributions. The nascent idea of the AamAdmi party to have "mohallasabhas" or neighbourhood meetings demonstrates a refreshing understanding of the same. However, the extent to which such a model can be institutionalized in a country like India is another question altogether.

Daniel Lansberg's piece provides an overview of 'necessity' doctrines and theories used by the Judiciary to validate coups in developing democracies in the common law system. His paper examines the aftermath of a "coup d'état" where a non-executive body seizes power and the court provides premeditated reasoning to validate or absolve the actors. He then traces the origin of the doctrine of necessity and its Grotian and Kelsinian facets that are applied in such situations. The author, cognizant of the threat a judiciary may be under, worries that premeditated decisions that justify such coups will create precedents that can weaken the legitimacy of a government. To prevent such a situation he examines the feasibility of several solutions like physical removal of courts from the countries they represent, mass resignation of judges, and declaring such issues non-justiciable. Nevertheless, he submits that Constitutions are better suited at constraining coups ex ante than taking measures after the act has taken place, making it advisable for democracies to have provisions that contemplate a possible overthrow of the government or its structures. Thus, provisions that indicate the circumstances and procedure for scrapping the constitution or a "right to resist proviso" allowing people to challenge or attack a regime under certain conditions might avoid problems regarding legitimacy.

This argument becomes relevant in the Indian context when the Emergency Provisions of the Constitution are triggered. The Emergency provisions have allowed us to maintain a semblance of balance in times of crisis but have also been misused in the past. Perhaps the decision in *ADM Jabalpur* v. *Shivkant Shukla*[17] could have been avoided if the independence of the judiciary could have been maintained.

The debate on whether such matters are justiciable played out in the State of Rajasthan decision, where the Supreme Court held that a question of whether the President should proclaim an emergency under Article 356 is a political question. The decision was overruled in *SR Bommai* v. *Union of India* and the Court held that if a decision was made on *mala fide* or irrelevant grounds it could be struck down. Such a decision armed the Indian Judiciary to deal with matters regarding encroachment of powers, thus restoring the balance of power and preventing the abuse of constitutional provisions.

Pushan Dwivedi's note provides us with a succinct albeit critical legislative analysis of the Equal Opportunity Commission Bill. The Bill seeks to provide for progressive conceptualization of non-discrimination and broaden the scope of Article 14 and 15 of the Constitution. He argues that the Bill is theoretically flexible but practically restrained as it does not itself prohibit discrimination and relies on the grounds mentioned in Article 15 and 16. It also limits the horizontal application of rights by limiting the jurisdiction of the Commission to entities that come under Article 12. In light of such limitations he comes to the conclusion that the legislature has merely passed on the duty of making hard policy to the Judiciary. He then

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17 AIR 1976 SC 1207

examines the mandate of the Commission to prevent discrimination in the housing sector and argues that the present framework is not sufficient in itself. Finally, he compares the Bill with the Fair Housing Act of the United States and argues that the Bill ought to prevent discrimination in private property usage which has a public dimension. The Equal Opportunity Commission Bill was expected to herald a new era of equality in society, finally allowing for horizontal enforcement of rights. Unfortunately, the draft of the Bill tabled in last year's budget session has limited itself to countering discrimination against religious minorities. Such an approach has taken the sting out a Bill that was already without teeth thus making it a shadow of what it was originally envisaged to be.

Badrinarayanan Seetharamanan and Yelamanchili Shiva Santosh Kumar, in a highly engaging piece, titled the '*Quest For Constitutional Identity*' explore the process of identity creation through the constitution. They note that a well drafted constitution unifies constitutional identity even though it is constantly evolving. This is demonstrated by their reliance on other constitutions across the world that attempt to "reconcile the experiences of the past and the aspirations of the future".

In their quest for determining an Indian Constitutional identity, the authors cite the colonial personal laws project and the experiments with secularism as forms of identity creation which the constitution is required to represent. After examining the same, they come to the conclusion that Indian constitutional identity is predominantly determined by extra-constitutional considerations based on religion, language, caste or even nationhood and is more than just the legal text. The authors then attempt to determine a site for the location of the engagement between the state and the citizen and

finally decide upon the Higher Judiciary, despite certain limitations involved. After doing so, they examine whether the basic structure can be used to determine constitutional identity. After examining the history of the doctrine in light of the 9th Schedule and the cases after *Keshavananda Bharti,* they come to the conclusion that the basic structure doctrine is a mere design to maintain the continuity of the constitution and can be counter-majoritarian. It fails to capture disruptive changes and the unknowable nature of constitutional identity.

Manav Kapur's piece is a comparison of sodomy laws and the political impact of the gay rights movement in Nepal, India and Singapore. It critically examines the politics behind the struggle for LGBT rights and the various (and mixed) results this has had across jurisdictions. The author also looks at the common justifications courts (and other Constitutions) have relied on when dealing either with the retention or abolition of these values. Interestingly, the author has explored the argument that courts are not the sole arenas where constitutional (especially rights-based) arguments take place.

This was a factor that played a large role in the Indian Supreme Court's judgment in the *Naz Foundation* decision in which it held that adult consensual sex is an offence under the Indian Penal Code. It must be noted that this article was written before the Supreme Court judgment was delivered. However the judgment does not substantially alter the author's analysis or arguments.

Lastly, Anant Padmananabhan presents a succinct book review of Madhav Khosla's 'Short Introduction to the Indian Constitution.' He appreciates the book for being opinionated as well as refreshing in its treatment of controversial constitutional issues.

Mr. Padmananabhan notes that the author places emphasis on the theme of asymmetry across the constitution. Asymmetry is used as an analytical device to explain special status accorded to certain states, reservations and the difficulties in the basic structure doctrine. The book also discusses horizontal application of fundamental rights, the jurisprudence on Article 21 and the basic structure doctrine. In summation Mr Padmananabhan considers 'Short Introduction to the Indian Constitution' a well written crisp narrative on Indian constitutional law and theory.

Acknowledgments

Firstly, we profess our sincere thanks to Prof. Faizan Mustafa, Vice- Chancellor, NALSAR University of Law and Prof. Vijendra Kumar, Registrar for pledging their support and time which was instrumental to the release of this Journal. We also highly appreciate the generosity of Mr. K. K. Venugopal and the M. K. Nambyar SAARCLAW Charitable Trust that has allowed us to come out with this issue. We are glad that they have supported this journal since its inception and shall always fall short in expressing our gratitude for their undying support. Further, Mr. Sudhir Krishnaswamy's concern and help to this Journal is sincerely appreciated and received with gratitude.

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Most importantly we would like to thank those people who peer reviewed selected articles. The peer-review process is fundamental to this journal as it gives the editors perspectives of third persons who have specific knowledge of a particular facet of constitutional law or jurisprudence. This enables us to maintain the high degree of scholarship and stylistic maturity that we pride ourselves on. Hence, our special gratitude goes out to Prof. Tania Groppi, Vinay Kesari, Radhika Gupta, Saurabh Bhattacharjee, Mohsin Alam, Manav Kapur, Anup Surendranath and Alok Prasanna.

Lastly, we also thank the administrative staff for the assistance they have rendered.

In Memoriam: Justice JS Verma's Contribution to the Development of Constitutional Law in India

Aditya Sondhi[*]

"*I would rather be a conscientious lone dissenter than a troubled conformist*"

– Justice Verma in *K. Veeraswami* v. *Union of India*, (1991) 3 SCC 655

Justice J.S. Verma's contribution to the march of the law, particularly constitutional law, is not only epochal but also unorthodox. The fact that he has, through his judgments, innovated and invented a new constitutional jurisprudence has had mixed reactions from jurists, scholars, lawyers, judges, and significantly from the government. In the last few days the government of India has chosen to introduce the 99th Amendment to the Constitution of India to provide for the Judicial Appointment Commission, a step clearly directed at undoing the judgment of in *Supreme Court AOR Association (SCAORA)* v. *Union of India*[1] of which Justice Verma was an integral part.

In *SCAORA* Justice Verma held[2] that the majority opinion in *S.P Gupta* v. *Union of India* insofar as it took the contrary view relating to the lack of primacy of the role of the Chief Justice of India in matters of appointments and transfers, did not lay down the correct law. Article 124(2) [and correspondingly Article 217(1) for the High Courts] was instead interpreted to mean that the opinion of the Chief Justice of India has primacy in the matter of all judicial appointments

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[*] Advocate, High Court of Karnatake and Supreme Court of India.

1 (1993) 4 SCC 441.

2 *Id.* at ¶486(14).

to the Supreme Court; and no appointment can be made by the President under this provision *unless it is in conformity with the final opinion of the Chief Justice of India*. However, while doing so, the Bench further held[3] as follows:

> "In matters relating to appointments in the Supreme Court, the opinion given by the Chief Justice of India in the consultative process has to be formed taking into account the views of the two senior most Judges of the Supreme Court. The Chief Justice of India is also expected to ascertain the views of the senior-most Judge of the Supreme Court whose opinion is likely to be significant in adjudging the suitability of the candidate, by reason of the fact that he has come from the same High Court, or otherwise. Article 124(2) is an indication that ascertainment of the views of some other Judges of the Supreme Court is requisite. The object underlying Article 124 (2) is achieved in this manner as the Chief Justice of India consults them for the formation of his opinion. This provision in Article 124 (2) is the basis for the existing convention which requires the Chief Justice of India to consult some Judges of the Supreme Court before making his recommendation. *This ensures that the opinion of the Chief Justice of India is not merely his individual opinion, but an opinion formed collectively by a body of men at the apex level in the judiciary*." (Emphasis supplied.)

Critics would argue that the judgment in *SCOARA* rewrote the law, introduced language that did not exist in the legal provision and thereby overreached the judicial process of interpretation of the plain letter of the law. However, the contrarians would argue (perhaps with

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3 *Id.* at 478.

greater force) that the judgment restored the independence of the judiciary, freeing it from the ominous control of the executive, which had caused some disturbing precedents of very fine judges being superseded for reasons other than merit. More significantly, the judgment conceded the scope for abuse (actual or perceived) by the CJI acting by himself and introduced the concept of the 'collegium' that would act together in rendering binding advice of the government. The framework introduced was as follows:[4]

> "In matters relating to appointments in the High Courts, the Chief Justice of India is expected to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court whose opinion, according to the Chief Justice of India, is likely to be significant in the formation of his opinion. The opinion of the Chief Justice of the High Court would be entitled to the greatest weight, and the opinion of the other functionaries involved must be given due weight, in the formation of the opinion of the Chief Justice of India. The opinion of the Chief Justice of the High Court must be formed after ascertaining the views of at least the two senior most Judges of the High Court."

The fact that the collegium system is seen to have failed in practice is hardly a fault of the judgment itself. The *manner* in which the system has been worked may have let down the ideal that was espoused in the judgment. One can scarcely detract from the spirit (and historical context) behind the decision. More so, one must do well

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4 *Id.*

to remember the further guidelines laid down in *SCOARA* to ensure fulfillment of this ideal. The judgment further provides thus:

> "The Chief Justice of India, for the formation of his opinion, has to *adopt a course which would enable him to discharge his duty objectively to select the best available persons* as Judges of the Supreme Court and the High Courts. The ascertainment of the opinion of the other Judges by the Chief Justice of India and the Chief Justice of the High Court, and the expression of their opinion, *must be in writing* to avoid any ambiguity." (Emphasis supplied.)

The onus was therefore clearly on the successors of Justice Verma to live up to this ideal. The judgment, if nothing else, tremendously raised the bar for the honourable judges to act with precision and commitment not only on the judicial side, but equally, on the *administrative* side. This can scarcely be underplayed in a Constitutional republic such as ours where the constitution is only as good as the people who administer it.

Justice Verma's approach to situations where law was inchoate was best reflected by his views in *Nilbati Behara (Smt) Lalita Behera (Through the Supreme Court Legal Aid Committee)* v. *State of Orissa and Others*[5]:

> "[I]n the *Bhagalpur Blinding cases: Khatri (II)* v. *State of Bihar* and *Khatri (IV)* v. *State of Bihar* .... it was said that the court is not helpless to grant relief in a case of violation of the right to life and personal liberty, and it should be prepared "***to forge new tools and devise new remedies***" for the purpose of vindicating

[5] (1993) 2 SCC 746, at ¶19.

> these precious fundamental rights. It was also indicated that the procedure suitable in the facts of the case must be adopted for conducting the inquiry, needed to ascertain the necessary facts, for granting the relief, as the available mode of redress, for enforcement of the guaranteed fundamental rights. More recently in *Union Carbide Corpn.* v. *Union of India* Misra, CJ, stated that 'we have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with the unusual situation which has arisen and which is likely to arise in the future...there is no reason why we should hesitate to evolve such principle of liability ...'"

This propensity to "forge new tools and devise new remedies" enabled Justice Verma to push the contours of the law in many of his judgments dealing with the protection, enforcement and in some senses, the *creation* of the rights of the citizens. In doing so, reference was also placed on Article 9 (5) of the International Covenant on Civil and Political Rights, 1966 to indicate that "an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right."

It was no coincidence that he also referred to the observations of Justice M.N. Venkatachaliah (as he then was) in the *Bhopal Gas case* that "the court is not helpless and the wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to this Court

under Article 142 is also an enabling provision in this behalf."[6] Justice Verma regarded Justice Venkatachaliah as his soul-mate, on and off the Bench, a sentiment that was warmly reciprocated by the latter. Together, they forged a formidable partnership that furthered the enforcement of human rights and the development of a new constitutional jurisprudence of the Supreme Court of India.

These "new tools and new remedies" sharply came to light in *Vishaka & Ors.* v. *State of Rajasthan &Ors.*,[7] where the Supreme Court laid down binding guidelines to deal with the recurring menace of sexual harassment at the workplace. In doing so, Justice Verma held thus:[8]

> "In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. *Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.* This is implicit from Article 51 (c) and the enabling power of 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 the Seventh Schedule of

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6 *Nilabati Behara*, at ¶20.
7 (1997) 6 SCC 241.
8 *Id.* at ¶7.

> the Constitution. *Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till Parliament enacts legislation to expressly provide measures needed to curb the evil*." (Emphasis supplied)

The canons of international conventions not incompatible with chapter III of the Constitution of India were read into the constitutional scheme – a giant leap for our jurisprudence (though not new). More subtly, the approach to a situation where there was *no* domestic law in place was filled by judicial dicta by relying on the fact that the executive too had failed to act under Article 73 in the absence of legislation. No doubt, Courts cannot and do not legislate *per se*. But this novel approach relying on the inaction of the executive to justify judicial intervention *till such time a legislation or executive order was passed* was astute and far-reaching. It acts, even today, as a *Brahmastra* for the Supreme Court to combine with its sweeping powers under Articles 141 and 142 to fill a legislative void, provided of course, fundamental rights are at threat.

This method was further applied in *Vineet Narain and Others* v. *Union of India and Others*[9] wherein it was reiterated that there are ample powers conferred by Article 32 read with Article 142 to make orders *which have the effect of law* by virtue of Article 141 and "there is mandate to all authorities to act in aid of the orders of [the Supreme] Court as provided in Article 144 of the Constitution." The said power could be exercised "by issuing necessary directions to fill the vacuum

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[9] AIR 1998 SC 889.

till such time the legislature steps in to cover the gap *or the executive discharges its role.*"[10] (Emphasis supplied)

Consequently the judgment issued a series of directions with respect to the manner in which the Central Vigilance Commission (CVC) and the Central Bureau of Investigation (CBI) are to function in the matter of achieving transparency and efficacy in investigation. The striking aspect in this decision is the minute attention to detail in the matter of laying down binding qualifications with respect to the functioning, term and tenure of senior officers, and other aspects relating to the effective investigation by the CBI. Many of these minutia are such that they make one wonder as to whether these are fully within the expertise of the courts. But the fact remains that such directions have been issued till such time legislature or the executive steps in to substitute them by appropriate legislation or notification as the case may be. The greater motivation (and therefore the justification) is to uphold and implement the rule of law and the fundamental rights of the citizens envisaged there under. The fact that the Central Vigilance Commission Act came to be passed in 2005, and the fact that the CBI itself has now filed an affidavit before the Supreme Court in the ongoing coal scam case pleading for freedom from the clutches of the bureaucracy, underscore the need for a legal framework that was foreseen by the judgment of the Supreme Court.

(The concept of a 'continuing *Mandamus*' applied in this case also enables the Constitutional courts to oversee the due implementation of their directions, and has been frequently invoked by successive judgments of the Supreme Court.)

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[10] *Id.* at ¶51.

A subsequent decision in *Naga People's Movement of Human Rights* v. *Union of India*[11] referred loosely as the *AFSPA* case, too deployed this technique in a lesser degree in holding that[12] "While exercising the powers conferred under clauses (a) to (d) of Section 4 the officers of the armed forces shall strictly follow the instructions contained in the list of "Dos and Don'ts" issued by the army authorities which are binding and any disregard to the said instructions would entail suitable action under the Army Act, 1950" and further that "The instructions contained in the list of "Dos and Don'ts" *shall be suitably amended* so as to bring them in conformity with the guidelines contained in the decisions of this Court and to incorporate the safeguards that are contained in clauses (a) to (d) of Section 4 and 5 of the Central Act."[13]

Once more, by way of judicial interpretation, the statute was 'refined' by incorporation of guidelines issued by the Court and perhaps saved from the stigma of being in conflict with the chapter on fundamental rights in the Constitution of India.

End Note

The discomfiture of the government with the jurisprudence of Justice Verma does not stop with the proposed 99th Constitutional amendment. It is interesting to note that the judgment in *Prakash Singh and Others* v. *Union of India and Others*[14] relating to police reform, though rendered after the retirement of Justice Verma, relied squarely on his techniques of adjudication by holding that:[15]

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11 (1998) 2 SCC 109.
12 *Id.* at ¶74(19).
13 *Id.* at ¶20.
14 (2006) 8 SCC 1.
15 *Id.* at ¶30.

> "Article 32 read with Article 142 of the Constitution empowers this Court to issue [such] directions, as may be necessary for doing complete justice in any cause or matter. All authorities are mandated by Article 144 to act in aid of the orders passed by this Court. The decision in *Vineet Narain case* notes various decisions of this Court where guidelines and directions to be observed were issued i*n the absence of legislation and implemented till the legislatures pass appropriate legislations*." (Emphasis supplied)

Accordingly, the Court hoped that the preparation of a model Police Act/s by the Centre and the States would provide for the composition of the State Security Commission and "wholly insulate" the police from political pressure so that the rights of the citizens under the Constitution are secured. However the Court held further thus: "*It is not possible or proper to leave this matter only with an expression of this hope and to await developments further. It is essential to lay down guidelines to be operative till the new legislation is enacted by the State Governments.*" (Emphasis supplied.)

This could so easily be mistaken to be a judgment of Justice Verma's – for its intent and effect. However, the governments of Maharashtra, Andhra Pradesh and Uttar Pradesh have recently, seven years after this judgment, made a submission before the Supreme Court in follow-up proceedings to the effect that the said directions in *Prakash Singh* were an "encroachment on the executive's function", outside the seisin of the Supreme Court and thereby "unconstitutional".

Both these reactions aforesaid (the 99th Amendment Bill and the stand of the three state governments), albeit belated, demonstrate the

far-reaching effects of several judgments of Justice Verma and the fact that they remain a sore point in the interface between the judiciary and the political establishment.

Such sweeping innovation and interpretation to quasi-legislate in the absence of law is ironical coming from Justice Verma who, while dissenting in *Veeraswami*, had held in no uncertain terms that:[16]

> "May be, need is now felt for a law providing for trial and punishment of a superior Judge who is charged with the criminal misconduct of corruption by abuse of his office. If that be so, the Parliament being the sole arbiter, *it is for the Parliament to step in and enact suitable legislation in consonance with the constitutional scheme which provides for preservation of the independence of judiciary and it is not for this Court to expand the field of operation of the existing law to covering the superior Judges by* ***usurping*** *the legislative function of enacting guidelines to be read in the existing law by implication*, since without the proposed guidelines the existing legislation cannot apply to them. Such an exercise by the court does not amount to construing an ambiguous provision to advance the object of its enactment, but *would be an act of trenching upon a virgin field of legislation* and bringing within the ambit of the existing legislation a category of persons outside it, to whom it was not intended to apply either as initially enacted or when amended later" (Emphasis supplied)

Was it that this judgment dealt with an existing legislation as opposed to the *absence* of legislation altogether? Or was it that His Lordship had a change in bent of mind afterwards?

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16 *Veeraswami*, at ¶74(19).

Regardless, the later *avatar* of Justice Verma surely did more to espouse the vibrant growth of constitutionalism in India. He was a "conscientious dissenter" in that he was happy to take a view that was not orthodox, happy to unsettle some conventional methods of adjudication and happy to push the contours of the law. Some would grumble that in so doing, he 'stretched' the law. But then, when the larger good of many depends on the interpretation of the law, the law would rather be stretched than curbed.

Doctrines of Convenience:
Judicial Review Following Periods of Extra-Legality

- *Daneil Lansberg*[*]

Overview

With the rise of constitutionalism as the dominant global paradigm for national governance, governments find themselves today under great pressure to adhere to a formalized set of procedures and precepts laid out in their respective constitutions.[1] Any radical departure from these norms, such as the unconstitutional seizure of state authority by an outside party or one of the state's own constituent parts, can deal a staggering blow to perceptions of government or regime legitimacy, both among the national population, and among skittish international investors and allies.[2] Likewise, the existence of human rights standards, membership guidelines for international organizations and treaty obligations,[3]

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1 CASS SUNSTEIN, WHAT CONSTITUTIONS DO 241 (2001); *see also* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 179 (1960) ("[The reason for constitutions] is that all men in the pursuit of immediate aims are apt—or, be- cause of the limitation of their intellect, in fact bound—to violate rules of conduct which they would nevertheless wish to see generally observed. Because of the restricted capacity of our minds, our immediate purposes will always loom large, and we will tend to sacrifice long-term advantages to them."); and discussion in A.C. Pritchard and Todd Zywicki, *Finding The Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C.L. REV. 409, 447-49 (1999).

2 Robert Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 580-81 (2004).

3 The charters of many international agreements and associations such as the OAS (*See* Article 21 of the Inter-American Democratic Charter), the British Commonwealth, and the African Union (*See* Megan Shannon, et. al, T*he International Community's Reaction to Coups,* APSA 2012 ANNUAL MEETING

alongside the ubiquitous presence of global media, mean that states are increasingly likely to have their actions (even during emergencies) subsequently scrutinized either by actual courts or else in the court of international public opinion. However the stakes of such considerations are high, and can include loss of aid revenue and expulsion from international organizations.[4] Despite this risk, unconstitutional power grabs and coups are by no means uncommon, as we have recently seen in places like Mali, Egypt and Central African Republic.[5]

PAPER6) all offer guidelines and indications for suspending member states following unconstitutional interruptions or seizures of power. As a result, countries seized through coup d'état, and whose governments are unable to offer sufficient justification, can soon find themselves cut off from receiving necessary aid as befell the "revolutionary government" of Mali in 2012.

4 Since 1993, the U.S. government has maintained a policy of expressly forbidding the distribution of national funds to "finance directly any assistance to any country whose duly elected Head of Government is deposed by military coup or decree." [Section 513, Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1993)

5 While it is perhaps worth noting that, during the Cold War, the occurrence of military coups peaked, particularly among the non-NATO/non-Warsaw Pact countries of Africa, Eurasia and Latin America. In the year 1964 alone there were twelve such coups, replacing the governments of more than 10% of those countriesin existence at that time, and that's excluding any number of failed coups and abortive attempts – discovered and undiscovered—that likewise may have taken place. It has been argued that the frequency and success of such constitutional disruptions have been declining. The last decade as a whole, has brought about only 10 successful "strikes of state" worldwide. (*See* Jonathan M Powell and Clayton L. Thyne, *Global Instances of Coups from 1950 to 2010: A New Dataset*, 2011 JOUR. PEACE RESEARCH 249-259). Yet, lest we be too soon to self-congratulate, I would argue that much of this is the result of new developments in "framing" and on the heightened need for, and availability of, justifications as a result of geopolitical changes. The importance of complying with constitutional procedures at the domestic level, in order to preserve its international credibility was relatively low. Prior to the fall of the Soviet Union in 1991, any government that arose by force could usually count on receiving support and legitimacy from one of the two superpowers. That is to say, during the Cold War, when Fidel Castro overthrew Fulgencio Batista, an ally of the

Modern constitutions are expected to fulfill several crucial roles in a society: setting up a structure for governance, clearly defining the responsibilities and authorities of various state actors, and limiting governmental power vis-à-vis the population through the creation of enumerated rights. Prior to the rise of constitutionalism as a nearly universal[6] characteristic of government globally, sovereign actions undertaken by a government had no agreed upon national framework with which to be subsequently compared and legitimacy was but a secondary consideration to feasibility. During this period, "necessity" was approached primarily as a common law defence to legitimize illegal acts undertaken by individuals,[7] not actual states for whom "might" was assumed to make "right."[8] Thus, while the state held considerable freedom of action, it was the individual that was beholden to the mandates of the law.

U.S., the new regime found a ready friend in the Soviet Union. Meanwhile, when Pinochet overthrew the left-wing Allende regime in Chile, this new regime now would be supported by the United States and the Western powers. With this predictable tit-for-tat system firmly in place governments during this period faced a far easier path to legitimacy: a path paved by geopolitical rivalries and well lit by ideological platitudes. The end of this system have complicated the ease, and heightened the importance, with which a nascent coup-arising government can hope to secure the requisite international legitimacy for rule.

6 *See* STEPHEN HOLMES, PASSIONS AND CONSTRAINT 135 (1995) (discussing how "[a] constitution disempowers short-sighted majorities in the name of binding norms"); JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 93 (2001) (describing constitution-making as "a nation's struggle to lay down and live out its own fundamental political commitments over time").

7 As of January 2013 only the United Kingdom, New Zealand, Canada, Saudi Arabia and Israel have not ratified some variety of written constitution, to function as their basic law.

8 For the classic example of 19th Century Necessity Defence *see Regina* v. *Dudley* and Stephens, 14 Q.B.D. 273 (1884); or, for a more general overview: Simon Gardner, *Instrumentalism and Necessity*, 6 OXFORD J. LEGAL STUD. 43 (1986).

By formalizing institutional relationships and clearly delineating the boundaries of what shall be acceptable behavior on the part of governments, written constitutions seek to raise the potential risks and transaction costs associated with any government actions that fall outside of those predefined constitutional parameters.[9] Constitutions accomplish this by compounding the perceived illegitimacy of acts that fall clearly outside the established working of the state, and, by extension, raising troubling specters of possible eventual penalties on those actors involved, should the constitutional norm eventually be re-established. And yet, constitutions are at their core pre-commitment devices[10] whose drafters seek to bind the future to the present, cognizant of the fact that subsequent governments and even popular majorities may someday seek to violate those very norms, rights, and procedures established at the time of the constitution's founding. For such a system to function, it is necessary to have bodies capable of monitoring events in real time, likewise

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[9] Beyond formalizing intra-governmental institutional relationships and enshrining basic individual rights, constitutions can often hold an important status within the national culture, and are likewise likely to contain important national credos and arguments for collective identity that go some way towards creating a proper raison d'état for the country as a whole. Indeed, it is within these very countries, those where commitment to constitutional government is more or less engrained, that revolutions, coup d'état and other upheavals are most traumatic as this interruption of regular governmental process effectively invalidates the constitution and – by extension the legitimacy of the state itself. (For more on this *See* generally, Mark Stavsky, *The Doctrine of State Necessity in Pakistan*, 16 CORNELL INT'L L.J. 341 (1983)).

[10] *See* generally Jon Elster, *Majority Rule and Individual Rights*, *in* ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 175, 187-89 (Stephen Shute & Susan Hurley eds., 1993) (discussing how majority rule can infringe upon individual rights owing to momentary interest and how constitutionalism acts as a restraint on majority rule); Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195, 195-96 (Jon Elster& Rune Slagstad eds., 1988) (describing the relationship between democracy and constitutionalism in historical perspective).

reconciling often messy realities with the legal abstractions of the constitution itself: a task that usually falls to a national judiciary.[11]

Yet, when in extremis, the crises with the greatest potential for long-term constitutional derailment such as revolutions, power grabs or coup d'état still take place. Judiciaries in developing common law democracies have routinely failed to condemn such acts.[12] Instead, it has been common for standing high courts to bend over backwards, contorting both the law and their own positions to provide some semblance of ex-post-facto validation for those responsible. By invoking various necessity and legitimacy doctrines, many of them ancient, or highly theoretical, courts serve up precooked justifications to absolve state actors (or those actors who have become the state) from ever being brought to task for having done so.[13]

In fact, not until quite recently, has a national judiciary actually stood its ground in condemning a successful unconstitutional seizure of power while that government itself remained in force.[14] In 2001,

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11 *See* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 661 (2011) (observing that "[j]udicial review is commonly portrayed as the fail-safe mechanism by which constitutional commitments become practically binding").

12 Recent history is rife with examples of such failures: Nigeria and Uganda in 1966, Rhodesia in 1968, and Pakistan itself has during the last 60 years become a veritable revolving door of coups and judicial validations. (*See*, for example, Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup D'Etat& Common Law*, 27 CORNELL INT'L L.J. 49 (1994) at 102)

13 *See*, generally, Mahmud Tayyab, *Praetorianism & Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan,* 4 UTAH L. REV. 1225 (1993).

14 It can be argued that in the case of *Madzimbamuto* v. *Lardner-Burke*,(1978) 3 WLR 1229 in Rhodesia/Zimbabwe, where the supreme court of the land was in fact the British Privy council these criteria were met but likewise a differentiation can be drawn based on it not being, technically, the court of that country. Likewise, there are cases where judiciaries did fail to validate a coup

Marine Commodore Bainimaram sought to justify his recent seizure of state authority in Fiji via coup arguing that his overthrow of the state had been justified by necessity.[15] The Supreme Court of Fiji, refused to accept this argument, declaring both his actions and his current authority illegitimate. The Commodore stepped down and, for a time, there was a return to constitutional normalcy. Yet five years later Bainimaram was back in power again following a second successful putsch in 2006.[16] This time, when the court attempted to declare his actions unconstitutional he was prepared.[17] The Fijian judiciary was dissolved and the Commodore remains in place to this day. So what lessons can we learn from this Tale of Two Fijis?

When governments are functioning from a place of legitimate authority there is likely to be an opportunity to assure constitutionality ex ante, perhaps by pushing through a constitutional amendment or even easing in through a creeping coup, minimizing potential risks or scandals. The type of constitutional questions likely to require judicial review as to constitutional legitimacy after-the-fact,

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once the propitiators of the constitutional violation were no longer in control of the government. Examples can be found in: *Jilani* v. *Government of Punjab*,1972 PLD SC 139*; Liasi* v. *Attorney-General*, 1975 CLR 558 (Cyprus), *Mitchell* v. *Director of Public Prosecutions*,1986 LRC (Const.) 35 (Grenada).

15 *The Republic of Fiji* v. *Prasad*, [2001] FJCA 1.

16 *Qarase v Bainimarama* (unreported, Court of Appeal, Fiji, 9 April 2009, No ABU0077 of 2008S, Powell, Lloyd and Douglas JJA), available at http://www.nswbar.asn.au/circulars/2009/apr09/fiji.pdf.

17 In April of 2010, Bainimaram announced the immediate implementation of the aptly-named "Revocation of Judicial Appointments Decree" which dissolved all judicial appointments made under the suspended Fijian Constitution. New High Court judges were appointed six weeks later. Subsequent decrees that followed would likewise bar the courts from addressing issues surrounding the legality of the recent interruption of constitutional rule, or to address potential human rights consequences stemming from it. (*See* generally, Amnesty International's Report on Fiji available at: http://www.amnesty.org/en/region/fiji/report-2010).

particularly within the context of the developing world, are often those that involve serious constitutional violations such as coups and illegitimate governmental seizures of authority. In my view, such seizures can best be understood as belonging to one (or more) of the following three separate modalities.

(1) An "auto-coup" where the executive unconstitutionally seizes power and authority constitutionally delegated to other bodies such as the judiciary or parliament.

(2) A "creeping coup" where an executive sequentially expands the scope of its power chipping away at other authorities via tactical consolidation and systematic undermining and erosion of other governmental authorities but falling short of outright seizure.

(3) A "coup d'état" where a non-executive body or group, often military, seizes control by force or threat of force from the previous executive.

The first two modalities represent situations where some previously established, or otherwise, legitimate authority oversteps constitutional boundaries placed upon it by the national Constitution or fundamental law. By having violated its constitutional role, often at the expense of another branch of government such as a legislature, the legitimacy of this previously lawfully empowered state actor is compromised, as can be, by extension, that of the government as a whole. At one extreme you might have a situation like the 2009 Fijian coup wherein the national executive was declared illegitimate by the judiciary following a coup and the acting executive simply dismissed Parliament, dissolved judicial appointments and suspended the Constitution:[18] essentially an auto-coup on the heels of a coup d'état.

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[18] UNITED NATIONS SECURITY REPORT #4 (2009), available at

While the primary focus of this paper, and most of the examples we will be dealing with are anchored to the third modality, the earlier two are likewise worth touching upon. In part, this is because they offer an example of state actions most easily justifiable through the necessity doctrine: situations where the actors themselves have some claim to legitimacy in principle, even if not in scope.

It bears noting that while I have categorized these modalities as being entirely separate, and think them best understood as such, in many cases a particular incident or scenario may involve more than one modality over a given period of time or else an external perception to that effect. At times this can represent multiple coups or attempted coups, as well as potential countercoups during the same short period of significant destabilization.[19] Likewise, coup leaders themselves are often quick to justify their extra constitutional actions as having in fact been a defense of the constitutional paradigm against some prior executive overreach.[20] In cases where such arguments prove successful they can go some way towards validating the new regime.[21]

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http://www.securitycouncilreport.org/update-report/lookup-c-glKWLeMTIsG-b-5108563.php?print=true,explaining how the rebirth of Fijian democracy would prove short lived, as in 2006 another coup would topple the government, again led by Commodore Bainimarama. Once again, in 2009 the Appellate Court would rule the move unconstitutional although this time the government was ready. The following day President Ratu Josefa Iloilo announced over a national radio broadcast that he has abolished the constitution, assumed governance and was rescinding all judicial appointments. Soon after, he would reappoint Bainimarama as president.

19 *The Republic of Fiji* v. *Prasad,* [2001] FJCA 1.

20 Marc Lacey, *Leader's Ouster Not a Coup, Says the Honduran Military*, THE N.Y. TIMES, July 1, 2009.

21 Helene Cooper and Marc Lacey, *In a Coup in Honduras, Ghosts of Past U.S. Policies,* THE N.Y. TIMES, June 29, 2009.

In short, national governments will often find it preferable to seek a way to justify their interruptions by pressuring national judiciaries to subsequently interpret their actions as having been constitutionally legitimate the entire time, even if they ran contrary to the letter of the law.[22] This allows for some semblance of a return to normalcy, while maintaining the existing institutions and protocols in place.[23] After all, scrapping a constitution outright (as was recently done in many of the Arab Spring countries)[24] can be a painstaking and laborious process, and while public opinion may demand it following some seminal event or truly popular revolution, should circumstances otherwise permit it coup leaders may seek to minimize interruption by merely shuffling the pieces around the chessboard: rather than fundamentally changing the game.

Name Your Necessity Doctrine: Kelsen, Grotius, Bracton et al.

Perhaps unsurprisingly, the various doctrinal justifications through which national courts will often seek to validate constitutional violations after-the-fact have proven to be both highly

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22 Farooq Hassan, *Juridical Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of a Coup d'état in the Common Law*, (1984) 20 STAN. J. INT'L L. 191, 240–241 (describing judicial acceptance of the validity of a coup as "a uniquely valuable source of credibility for the revolutionary government." Although it is true that refusing to accept the validity of the coup government may produce unrest, "it seems more likely that the acceptance of revolution as a viable means of governmental transformation would facilitate rather than foreclose the likelihood of additional takeovers of the same type.

23 Charles Sampford and Margaret Palmer, *Strengthening Domestic Responses to the Erosion of Democracy and to Coups D'état*, 2005 COUNCIL ON FOREIGN RELATIONS26 (where: "*Genuine revolutions may justify a finding that the old legal order has vanished. However, coups are not about getting rid of the old order but taking it over.")*

24 Daniel Lansberg-Rodriguez, *Four Arab Democrats and a Constitutional Scholar Walk Into a Bar*, FOREIGN POLICY, May 6, 2013.

inconsistent[25] and somewhat incestuous. Much as coups themselves occur in self-perpetuating cycles[26] – wherein each incoming violation seemingly increases the statistical likelihood that a future violation will take place – so too do specific justification doctrines of choice seem to emerge and repeat themselves based on regional, cultural and historical factors.[27]

For our purposes, this current cycle can be said to have begun in Pakistan in 1955, when the Lahore High Court granted legal legitimacy to the dissolution of Parliament by the fledgling nation's Governor General.[28] Since then, over a dozen commonwealth countries have -- at one time or another -- relied on some combination[29] of the Doctrine of Necessity,[30] vaguely Grotian conceptualizations of implied mandate,[31] and Kelsen's Pure Theory[32] of

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25 *Supra.* n.13.

26 *Supra.* n.12.

27 *Id.*

28 *Reference by His Excellency the Governor-General*, PLD 1955 F.C. (Pak.) 435 ("Reference") where guided by Bracton the Governor-General's labels dissolution of the Constituent Assembly as having been made "under the stress of necessity... in order to avert an impending disaster and to prevent the State and society from dissolution', but urged that 'since the validity of these laws is founded on necessity, there should be no delay in calling [a new] Constituent Assembly."

29 *Supra.* n.9 at 364.

30 A note on terminology: When referring to "doctrines of necessity" (in the lower case) or "necessity doctrines" I am referring to a collective bundle of commonly invoked doctrinal justifications used to justify violations of the existing constitutional order. Meanwhile, The Doctrine of Necessity (capitalized) refers to the specific doctrinal justification predicated in part by sayings of Cicero and Henry de Bracton and Grotius, and the first justification used for coup validation in Pakistan in 1955.

31 *See generally* HUGO GROTIUS, THE LAW OF WAR AND PEACE, DE JURE BELLI AC PACIS (F. Kelsey trans., 1925) explaining how usurpers can never becoming legitimate, as that is a right attached only to the rightful sovereign, but whose acts of Government can have binding force, conditional on whether the lawful ruler *would* prefer that the measures be enacted in order to avoid the utter

institutional legitimacy alongside precedents of similar violation / justification cycles in their own or other commonwealth countries. In nearly every case where the offending government remained in power and the court itself was within that government's reach, the court would find some platitude through which to justify the unjustifiable.[33]

Being a mechanism that often relies heavily on sound bites: snippets of doctrine taken out of context, ancient legal maxims, and contorted or oversimplified versions of more nuanced ideas; the roots of the phenomenon are remarkably easy to trace. Each new iteration of the practice facilitates not only further constitutional breakdowns in the specific country affected but rather – through the importation of doctrines and precedence from one part of the commonwealth to the next – the vicious cycle has kept perpetuating with withering effects upon the tenability of democratic governance.[34] By bypassing the existing constitutional framework state actors may facilitate short-term solutions but they also create precedents that can weaken governmental legitimacy for a very long time.

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confusion and anarchy among his subjects. As such the fount of the law remains corrupt but the law itself may be valid.

[32] Kelsen was a positivist and his pure theory is likewise a positivist theory. It seek to define "what is law" in conceptual sense free of value judgments as to its legitimacy or inherent justice or injustice. At the heart of this theory lies the idea of a *"Grundnorm"* the base from which a legal system derives its validity. In Kelsen's conceptualization a successful *coup d'etat* or revolution can create a new "Grundnorm", and efficaciousness in being externally regarded as a new order, in turn legitimizes it and validates it as a new legal order. *See* generally HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1945). See also HANS KELSEN, PURE THEORY OF LAW (2nd ed., 1967) and F.M. Brookfield, *The Courts, Kelsen and the Rhodesian Revolution,* 19 U. TORONTO L. JOUR.326, 329 (1969).

[33] *Supra.* n.12.

[34] *See* Appendix I, and also, for example, *The State* v. *Dosso,* PLD 1958 S. Ct. (Pak.) 533, *Madimbamutov Lardner-Burke,* (1968) 2 S.A. 284.

Defining Necessity

The inherent tension between doing one's duty and doing what is necessary is of course nothing new. It is a deep and timeless theme in our collective history. As far back as the Old Testament, the book of Jonah describes desperate sailors throwing their precious cargo out to sea, so as to lighten a foundering ship during a terrible storm.[35] In the prevailing centuries, captains of state have often invoked similar justifications to instances where fundamental laws, or even sacred national values, have been likewise sacrificed either due – as in Jonah – to actual necessity, or, more often, as a result of internecine power struggles or personal ambitions.

In a sense, the doctrine of state necessity is a logical continuation of the more well-known and uncontroversial defence of necessity in criminal law. Within the common law legal tradition otherwise criminal acts can be deemed justifiable (and by extension irreproachable) if a defendant is able to prove that greater harm would have occurred had the accused strictly adhered to the law in that specific case.[36] The stakes are a bit higher however, since such considerations often apply to state actors, claiming to have acted under color of law, and currently positioned at the highest levels of government: individuals for whom the actions in question, if not legitimized, may be sufficient to compromise the integrity and validity of the state itself.

The use of "State Necessity" as a justification for illegal acts (although not specifically for coup validation) dates back much further

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35 *See* Jonah 1:4–5, New American Standard Bible.

36 With one classic example being the man who trespasses on private land to avoid being attacked by an animal.

within the common law tradition. Following the Jacobite revolution of 1715, Whig parliamentarians postponed parliamentary elections, and extended their own mandates, through an emergency measure known as the Septennial Act of 1716. As justification they invoked the "*saluspopuli"* maxim.[37] A doctrine of state necessity was likewise strongly implied during the 19th Century United States Supreme Court Case *Texas* v. *White*[38] (1868) a post-Civil War case in which certain limiting acts undertaken under the auspices of the then – confederate governments – were allowed to continue in force afterwards despite them not having a clear constitutional justification for such.[39] While they were patently illegitimate, as the rebels had never been in a constitutionally legitimate position to be making law, the necessity of acquiescing to those laws was deemed sufficiently compelling by the Supreme Court.

Later, during the early 20th Century, several civil law European States, suffering under the uncertainties caused by the two World Wars, and the onerous rise of fascist movements during the inter-bellum period, began declaring "state of emergencies" unconstitutional. The first state to do so was Switzerland. In 1914, the Swiss Parliament gave over absolute power to the executive governors: although the national Constitution did not actually allow for such a transfer.[40] This *Droit de nécessitéetétat d'exception* persisted until 1921.[41] In 1939, with the advent of the Second World War, the executive once again seized

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37 *Supra.* n.34.

38 BENJAMIN STRAUMANN, CONSTITUTIONAL THOUGHT IN THE LATE ROMAN REPUBLIC, HISTORY OF POLITICAL THOUGHT 282, Vol. XXXII. No. 2. (2011).

39 *Id.*

40 Anna Khakee, *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe,* POLICY PAPER NO. 30, GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES (2009), at 19.

41 *Id.* at19-20.

power, although this time they would prove unwilling to give it back until it was wrestled away via popular referendum and protests in 1950.[42] To various degrees Norway and France, underwent similar experiences during this time, with the proto-doctrine of necessity being invoked so as to validate actions undertaken without explicit constitutional grounding – and at times with begrudging acquiescence by other powers.[43] In contrast, countries such as Germany, Greece, Hungary, Poland, Portugal, and Spain have very well defined constitutional parameters as to how the country may function during a state of emergency. Though certain constitutional protections and procedures are temporarily suspended they have enacted careful stipulations as to the extent, authority and potential duration of such measures.[44]

Modernity has made such situations no more cut and dry. Take for example the situation in Cyprus[45], which, in 1964, was a country deeply and passionately divided between its majority Greek and minority Turkish populations. Upon achieving independence in 1960, as a way of diffusing feelings of ill will, the government had been deliberately set up in such a way so as to require the active participation of government positions, explicitly set aside only for members of the Turkish Cypriot minority. Yet when the relationship and cooperation between the two groups broke down, the Turkish Cypriots began to deliberately withdraw from the system: creating a constitutional crisis which effectively paralyzed the government.[46]

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42 *Id.*
43 *Id.*at 18.
44 *Id.*at 11-22.
45 *Supra.* n.9.
46 See *Attorney General of the Republic* v. *Mustafa Ibrahim and Others,* 1964 Cyprus L. Reports 195.

In response, the Greeks moved to adjust the system unilaterally, in an attempt to reconcile the de facto workings of the government during the Turkish boycott with the processes required under the national Constitution. This was unconstitutional on its face, but the nation's constitutional court subsequently acquiesced to the government's argument that the move had been necessary, and justifying the decision through an appeal to the Doctrine of Necessity.[47]

More recently, the former kingdom of Nepal has entered into what appears to be a type of infinitely looping over reliance on the Doctrine of Necessity. It has regularly appealed to the said doctrine so as to legitimize repeated failures among its collapsed institutions through meeting deadlines for formalizing constitutional norms.[48] To date this has meant repeatedly extending the term of what should have been a temporary constituent assembly and prolonging the enforcement of what was meant to be a short-term transitional constitution.[49]

Coup Validation

The theoretical justification of what would eventually become the Doctrine of State Necessity (at least as regards its current troublesome, coup validating incarnation) is usually attributed to a series of cases undertaken by the Pakistani Judiciary beginning soon

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47 *Id.*

48 Punjita Pradhan, *Nepali Parties Agree to Extend CA Term for Fourth Time*, available at http://news.xinhuanet.com/english2010/world/2011-11/28/c_131275270.htm.

49 *Into the Wild,* May 28th 2012, available at http://www.economist.com/blogs/banyan/2012/05/nepal-without-constitution.

after the country's initial independence.[50] In 1955's Khan case, and several subsequent ones, the Pakistani Supreme Court, spearheaded by Chief Justice Muhammad Munir, first hinted at the existence of such a doctrine in dicta, although the case itself would be decided based on other technicalities.[51] Around the same time a Special Reference was requested by the acting Pakistani leadership soon after and it was this decision, commonly referred to as "*the Governor General's case*", that first delineated the idea of the Doctrine of State Necessity as a coup validation device.[52]

These and subsequent cases would likewise draw on one or more doctrines at given times, as well as precedents from as far away as the United States.[53] In Pakistan with its troubled history of coups, these arguments would repeat themselves many more times including the period of General Zia's coup against the Bhutto government, and more recent constitutional violations by General Musharraf.[54] In Pakistan, as in other countries, certain justifications might be seen to ebb and wane in popularity for a time but with the court's eventual findings being rarely in doubt.[55]

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50 *Supra.* n.9.

51 *See* generally *Federation of Pakistan* v. *Moulvi Tamizuddin Khan*, PLD 1955 F.C. (Pak.)240.

52 Soon after, the Pakistani High court would depart from their earlier reliance upon classical Doctrine of Necessity –which assumes a state actor seizing extraordinary authority during a crisis – to the more coup-friendly Kelsen theory in *State* v. *Dosso*, PLD 1958 S. Ct. (Pak.) 533.

53 *Supra.* n.9.

54 *See Begum Nusrat Bhutto* v. *Chief of Army Staff,* PLD 1977 SC 657 and *Tikka Iqbal* v. *Federation of Pakistan & Ors*., PLD 2008 SC 178.

55 *Supra.* n.12where: "Although these different coups unfolded in diverse contexts and resulted in regimes with varied political agendas, the courts validated all incumbent usurper regimes with one exception."

Early on, Mr. Munir and his fellow progenitors of the doctrine predicated their argument for The Doctrine of Necessity primarily on maxims: Henri the Bracton's belief that "necessity makes lawful what is otherwise unlawful" and the Latin maxim *salus populi est suprema lex*.[56] This maxim, while often misattributed to the Twelve Tablets – fundamental laws of ancient Rome that functioned as a type of pseudo-constitution—actually seems to have originated with Cicero.[57] The phrase is used within the context of delineating the particular responsibilities of Roman consuls, rather than as an overarching suggestion for the proper scope of governance.[58] Yet the maxim itself would subsequently make the rounds among important legal scholars and common law theorists of the enlightenment and industrial eras such as John Locke,[59] and John Selden, casting an outsized shadow over the prospect of constitutional integrity in much of the developing world.[60]

The other maxim invoked under the Munir judgments was by 13th Century British jurist Henry de Bracton.[61] Bracton's argument "that which is otherwise unlawful, necessity makes lawful, and necessity makes a privilege which supersedes the law"[62] has likewise proven to be an important source of justification, not only within the

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56 Translation: "The welfare of the people is the supreme law"

57 *Supra.* n.38.

58 *Id.*

59 John Locke uses this as the epigraph in his *Second Treatise on Government* and refers to it as a fundamental rule for government.

60 *Supra.* n.38.

61 Bracton was a 13th Century British jurist who, among other things, defended supreme papal authority over secular affairs and recommended that criminal trials be undertaken "by ordeal" (wherein the defendant would hold red-hot iron or be thrown bound into a lake under the premise that a just god would protect the innocent).

62 HENRICUS DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 231.

cannon of regular criminal law but likewise – at the state level – particularly for the initiations of dictatorships and states of emergency.[63]

Although not invoked in the earliest cases of the Munir court, Grotius, would soon become the third standard fount for justifying doctrines.[64] While Grotius was steadfast in his belief that though a force which overthrows the sovereign can never be legitimate, some of its actions *can* be legitimate, provided they are actions that the sovereign itself would have preferred had it remained in power.[65]

Under this line of reasoning, for example, while the acts of a usurper are tolerated and their laws can be obeyed to avoid anarchy, the act of usurpation itself remains unlawful.[66] In some cases this conceptualization can have advantages over the more commonly invoked, Bractonian variant, since it does not presuppose an underlying modicum of legitimacy for the actors.[67] Grotius might excuse overreach in terms of scope, as in the case of the *Governor General*, but actual revolution – that is to say the legitimacy of actors, not acts -- falls outside his purview.

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63 See generally, *Special Reference by His Excellency the Governor-General*,1955 PLD FC 435; S. A. de Smith, *Constitutional Lawyers in Revolutionary Situations*,7 WEST ONTARIO L. REV. 72 (1968).

64 *See,* for example, *Madzimbamuto* v. *Lardner-Burke*,[1968] 2 S Afr LR 284 and *Jilani* v. *Government of Punjab*, 1972 PLD SC 139.

65 *Supra.* n.12.

66 *Id.*

67 Mark Stavsky, *The Doctrine of State Necessity in Pakistan*, 16 CORNELL INT'L L.J. 341 (1983):"*The only advantage of Grotius' theory is that it was designed for application in a revolutionary context. The doctrine of state necessity was not. The theory freely admits that the successful revolutionary government is, in fact, usurping lawful authority. Like necessity, however, it equally undermines constitutional rule.*"

A more modern rationalization, and one of similar consequence to the invocations of the doctrine of necessity at the state level comes to us from, what is known as Hans Kelsen's "pure"[68] theory of institutional legitimacy. In contrast to Grotius, Kelsen does not dismiss the idea of revolution out of hand rather stating that, if sufficiently "efficacious", a revolution can be lawful.[69] This theory justifies the usurper's control of power where it can be established that it was for the benefit of the larger community. It is fundamentally based on the principles that as long as there is acquiescence by the citizens, and the *de jure* administration is effective then the Courts have to evaluate the evidence and grant legitimacy to the usurper's claim. However, there always remains the test of efficacy to be applied by holding a general election.[70]

So What Should Courts Do?

For a judiciary faced with a clear and present disruption of the constitutional order to survive the inevitable pro-validation onslaught of a national government requires a great amount of commitment and courage. In many cases they may be threatened with dismissal, or even physical harm.[71] Likewise, they may fear the destructive chaos and social breakdown should they refuse and the government remain illegitimate.[72] As we have seen, given these pressures and the myriad justifications available, courts have generally always opted for

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68 The "purity" of the theory is actually quite crucial to its proper understanding – an issue that has let to its systematic, and perhaps deliberate, misapplication in the past. Kelsen is discussing these issues in terms of theoretical constructs that, even to him, may have limited applicability in the much messier environment of real world events.

69 HANS KELSEN, PURE THEORY OF LAW (2nd ed., 1967).

70 *Supra.* n.12.

71 *Id.*

72 *Id.*

validation[73], except in situations where the affected government has either already been toppled, or if the court itself is able to put a distance between itself and the usurper government in question.

In his watershed analysis for the Cornell Law Review in 1994, Tayyab Mahmud traced in considerable detail many specific cases where judicial coup validation had taken place, or else been attempted, and eventually rejected by a national court.[74] Mahmud argues convincingly that the lack of doctrinal consistency through which these decisions (see chart) were decided, and the predictable outcomes involved in cases where the offending government remained in power, evidenced the extent to which judiciaries were *"politically timid, personally expedient, intellectually dishonest...making policy determinations clearly not within judicial discretion."*[75]

That said Mahmud is clearly cognizant of the poor alternatives confronting judiciaries during these situations. Courts can either (a) rationalize some type of validation mechanism for the *de facto* rulers (b) refuse to validate and risk dissolution or perhaps even physical

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[73] *Id.* where "Of the options available to a court when confronted with a coup d'etat, the one validation/legitimation legislative capacity of the usurpers. This option is riddled with such theoretical, suitable option for a court.

[74] *Id.* discussing the four possible judicial responses: validation and legitimation of usurpation, strict constitutionalism, resignation of office, and declaration of the issue to be a non-justiciable political question.

[75] *Id*. where: "While most courts validated coups d'etat, there was a singular lack of doctrinal consistency. The courts vacillated between the pure theory of revolutionary legality; the modified theory of revolutionary legality; the restricted doctrine of necessity; the unrestricted doctrine of necessity; the doctrine of implied mandate; the public policy doctrine; and various combinations thereof. Utterly lacking any measure of continuity, the contradictory pronouncements render the courts vulnerable to the charge that they were politically timid, personally expedient, intellectually dishonest, and that they were making policy determinations clearly not within judicial discretion."

harm and persecution, (c) resign *en masse*, or (d) declare the matter non-justiciable *ex ante.* It is this latter option which Mahmud considers most desirable because it: "keep[s] the courts out of the main area of dispute, so that, whatever be the political battle, . . . the courts can carry on their peaceful tasks of protecting the fabric of society and maintaining law and order."[76]

Yet while Mahmud's theory has proven highly influential, it has its detractors. Sampford and Palmer assessed Mahmud's options and found them incomplete.[77] While agreeing with Mahmud as to the inherent weaknesses of the first three options, the authors discarded the idea of injusticiability, suspecting that it would weaken the relevance of the court as a body and deprive the people of judicial review in the moment when they would be most certain to need it.[78] To them, such a policy would underplay the role of repeated coups within a single country and help reinforce the vicious cycle "created and reinforced by each succeeding coup".[79] Writing in 2005, their work was informed by the successful judicial recalcitrance of the Fijian court in 2000, although not by the less successful second iteration were the court had been dissolved.[80] In this view, a situation, where the judiciary would deliberately set itself up to not rule on "political questions" such as government legitimacy following a disruption of the constitutional order is a serious betrayal of the role of the judiciary[81] –

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76 *Id.*

77 *Supra.* n.23.

78 *Id.*

79 *Id.*; J. Fieldsend in *Madzimbamuto* v. *Lardner-Burke,* [1968] 2 S Afr LR 284.

80 *Id.*

81 *Supra.* n.23 at 31-32 where: "My own unequivocal and uncompromising view is that the legal and ethical duty of the Pakistan Supreme Court, like other judiciaries in democracies (even flawed democracies), is simple. It is to do justice according to law. Doing justice would, at the very least, involve clearly stating that the oath Musharraf demanded was illegal and the most outrageous contempt

and the judiciary's ruling of illegality in this respect can serve as a crucial trigger for the ultimate stakeholders, the people, to take action[82] and do much to ameliorate many of the potential collective action issues that might otherwise occur.

Sampford and Palmer also suggest that any decisions as to constitutional validity following a breakdown of the constitutional order should be undertaken by a supreme court which is both appointed by the old regime, and beyond the grasp of the new one.[83] They likewise place a great deal of importance into the fact that the Fijian Supreme Court was physically located away from Fiji itself, and thus ostensibly out of reach from potential repercussions on the part of the commodore and his cadre.[84]

In their view, this system might be exported to other common law systems with a history of coup/coup validation cycles such as

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of court, that it was a nullity with no binding force because it had been extracted through the threat of force, the dismissals of judges who had not taken it was illegal, any dismissal of them would be illegal, and any purported replacements were not judges. It also would mean pointing out the illegality and criminality of any orders given by Musharraf. Courts should then go through the very simple legal analysis involved: Musharraf was threatening many people with violence (including lethal violence) if they did not submit to his criminal orders; the army had no duty to follow his orders; the army had a duty to protect citizens and officials from his criminal acts; if Musharraf did not surrender to the nearest police officer and it was not possible to effect an arrest, self-defense would allow his being shot on sight. There is no room for compromise on this analysis.

82 A. O. Ekpu, *Judicial Response to Coup d'état: A Reply to Tayyab Mahmud (from a Nigerian Perspective),* 13 ARIZ. J. INT'L & COMP. L. 1 (1996) at 11.

83 *Supra.* n.23.

84 During the Court of Appeal in Fiji in *The Republic of Fiji* v. *Prasad,* [2001] FJCA 1, and *Qarase v Bainimarama*(unreported, Court of Appeal, Fiji, 9 April 2009, No ABU0077 of 2008S, Powell, Lloyd and Douglas JJA): judges were drawn from around the South Pacific. A similar example can be found in For example, the Privy Council in *Madzimbamuto* v. *Lardner-Burke,* [1968] 3 All ER 561; [1969] 1 AC 645 which was in England.

Pakistan. While offering comparatively little in terms of what specifically such a body might look like, we are told that it might consist of judges who have escaped, retirees abroad, ambassadors, and—if necessary—even foreigners. After all, was not the 2001 Fiji court of appeals composed mostly of Australian and New Zealand judges?[85] While an interesting theory, there is an extent to which, functionally, this would be able to work in practice.

Even if outside the physical grasp of an illegal regime, court-members are likely to leave behind loved ones, property and acquaintances whose safety and well being could still be used to coercive effect by a government sufficiently intent on doing so. Furthermore, while adding some extra pre-coup groundwork on the part of a prospective coup leader, such a system would certainly create incentives for unconstitutional movements to simply secure necessary support from the external court *ex ante*, something which might even being rendered easier given the individuals' distance from the center of government. Being foreigners the judges in the Fiji cases were somewhat shielded from this, but barring the island nation's tiny size and the particulars of its history would this model be likely to flourish elsewhere?

The scientific method demands that a successful experiment be both observable and replicable. While the 2001 Fiji case can be observed as having had a good outcome in that the Government whose authority it was questioning chose to abide by what was –from its perspective-- an unfavorable decision, that case was itself unusual in many ways, and may not prove to be easily imitatable. First of all, the respondent was not seeking to overturn a conviction imposed by a

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85 *Id.*

revolutionary court, an unconstitutional detainment or taxes levied by a usurping power as has generally been the case, but supposedly sought only the Court's confirmation that the country's 1997 Constitution remained in force. Secondly, due to its limited population, and the regional paradigm of intrastate cooperation common to the South Pacific League many Appellate court justices are citizens of other jurisdictions (most commonly New Zealand or Australia) but this is not only for constitutional matters but for everything, and has long been the way that courts have been set up. The same was the case in the *Madzimbamuto* case where, given the slow departure from colonization, the Britain-based Privy Counsel's jurisdiction over such matters was a matter of long standing and thus universally understood (if not necessary palatable) among necessary institutional actors and quite likely, much of the population as a whole.[86]

Perhaps most importantly, the government may have been unready for the decision *ex ante*, and acquiesced in part due to its own mobilization problems, a mistake it would not repeat. While it cannot be denied that the subsequent Fijian auto-coup, dissolving the Court and the Constitution, came with a heavy price tag, and proved seriously damaging both to the country's international reputation and its relationships abroad (in short order it was expelled from both the Pacific League and the Commonwealth) the government survived and remains in place at the time of this article's writing.

Sampford and Palmer likewise overlook the extent to which the Fijian court's steadfastness (to say nothing of its existence) were products of specific idiosyncratic particulars of the island nation itself. Had it not been for its tiny size, recent postcolonial history and

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86 *Supra.* n.23 at 34.

underlying ethnic tensions traditionally moderated from without, could we expect the same result? And, if not, would such a model be exportable to countries with a more robust internal judicial tradition like Pakistan or xenophobic internal dialogue as in Zimbabwe? One can easily imagine, that a court packed with expatriots and foreigners, different from the courts that generally resolve domestic issues, might be seen as less legitimate by the general population and be open to accusations of imperialist intrigue by the new regime.[87]

As such, if we return to the idea of constitutions as normative documents set up to unacceptably raise the transaction costs associated with government actions deemed to be illegitimate *ex ante*, then the system worked. Yet is this really the best we can hope for?

Options (Mahmud)	**Pros**	**Cons**
Constitutional Adherence	Integrity of the State is maintained	Risk of personal backlash, court dissolution, further unconstitutional acts
Coup Validation	Can minimize disruption to the state overall by allowing judicial and other bodies to continue to function	Integrity of the state and the court greatly compromised moving forward
Mass Resignation	Disassociates the judiciary with the current regime, preserves reputation of justices, publically undermines regime	Highly disruptive, hard on individual judges
Declaring the validity and legitimacy of a regime born of a	Separates the court from the political turmoil while still allowing it to preserve certain functions	Lessens the importance of the court overall and its relevance when most needed

[87] *See* for example Graham Davis, *77 Reasons the Cobbers Should Get a Grip*, available at http://www.grubsheet.com.au/?p=3516.

coup d'état a non-justiciable political question (Mahmud)		
External Coup Courts (Sampford & Palmer)	Separates the court from direct coercion or threat of physical harm.	May undermine the institutional credibility of the court in the eyes of the population

Yet to these I would add another possibility. One idea might be to amend existing constitutions in coup-prone common law jurisdictions, so as pre-establish how the constitution can be scrapped and under what circumstances. This might be something along the lines of the emergency provisions in constitutions such as Germany's, which essentially sets a two tiered approach to constitutional norms, so, should a crisis invalidate the normal workings of state there might remain something of a constitutional safety net with which to regulate the current crisis and assure an eventual return to order.[88] Likewise, by addressing issues such as the applicability of State Necessity (confining it, say, only to elected and established authorities) this might serve to limit its destructive use in future: at least insofar as it might limit the most jarring of the three modalities discussed above.

Finally, to shield against what has historically been the rampant misuse of the Kelsen Doctrine it might be possible to add a "right to resist" proviso, by amendment, into the constitution which empower the population to ignore, frustrate or even openly attack the governmental order or regime, often set up elsewhere within the same constitution, under certain predefined circumstances.[89] As Tom

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88 See generally, Tom Ginsburg, Daniel Lansberg-Rodriguez and Mila Versteeg, *When to Overthrow Your Government: The Right to Resist in the World's Constitutions,*60UCLA L. REV1184 (2013).

89 *Id.*

Ginsburg, Mila Versteeg and I discussed in a recent piece for the UCLA Law Review[90]:

> *"The constitutional right to resist "can represent a fundamentally democratic and forward-looking tool that constrains future government abuse, empowers the national citizenry, and acts as an insurance policy against undemocratic backsliding. It is no coincidence, for example, that the state constitutions of the German Länder adopted a right to resist after World War II, while the right for all Germans to "resist any persons seeking to abolish this constitutional order" was later enshrined in the West German Federal Constitution.[91] Similarly, a number of Eastern European countries adopted a right to resist when writing their new democratic constitutions in the early 1990s[92] when committing to a new democratic future that would avoid repetition of their repressive past."*[93]

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90 *Id.*

91 GRUNDGESETZFÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. II, art. 20(4) (Ger.) (amended to 2010), *translated in* DEUTSCHER BUNDESTAG: BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Christian Tomuschat et al. trans., 2010) ("All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.").

92 *See, e.g.*, Ústavnízákon č. 2/1993 Sb., Ústava České Republiky [THE CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS AS PART OF THE CONSTITUTIONAL ORDER OF THE CZECH REPUBLIC], December 16, 1992, art. 23 (amended by Const. Act. no. 162/1998), *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: THE CZECH REPUBLIC (Albert P. Blaustein & Gisbert H. Flanz eds., Gisbert H. Flanz trans., 1993) ("Citizens have the right to resist anybody who would do away with the democratic order of human rights and fundamental freedoms, established by this Charter, if the actions of constitutional bodies or the effective use of legal means have been frustrated."); ÚSTAVA SLOVENSKEJREPUBLIKY [CONSTITUTION] Oct. 1, 1992, art. 32 (Slovk.), *translated in* CONSTITUTION OF THE SLOVAK REPUBLIC, CONSTITUTIONAL COURT OF THE SOVAK REPUBLIC, "The citizens shall have the right to resist anyone who would abolish the democratic order of human rights and freedoms

Unfortunately, history has shown that a regime (or revolutionary movement) sufficiently ambitious and well positioned to overwhelm such norms, and intent on doing so, is likely to do so suddenly. And in practice constitutions seem better suited at constraining illegitimate acts *ex ante* than they are at attempting to put the genie back in the bottle after-the-fact. As such, constitutions work best within a political culture of restraint, where national peer pressure and strong institutions curtail certain actions from even being considered, and create collective action problems that disincentivize unconstitutional behaviors on part of state actors. Yet when circumstances require such rebottling, the primary mechanism available for doing so will generally be the national judiciary,[94] which, given the inherent power imbalance between courts and an acting executive – particularly during the aftermath of a power grab - can in practice prove ill-suited for the task.[95]

Much like the oft-overlooked "purity" of Kelsen's theory itself, in practice, constitutions are for most part squarely anchored within a

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set in this Constitution, if the activities of constitutional authorities and the effective application of legal means are restrained."

93 *See* Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 303 (2003) (noting how Polish Constitutional Court Justice Lech Garlicki observed that after the fall of communism, there were "several hopes as to the functions to be fulfilled by the new constitutional instruments: to demonstrate a clear rejection of the communist past, to create legal foundations of the new democratic order, to describe and confirm the new identity of the nation").

94 *See generally:* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 661 (2011).

95 *Supra.* n.12 where: "notwithstanding the usurpers' desire for judicial recognition and hence the motivation to placate the judiciary, the options available to the judiciary are quite limited. The judiciary does not have the ability to enforce any judgment against the usurpers, while the usurpers have the power to abolish the courts or replace "uncooperative" judges.

world of theoretical legal abstraction. And as they have become longer, more detailed and specific with time, the likelihood of their explicit provisions being ignored or passed over has likewise grown. It follows that we should no longer design them with a presumption of immortality, and should instead include provisions encompassing the eventuality of their potential overthrow, abuse or suspension; if possible spreading the constitutionally predefined reactions across multiple institutions including various ministries, the courts and the population themselves. Acknowledgement of the brutal realities and risks facing most modern states is crucial if these governing documents are to serve their stabilizing function in future. Hence establishing measures that would frame subsequent considerations *ex ante* would represent a powerful step in the right direction.

Conclusion

This article has attempted to survey several of the problematic rationalization mechanisms relied upon by judiciaries to validate large-scale interruptions in the constitutional order within developing common law democracies after the fact. We have likewise shown the extent to which eventual validation can to a large extent be presupposed by usurping powers stemming, as it appears to do, from the pressures exerted upon judiciaries themselves, rather than on the niceties of applicable legal norms. In this sense the specific arguments for justification have essentially become irrelevant. They are more so a means to an end rather than a reasoned consideration of the actual events and circumstances in play.

With this in mind, we have assessed various existing suggestions for cushioning the pressures that all too often strip judiciaries of their institutional independence, an asset that is presupposed during the

constitutional construction phase and that is absolutely necessary if the actuality is to reflect design within the context of the workings of state.

By moving more towards models where the constitution itself, presupposes these potential problems, we can add an extra set of limitations upon what can be judicially justified after-the-fact: adding a second enforcement mechanism for maintaining the constitutional order through the actions of both non-judicial institutions and via people themselves. The existence of such a device would arm judiciaries faced with these problems with a potential shield against regime coercion and do so in a way that is predictable *ex ante* so that we might hope to see fewer successful coups in future. In the end, a constitution is only as strong as the degree to which it is respected by choice, and the extent to which it has institutions strong and independent enough to push back against unconstitutional threats on constitutional grounds. Failing that, a constitution is not even a paper tiger: it's just paper.

Appendix I

Country and Year	Case Name	Seizing Regime still in Power?	Judiciary in Country	Reasoning	Gov. Action Validated?
Pakistan 1954	State v. Kahn	Yes	Yes	Constitutional Technicalities	Yes
Pakistan 1955	Special Reference no. 1 of 1955 (Governor General's Case)	Yes	Yes	"Saluspopulisuprema lex"; Doctrine of Necessity	Yes
Pakistan 1958	State v. Dosso	Yes	Yes	Kelsen	Yes
Cyprus 1964	Attorney General of the Republic of Cyprus v Ibrahim	Yes	Yes	Doctrine of Necessity	Yes
Ghana 1966	Sallah v Attorney General	Yes	Yes	Doctrine of Necessity	Yes
Nigeria 1966	Ex parte Matovu	Yes	Yes	Doctrine of Necessity / Gortius	Yes
Uganda 1966	Uganda v. Commissioner of Prisons	Yes	Yes	Kelsen*	Yes
Rhodesia/ Zimbabwe 1968	Madzimbamuto v. Lardner-Burke	Yes	No	Kelsen, Doctrine of Necessity	Yes
Nigeria 1970	Lakanmi and Ola v. A.G	Yes	No	Doctrine of Necessity	NO
Pakistan 1972	Asma Jilani v. Government of Punjab	No	Yes	Kelsen invalid, Dosso precedent reversed	NO
Lesotho 1975	Matsubane Putsoa v Rex	Yes	Yes	Kelsen	Yes
Pakistan 1977	Bhutto v Chief of Army Staff	Yes	Yes	Necessity (Kelsen may be valid but did not apply)	Yes
Seychelles 1978	Taxes v Ramniklal Valabhaji	Yes	Yes	Kelsen	Yes
Granada 1985	Mitchell v Director of Public Prosecution	Yes	Yes	Kelsen, Doctrine of Necessity	Yes
Fiji 1987	Chandrika v. Prassad	Yes	No	Doctrine of	Yes

				Necessity	
Lesotho 1988	Mokotso v. Republic of Lesotho	Yes	Yes	Kelsen	Yes
Transkei 1988	Matanzima v President of the Republic of Transkei	Yes	Yes	Kelsen	Yes
Pakistan 2000	Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pakistan	Yes	Yes	Doctrine of Necessity	YES
Fiji 2001	The Republic of Fiji v. Prasad	Yes	No	Doctrine of Necessity and Kelsen rejected.Rejected	NO
Fiji 2009	Qarase v Bainimarama	Yes	No	Doctrine of Necessity and Kelsen rejected.Rejected	NO
Nigeria 2010	Legislative justification of unconstitutional authority (no cases yet)	N/A	N/A	Doctrine of Necessity	N/A
Nepal 2010	Legislative justification of unconstitutional authority (no cases yet)	N/A	N/A	Doctrine of Necessity	N/A
Nepal 2011	Legislative justification of unconstitutional authority (no cases yet)	N/A	N/A	Doctrine of Necessity	N/A

Promissory Fraud, Constitutionalism and the Limits of Majoritarian Power

HaiderAla Hamoudi[*]

Introduction

To understand what the *contractual* concept of promissory fraud might have to do with *constitutionalism,* how this might be important to understand constitution making in divided societies and the means by which majoritarian demands might be tempered through use thereof, it might behoove us to consider a hypothetical.

Let us presume a state X, which is highly divided as between a majority population A and a minority population B, is currently engaged in constitution making. There may or may not be other divisions within this highly divided society of X as well, some potentially severe, but for our purposes, we may focus exclusively on the divisions between A and B. For those falling within population A, it is of fundamental importance that a *particular, specific* state action be taken as the state is reconformed in accordance with any new constitution. This might include, for example, the repeal of a specific existing law that the majority community of A has long opposed. The problem, however, is that the minority community of B, significant enough in size that its broad support of the constitution is a *sine qua non* for a harmonious polity within state X, opposes the same (particular and specific) action with equal fervor.

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[*] Associate Professor of Law, University of Pittsburgh School of Law. The author would like to thank Tom Ginsberg, Nathan Brown and Richard Kay for their generous comments and contributions. All errors and omissions are the responsibility of the author alone.

Such a hypothetical is hardly fanciful, even if it is not universally common. In fact, it summarizes (albeit in a reductive, one paragraph fashion) the debates that surrounded personal law in both Iraq and India during the making of their respective Constitutions currently in effect.[1]And yet existing theory has very few tools to deal with it, an absence which this Article hopes to begin to fill.

The solution, or at least a solution that seems to have been deployed, is to engage in *promissory fraud.* I borrow the term, obviously, from the common law tort that refers to a party that makes a promise in a contractual setting that *it has no intention of ever carrying out.*[2]A private party that engages in promissory fraud may be liable for damages in tort. Of course, translated into the constitutional setting, there is no claim that might be made as against drafters who make constitutional promises that they have no intention of carrying out, which makes resort to promissory fraud all the more palatable.

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1 Articles 41 of the Iraq Constitution and Article 44 of the Constitution of India both address personal law, and they are in many ways the mirror image of one other. Article 44 of the Constitution of India contemplates the enactment of a uniform personal law to govern all citizens, referring to such a law as a "Uniform Civil Code." INDIA CONST. art. 44. As a civil law state with its own existing and non-controversial Civil Code already in effect (which Civil Code specifically exempts matters of personal status from its scope, in broad keeping with praxis in Islamic states), Iraq refers to the same area of law as "personal status." Article 41 of Iraq's Constitution calls for the repeal of the already existing Personal Status Code, or at least the freedom of Iraqis to live by different personal law rules than those contemplated by the Personal Status Code if they so choose. DUSTUR JUMHURIY AT AL-IRAQ [THE CONSTITUTION OF THE REPUBLIC OF IRAQ] of 2005 art. 41. These provisions are discussed in greater detail throughout this Article.

2 *Lazar* v. *Superior Court*, 909 P.2d 981, 985 (Cal. 1996) ("'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud.")

Hence, for example, the drafters in State X might insert into the Constitution a provision that requires the legislators to take a certain, specific action in the future, leaving the details for the legislature to determine. Yet they do so *fraudulently*, with full awareness that the legislature will never take such an action for political reasons, indeed it could not without causing deep social unrest. Nor do the drafters expect that the courts will take such actions, given the deep sensitivities involved. (And even if they are concerned about judicial interventions, they can render the provisions non-justiciable to address this.)[3]

The term *promissory fraud* is obviously provocative, and yet still broadly accurate. One is acting with some level of deception, after all, when obliging a state to take an act that it could not possibly take. There is, nevertheless, justification for it. The reason to engage in

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[3] The Constitution of India does precisely this as to Article 44 of its Constitution, placing it in Part IV of the Constitution, entitled the "Directive Principles of State Policy", which are formally non-justiciable, INDIA CONST. arts. 37, 44. Indeed, the major debates during the India constitutional negotiations did not concern whether to call for the enactment of a uniform personal law, but rather whether to render the matter jusiticiable, HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 136 (2011).Yet it would be important not to emphasize the point of formal justiciability excessively when considering the matter of promissory fraud constitutionalism. In the first place, the Supreme Court of India does regard the Directive Principles of State Policy of Part IV to be coequal with the Fundamental Rights of Part III in constitutional adjudication, Abhishek Singhvi, *India's Constitution and Individual Rights: Diverse Perspectives*, 41 GEO. WASH. INT'L L. REV. 327, 351 (2009) (describing this as an "abiding constitutional principle"). Moreover, Iraq's constitution has no section relating to non-justiciabilty, and yet as Part III of this Article shows, the courts have effectively rendered Article 41 non-justiciable. The point, in the end, is not whether or not a particular provision promising a particular change is *formally* non-justiciable, but whether as a matter of practical effect the change so promised is likely to be realized, by legislature or court. When it is exceedingly unlikely, and when the drafters are aware of this from the start, then the matter is promissory fraud constitutionalism as herein described.

promissory fraud in State X is two-fold. First, as to the majority community A, it will find anything other than a constitutional *promise* to be unsatisfactory, in particular given its majority status. In the evangelizing democratic ethos that permeates our global governance discourse, it is not hard to see why population A might feel that it is entitled to impose its will on a recalcitrant minority. The making of the promise demanded by A fulfills a core demand. Per the constitutional text, A has won the debate over the future course of the state. The state is obligated to undertake the action A demands, with the only concession being a temporal release to the defeated forces of B, so as to allow them to reconcile themselves to the new reality.

And yet the promise must be *fraudulent* because B will not accept the new order if the promise is actually carried out, and surely the drafters representing populations both A and B are aware of this, whether or not they wish to admit it, even to themselves. It is simply not reasonable, for example, to assume that nationalist forces committed to preserving a single, uniform Personal Status Code in constitutional negotiations will vigorously oppose repeal of that code in the constitutional setting but not in later legislative sessions.[4] That substantial majorities of Muslims might at some point not regard it as important to be governed by *shari'a* in a non-Muslim majority state as to personal law matters seems rather fanciful as well. Or at least this must be true if Muslim representatives had fought so hard to ensure the continuation of *shari'a* rules during constitutional negotiations in the first place, as a symbol of Muslim autonomy in a pluralistic state.[5]

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4 Part II of this Article describes the extent and fervor of opposition to Personal Status Code repeal among nationalist forces in the specific context of Iraq.

5 Respecting broad (but not universal) Muslim opposition to a uniform civil code in India, and its relationship to autonomy for the Muslim community, *see* notes 41-42 *infra* and accompanying text.

Promissory fraud in constitution making provides a means, perhaps the *only* means, to navigate the divide that does not result in widespread violence. Those involved in the negotiations from population A can make the plausible case that they have won the debate, given the obligatory formulation in the constitution that a particular action be taken. They have not obtained the action, they might maintain, but they have obtained the *promise* to undertake it. Similarly, those representatives from population B can point out to their constituents that in fact nothing has been done as of yet, nor will they permit it to be done at future legislative sessions. Both populations might therefore support the constitution, with the ultimate reality, perfectly obvious to anyone paying attention, being that the promise over the divisive issue will remain unfulfilled.

The purpose of this Article is to explore in greater depth the reasons for the phenomenon of promissory fraud in constitution making, and the conditions under which it comes to exist, with particular and specific reference to the Iraqi example, as informed by the earlier case of India. First, it explains why the existing theory does not adequately address the circumstances that give rise to the phenomenon of promissory constitutionalism. It then turns to the specific circumstances of Iraq. It lays out how the particular forces in Iraq were arrayed on the question of personal law and compares this to the situation in India during its constitution making to demonstrate significant overlapping similarities. Further, it shows how the ultimate formulations came to be adopted, and the manner in which they embrace the principle of promissory fraud constitutionalism—a *promise,* that is, to make a change that will lie forever unfulfilled. Finally, the conclusion highlights how the promissory fraud approach can be and has been adapted by courts seeking to forestall seemingly inevitable legal changes demanded by powerful political forces, with

particular reference to the Supreme Constitutional Court of Egypt. The conclusion notes some qualifications respecting the use of a contractual term "promissory fraud" to the constitutional phenomena herein described.

Constitution Making and Bridging Divides: Theoretical Considerations

Returning to the hypothetical set out in the Introduction, the problem discussed therein relates to a type of dispute that is *discrete and specific*. This means that it renders inapplicable notions such as Balkin's "framework originalism",[6] whereby the drafters of a constitution set forth a framework onto which future state actors construct much constitutionalism through the political process. This might very well work for highly generalized divisive matters such as the extent of federalism in a given society. In that context, drafters could of course create a capacious (and perhaps even contradictory) framework, and later actors could construct praxis thereon over time.[7]Indeed, the advantages of such an approach appear rather

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[6] JACK BALKIN, LIVING ORIGINALISM 21-22 (2011). Balkin thus maintains, for example, that the reason that the drafters of the Fourteenth Amendment to the United States Constitution used capacious phrasing such as "due process" and "equal protection" was because they knew that successive generations might understand the terms differently and thus adapt them to meet their own particular needs, Jack Balkin, *Framework Originalism and the Living Constitution,* 103 N.W.U. L. REV. 549, 555-56 (2009).

[7] Spain offers an excellent example of how this might be done, specifically in the context of federalism. Upon Franco's death, Spain was divided between identitarian communities such as the Catalans and the Basques that sought a broadly confederal state within which any given identitarian community could enjoy substantial autonomy; strongly centralist elements attached to the Madrid-driven policies of the former regime; and elements that lay somewhere between these two poles. Similarly, there were those who had more faith in the military as an institution designed to keep order, and those who viewed the military as inherently oppressive. There were Communists who operated as an arm of the

obvious, as the approach enables future actors to address highly contentious points of dispute piecemeal and incrementally rather than in a single drafting session.[8]Yet if the question is to retain a personal law or to discard it, there is little by way of broad framework to create, only a decision to be made, and in a manner that one or the other of the respective populations of A and B will find deeply unsatisfactory.

Indeed, the same might be said as to the deployment of ambiguous phrasing generally, whether or not intended as broad framework text. Social forces with different commitments over the proper role of religion over law might come to agreement over constitutional formulations such as the inclusion of a requirement that a law not contradict the "settled rulings of Islam."[9] This is because of the inherent ambiguity over what such a phrase might mean, and the near certainty that it means something different to the different social forces in question. By contrast, any attempt to create ambiguity over a narrow and specific demand will prove inadequate to any social force deeply committed to the realization of that demand, and it will meet

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Soviet Union and Far-Right Falangists as well. ANDREA BONIME-BLANC, SPAIN'S TRANSITION TO DEMOCRACY: THE POLITICS OF CONSTITUTION MAKING 27-31 (1987). Given strong Catalan and Basque desires for federalism, equally strong demands for a unified central authority by centralist elements, and internal division on the subject among the leftists, the drafters of Spain's Constitution fell back on contradiction to manage the intractable dispute. BONIME-BLANC, *supra* at 37. They inserted a constitutional provision that both declared "the indissoluble unity of the Spanish nation" and referred to rights of autonomy to be granted to the "nationalities and regions." CONSTITUCIÓN ESPAÑOLA arts. 2, Dec. 29, 1978.

8 *See* Lerner, *supra*. n. 3 at 6 (describing use of approach in various nations so as to avoid exacerbating conflict over contentious matters).

9 *See* Dustur Jumhuriyat al-Iraq [The Constitution of the Republic of Iraq] of 2005 art.2 (containing such a requirement); Haider Ala Hamoudi, *Notes in Defense of the Iraq Constitution*, 33 U. PA. J. INT'L L. 1117, 1122-23 (2012) (describing elasticity of this phrasing).

with similarly vociferous resistance from any social force deeply opposed to the same demand. The differences between A and B, it seems, can hardly be resolved through ambiguous, contradictory or broad framework text in the hypothetical provided.

Lerner refers to another possibility that deserves exploration. This is the use of constitutional phrasing that by its terms defers a highly contentious matter for later, legislative determination through the enactment of a subsequent law. An example, Lerner indicates, is Article 44 of the Constitution of India.[10]In other words, rather than the Constitution settling the question, it delegates to subsequent political actors the power to do so. It is important to note how the use of this technique might be different than Balkin's framework originalism. The constitution in this context is not providing any sort of "framework" on which to construct later praxis. Nor is there any ambiguity in the text. There is no guidance at all, even vague guidance, as to potentially conducive actions that might be taken through the political process. Rather, the entire affair is deferred, to be decided at a later time, by later actors, more or less unconstrained by constitutional text, except as ordinary sense and reason might constrain them.

Hence, for example, a constitutional provision that indicates that a legislature "should" consider a potentially divisive law in the future would be an example of deferring to future legislative action as per Lerner's description. The same would be true of a constitutional provision that indicates that the number of seats in a legislature is to be set by an electoral law, to the extent the precise number proved divisive.[11]Neither of these is promissory fraud, however, as drafters

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10 Lerner, *supra.* n. 3 at 141-42.

11 France has such a provision in its constitution.1958 CONST. art. 25 (France) It also calls for the terms of the houses to be determined by law. These provisions

could perfectly well have expected that future legislators *would* fulfill the undertakings delegated to them. Indeed, something would be terribly wrong in a state where an electoral law setting the number of legislators in a national assembly could not be passed at all because of existing social divides.

Promissory fraud constitutionalism is therefore a largely undiscussed subset of Lerner's incremental constitutional toolkit. For promissory fraud constitutionalism to lie, there must be a promise to take an action which is simply impossible to imagine being fulfilled given existing political and demographic divides. The goal is not to *defer* so much as to *defraud*, to pretend a future action is taken and to hope that the promise to do so proves sufficient to moderate passions in favor of and in opposition to that promise.

Thus, while Lerner's incremental constitutionalism might very well prove a useful guide, there is a need for more consideration of the more narrow type of constitutionalism that engages in *promissory fraud*, given the unique and in many ways troublesome nature of the technique. This Article takes a modest step in that direction. The next section demonstrates promissory fraud at work in the constitutional setting in the particular context of Iraq, and to a lesser extent, India.

The Iraqi Personal Status Code and the Genesis of Article 41

In popular accounts, the Iraqi Personal Status Code is inaccurately portrayed as a secular document that religious forces were seeking to overturn and replace with *shari'a.*[12] In fact, in this

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do not appear to manage social divides, but to give legislators some level of flexibility to adapt to evolving needs.

12 *See, e.g.,* Maureen Dowd, *Reformer Without Results,* N.Y. TIMES A11 (August 13, 2005); Vivian Stromberg, *Protecting Women's Rights in Iraq,* DET. FREE PRESS

overwhelmingly Muslim country, the substance of the Personal Status Code derives largely from *shari'a.* It permits a husband to take more than one wife[13] and to divorce his wife unilaterally.[14] It grants female relatives inheritance shares that are half of those of similarly situated males.[15] More generally, the law requires the courts applying the law to be guided by *fiqh,* or the interpretations of Muslim sacred texts undertaken by authoritative jurists of various schools of thought.[16] Where *shari'a* might be thought of as, and certainly for the purposes of this Article is intended to refer to, the *corpus in toto* of the norms and rules derived by Muslim jurists from Islamic revelatory text,[17] *fiqh*

(Aug. 10, 2005); Brooke D. Rodgers-Miller, *Seminar Papers On Women And Islamic Law: Out Of Jahiliyya: Historic And Modern Incarnations Of Polygamy In The Islamic World,* 11 Wm. & M. J. Wom. & L. 541, 561 (2005); Pamela Constable, *Iraqi Women Fear Push For Sharia Law*, CHI. TRIB. A2 (Jan. 21, 2004);Charles Clover and Nicolas Pelham, *Iraqi Plan for Shari'a Law a 'Sop' to Clerics, Women Say*, FIN. TIM. A11 (Jan. 15, 2004).

13 PERSONAL STATUS CODE OF IRAQ, No. 188 of 1959, art. 3(4).

14 *Id.* at Art. 37.

15 *Id.* at Arts. 89-90.

16 *Id.* at Art. 1(3).

17 Hence, I use the term *shari'a* herein to refer to the corpus of extensive, overlapping and oft-conflicting rules developed by Muslim jurists, medieval and modern, from Islam's sacred foundational texts, the Qur'an, as revealed word of God, and the *Hadith,* or statements, utterances and actions of the Prophet Muhammad. I am intelligently and thoughtfully criticized for often defining this vast and contradictory body of norms and rules developed by medieval jurists as *shari'a*. *See, e.g.,* Patrick S. O'Donnell, *Divine Law (Shari'ah) and Jurisprudence (Fiqh) in Islam*, *Ratio Juris: Law, Politics, Philosophy*, Ratio Juris Blog (June 26, 2009, 10:58 AM), available at http:// ratiojuris.blogspot.com/2009/06/divine-law-shariah-jurisprudence-fiqh.html. It is true, as these critics suggest, that the *shari'a* conveys a more idealistic sensibility than that which can be conveyed by the substantive rules of *fiqh* even considered as a whole. *See*, *e.g.,* Asifa Quraishi, *What if Shari'a Weren't the Enemy*: *Rethinking International Women's Rights Advocacy on Islamic Law*, 22 COLUM. J. GENDER & L. 173, 203 (2011) (distinguishing between shari'a as the immutable Divine Law and *fiqh* as human efforts to capture that law through scholarly interpretation). The problem is that if *shari'a* refers to nothing beyond a perfect and immutable Divine Law separate and apart from any human effort to understand that law, then almost as a matter

refers instead to a more individualized interpretation, either by a single jurist or often by a particular school of thought. In overwhelmingly Sunni states, there are four historic Sunni schools of thought whose rules of *fiqh* might be taken into consideration when interpreting or applying Islamic law—the Hanafi, Hanbali, Shafi'i and Maliki.[18] In the context of Iraq, however, the primary Shi'i school, the Ja'fari, is taken into account as well not only in the context of the Personal Status Code, but also whenever reference to *fiqh* or *shari'a* is made in legislation.[19]

That said, the Personal Status Code is more progressive than the rules of any single school of thought, Sunni or Shi'i, primarily because it liberally adopts *fiqh* rules from a variety of different schools of thought, putting into legislation the most progressive rule among them in any given context.[20] It also contains certain modest

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of epistemological necessity it means precisely nothing that is knowable and therefore of value to lawyers. Moreover, if *shari'a* were truly divorced from human understanding of Divine Law, it would render clauses like the one contained in Article 2 of the Egyptian constitution declaring the principles of the *shari'a* to be "the principal source of legislation" entirely baffling. *See* Jill I. Goldenziel, *Veiled Political Questions: Islamic Dress, Constitutionalism and the Ascendance of Courts,* 61 AM. J. COMP. L. 1, 17(2013) (respecting content of Article 2). Hence I find my definition, while contestable, more appropriate under the circumstances.

18 *See* Kristen Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System,* 36 GEO. WASH. INTL. L. REV. 695, 721 (2004).

19 *Id.* at 747-48.

20 *Id.* at 749. Hence, for example, the Shi'a have a rule of inheritance which permits a daughter or daughters of a decedent who has no sons, parents or spouse to inherit the entirety of her parent's estate. GRAND AYATOLLAH ALI SISTANI, MINHAJ AL-SALIHEEN 3: ¶991. The Sunni schools, by contrast, grant the daughter only half the estate so long as there are any male agnatic relatives of the decedent alive, such as a brother or paternal cousin of the decedent. DAVID PEARL, A TEXTBOOK ON MUSLIM PERSONAL LAW 175 (2d ed. 1987). The Code adopts the more progressive Shi'i formulation. Personal Status Code, *supra.* n. 13 at Art. 91(2). By contrast, the law permits a woman to seek a judicial dissolution

innovations.[21] As such, nationalist parties, and the Kurds, who tended to be more secular overall, certainly preferred it to the traditional rules.[22]

Yet when the law was enacted, the reasons offered for its passage did not centrally relate to its quite limited progressive elements. Rather, the purpose was to *unify* the personal status law. The drafters quite explicitly indicated that the system that had existed before, where Sunnis and Shi'a were governed by different rules, invited a series of problems that the Personal Status Code sought to eliminate.[23] The implicit suggestion was that uniform law not only created clarity and permitted individuals to know their legal rights and

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of her marriage from her husband under a comparatively broad set of circumstances which include the infliction of significant emotional or physical harm, failure to support, and abandonment of the marital home for two years. Personal Status Code, *supra.* n. 13 at arts. 40, 43.These bases for judicially ordered marital dissolution at the request of the spouse are recognized by the Maliki Sunni school primarily. Pearl, *supra.* at 130.They are not recognized by the Shi'a, nor by the Hanafis. Pearl, *supra* at 130.Interestingly, Iraq's Sunni Arab population is overwhelmingly Hanafi, and its Kurdish population Shafi'i. ALI ALLAWI, THE OCCUPATION OF IRAQ: WINNING THE WAR, LOSING THE PEACE 33 (2007).Effectively, this means that the drafters of the Personal Status Code adopted a rule from an Islamic school of thought to which almost no Iraqis generally adhered.

21 For example, a man who arbitrarily divorces his wife may be liable for up to two years of spousal maintenance. Personal Status Code, *supra.* n. 13 at Art. 39(3).This is not a rule recognized among any of the primary Sunni or Shi'i sects, and indeed when a similar rule was proposed in Egypt, it caused a great deal of controversy. CLARK B. LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE *SHARI'A* INTO EGYPTIAN CONSTITUTIONAL LAW 170 (2006).

22 Ashley S. Deeks and Matthew D. Barton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INTERNATIONAL LAW JOURNAL 1, 22-23 (2007).

23 Personal Status Code, *supra*. n. 13 at Reasons for Enactment. ("It was discovered that the multiplicity of sources for decisions and the differences in rulings rendered family life unstable, and the rights of individuals insecure. This was a motivation to consider the creation of a law that would combine the most important agreed upon rulings of the *shari'a*. . . .).

obligations, but it was also central to the establishment of a national identity. Hence the law indicates in its reasons for passage that the desire for legal uniformity was "the first goal" of the state "ever since the glorious revolution of 1958 erupted."[24] Such a law, moreover, is expected to be "a basis for the establishment of the Iraqi family in its new era, and it will ensure the stability" of the state. The principle that uniformity creates stability and inspires national identity is not difficult to discern from this.

The primary goal was therefore to forge a uniform national identity from Iraq's diverse elements. This had been a core normative commitment of Iraq's Sunni dominated political and social elite from the time of formation of the Iraqi state, just after the British mandate. Hence, for example, the architect of Iraq's modern education system, Sati al-Husri, a very strong Arab nationalist, envisaged using public education as means of creating a national, political and cultural identity to which regional interests would be subordinated.[25]As such, Husri opposed the spreading of secondary education and teacher training institutes to the provinces as a threat to national unity, precisely because the majority of those trained and training in such provincial institutions would belong to individual sectarian communities, thereby diluting the cultural and technical hegemony that Sunni-dominated Baghdad sought over the matter of education.[26] In Husri's view, permitting Hilla to train its own teachers, and Mosul to train its teachers, would be a strengthening of sectarianism rather than an affirmation of a commitment to a national identity. Naturally, these measures, along with accompanying efforts to reduce the use of colloquial Arabic used in some parts of Iraq and not others, generated

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24 *Id.*

25 LIORA LUKITZ, IRAQ: THE SEARCH FOR NATIONAL IDENTITY 110-11 (1995).

26 *Id.* at 111-12.

resentment in subnational communities. This was especially the case among the Kurds and the Shi'a, both of whom had strong particularist, subnational identities to which they were already committed and which they were loath to relinquish.[27]

The effort to create national consciousness through suppression of subnational sectarian and ethnic commitments was not limited to education alone. Yasin al-Hashimi, the "Ataturk of Iraq", was intent on banning the specifically Shi'i Husseini rituals throughout Iraq's south for similar reasons.[28] The enactment of the Personal Status Code must therefore be understood not as an isolated attempt to create a single law where none had existed before. Rather, it was another means to expand an effort to foster national identity that was being conducted on a variety of fronts.

But of course just as Iraq's Sunni dominated elite sought to expand national consciousness at the expense of subnational loyalties, so Iraq's Shi'a, while certainly nationalist and seeking to participate in affairs of the state,[29] also sought to retain their own unique identity to which they were quite committed. This is amply demonstrated by the zeal with which they pursued Shi'i rituals once given the freedom to do so after the fall of Saddam Hussein.[30] Their sectarian commitments also often manifested themselves in their loyalties to the jurists of the holy city of Najaf.[31] Thus, when the Personal Status Code effectively supplanted Najaf's jurists as the source of rulemaking in the vital area

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27 *Id.* at 115.

28 YITZHAK NAKASH, THE SHI'IS OF IRAQ 161 (1994).

29 *Id.* at 277.

30 Allawi, *supra*. n. 20 at 138; PATRICK COCKBURN, MUQTADA: MUQTADA AL-SADR, THE SHIA REVIVAL AND THE STRUGGLE FOR IRAQ 23 (2008).

31 Cockburn, *supra*. n. 30 at 25-26.

of personal law, the objections from Shi'i leaders were swift and immediate.[32]

They also recurred repeatedly over the course of decades. Hence, in 1963, a junior cleric at the time, Muhammad Bahr ul-Ulum, published a pamphlet opposing the Personal Status Code that has achieved a canonical status of sorts among Iraqi Islamist Shi'a.[33] Though the Shi'i resistance to the Code at that time as exemplified by the Bahr ul-Ulum pamphlet did not lead to its repeal, the Shi'a never reconciled themselves to the Code. Nothing else was nor could be done during the totalitarian rule of the Ba'ath, but the Shi'a took the first opportunity availability to them to repeal the Personal Status Code following the removal of Saddam Hussein from power by the

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[32] Stilt, *supra.* n. 18 at 751.

[33] MUHAMMAD BAHR AL-'ULUM, ADWA' 'ALA QANUN AL-AHWAL AL-SHAKHSIYA (1963). That the actual, substantive rules of the Personal Status Code were hardly problematic is further amply demonstrated by even a cursory review of the objections in the Bahr ul-Ulum pamphlet. Bahr ul-Ulum points out that under the Personal Status Code a Sunni man could not divorce his wife while drunk. This is a right available to him under Sunni Hanafi rules but not the Personal Status Code, which adopts the narrower Shi'i rules that require sobriety. Bahr ul Ulum, *supra* at 26; *see also* Stilt, *supra.* n.19 at 752. While clever in its political correctness (suggesting that it is just as unfair to apply Shi'i rules to Sunnis as it is unfair to apply Sunni rules to the Shi'a), it is hard to imagine how this presents any practical impediment to divorce for any serious person. Similar examples often offered by the Shi'a in discussions during constitutional negotiations are equally silly. For example, as I was told by one Shi'i cleric, the Personal Status Code requires two witnesses to a marriage (in accordance with Sunni rules), while the Shi'a require only the two contracting parties themselves. Should a man and a woman find themselves alone together in irrepressible need of sex, the Personal Status Code would deny them an opportunity to marry where their religion clearly would permit them to marry. To believe the dispute is over rules of substance rather than the source of rulemaking, we would have to believe that concerns such as the presence of a man and a woman with outsized libidos trapped in a desert wishing to marry, or a drunk man unable to divorce until sober, were somehow important on their own in the context of constitutional negotiations.

United States. Hence, in 2003, fully forty four years after the passage of the Personal Status Code, and shortly after the United States created an advisory group of handpicked Iraqis known as the Iraq Governing Council to advise it on legislation and governance, that council (which included the same Bahr ul-Ulum in its membership) voted to repeal the Personal Status Code in Governing Council Decision 137.[34] The effort failed, largely because the United States refused to support it,[35] but the attempt was nevertheless remarkable. It demonstrates well the depth of the Shi'i hostility to the law when a move to repeal it was one of the first legislative moves the Shi'a Islamists attempted upon being given an opportunity to meaningfully participate in governance.

Unsurprisingly, then, during constitutional negotiations just a few years later, at a time when United States influence was steadily waning, the Shi'a Islamists tried again. This time their proposal, which ultimately became Article 41, was a provision of the Constitution that would repeal the Personal Status Code. It was framed in the form of an individual freedom and contained in the section of the Constitution addressing rights and freedoms. It obligated the state to grant Iraqis the ability to abide by their own rules of religion and sect if they so chose. Nothing was said about the Personal Status Code as it existed, hence the proposal did not so much call for its repeal as permit anyone to exempt themselves from its purview if they wished to do so. This pluralist proposal, of course, was precisely the type of legal Balkanization that Iraqi nationalists had spent decades opposing, and

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[34] LARRY DIAMOND, SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ 131 (2005).

[35] L. PAUL BREMER III, MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE 292 (2006).

they opposed it with particular force when raised during the drafting negotiations.[36]

The analogy to India's constitutional experience is admittedly not perfect. In particular, it is hardly fair to compare the efforts of the drafters of the Indian Constitution to create a singular Indian identity with that of Iraq's Sati al-Husri or Yasin al-Hashimi. Where the Iraqi centralists sought to create a nation by squelching any particularist sentiment, the Indian drafters embraced a cultural pluralism of sorts that was far more tolerant of loyalties beyond those owed the state but that certainly included nationalism within it.[37] Hence Jawaharlal Nehru indicates, for example, that within the unity of the Indian identity, "the widest tolerance of belief and custom was practiced and every variety acknowledged and even encouraged."[38] The distinction as between this model of nationhood and that of Iraq, which included

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[36] I spent nearly a year in Iraq working with a committee delegated by Iraq's legislature to develop a set of critical amendments to the Iraq constitution. These meetings were held in the offices of the Chair of the Constitutional Review Committee, Sheikh Humam Hamoudi (in full disclosure, my paternal uncle).The consultation was part of a larger project organized and run by the University of Utah S.J. Quinney College of Law entitled: "Global Justice Project Iraq." The project was funded by the U.S. Embassy's Constitutional and Legislative Affairs Office and operated in Baghdad from the fall of 2008 through March of 2010.

Significantly, in connection therewith, I was given access to the plethora of negotiation materials that were compiled during the drafting of the Constitution, and because many of the same actors served on both the original committee drafting the Constitution and the committee tasked with amending it, I had extensive access to those individuals as well. Many of the reflections contained herein are the product of those conversations and that documentary review.

[37] Khilnani specifically indicates that following independence, "no attempt was made to impose a single or uniform 'Indian' identity." SUNIL KHILNANI, THE IDEA OF INDIA 173 (1999).The same can certainly not be said of Iraq.

[38] JAWAHARLAL NEHRU, THE DISCOVERY OF INDIA 55 (2004).

attempts to deny the Shi'a the ability to practice their most sacred rites in an effort to create national identity, could not be starker.

At the same time, the tensions were largely similar. On the one hand, there were nationalists seeking to foster national identity, concerned that personal laws based on religion divided the state. Three supporters of a constitutional provision in India's constitution that would require a uniform civil code on a non-justiciable basis specifically linked their demand to a "keen desire . . . for a more homogenous and closely knit Indian nation."[39] On the other hand, there were leading Muslim constitutional negotiators who framed the matter as being related to the autonomy of their community, and, indeed about religious freedom,[40] precisely as the Shi'a Islamists did by placing the personal law provision of Iraq's Constitution in the "Rights and Freedoms" section. And just as in Iraq, any effort to impose one vision onto the minority would certainly raise their fears considerably, and lead to unpredictable and destabilizing consequences.[41]A means to mediate the divide needed to be found.

The chief differences, in fact, between the Indian experience and the Iraqi lay less in the opposing commitments of the forces and the nature of the dynamic between them, and more in the identification of *which* force happened to be dominant and the status quo ante they sought to challenge. In Iraq, the rising dominating powers were Shi'a Islamists, eager to return their jurists to a position of prominence and distrustful of the state's ability to make rules in

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39 GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 81 (1972).

40 Lerner, *supra*. n. 3 at 137-38.

41 Austin, *supra.* n. 39 at 80.

areas of law traditionally reserved to the clergy.[42] They were challenging a longstanding Sunni-centric paradigm that had managed to create national *legal* uniformity in nearly all respects with the enactment of the Personal Status Code.[43] In India, the roles were reversed. The rising power was one that sought uniformity, challenging a British imposed system that had insisted upon particularism in the matter of personal law and nowhere else.[44]

Yet despite this, in two quite different nations, a remarkably similar constitutional division was resolved in a remarkably similar fashion—through resort to promissory fraud constitutionalism. The next section sets out the constitutional formulations and their consequences in more detail to see how this is so.

The Fraudulent Promises

Given the dominance of the forces in the constitutional drafting chambers favoring one particular formulation—of legal pluralism in the context of Iraq, and of legal uniformity in the case of India—it was almost inevitable that *something* would be inserted that would call for the very change that the dominant forces advanced with such passion. The only real question was the extent to which the provision itself called for immediate or at least near term change that

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42 *See* notes 29-35*supra.*and accompanying text.

43 It should be noted that the uniformity is not entirely complete, even in the context of the Personal Status Code itself. Hence, for example, Article 90 of that law largely requires courts to revert to rules of sect in determining the proper apportionment to be given to relatives of the decedent. Personal Status Code, *supra.* n.14 at Art. 90.This may well explain why the inheritance provisions are under less sustained attack than other provisions pertaining to family law.

44 MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA 144-45 n. 9 (1989) (pointing out that the British generally imposed uniform law applicable to all citizens throughout India, with the exception of personal law, where religious communities were each governed by their own respective religious rules).

was in some manner enforceable. In the absence of this, the provision would be merely *promissory*—that is, a promise to undertake a change—and there would be no real consequence attaching if it did not. Taken together with the political impossibility of imagining the promise fulfilled, at least without deep social unrest, that promissory undertaking is rendered into *promissory fraud.*

Hence, a self-executing provision that made a preferred formulation not only absolutely clear, but the law of the land, is not promissory, but effective immediately. In Iraq, this was a possibility as to personal law, as a constitutional provision can plainly *repeal* a law. Article 41 could, for example, as Governing Council Decision 137 did before it, declare the Personal Status Code null and void, with rules of personal status depending on religion and sect.[45] Alternatively, given that it was framed as a matter of religious freedom, the provision could keep the law intact, but give Iraqis the ability to exempt themselves from it and be governed instead by rules of religion and sect, to the extent they wished.[46] In India, a similar approach would not be possible purely as a logistical matter. One cannot create an entire personal law in a constitutional provision, after all. However, a formulation that obligated the state to create a law within a fairly short time period and that authorized a highly specialized and empowered tribunal to aggressively intervene to ensure passage of that law would be possible.

These approaches were not adopted, however. While it is impossible to know precisely why, two primary reasons appear the

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45 Diamond, *supra.* n. 34 at 131.

46 Secular forces in Iraq tried (and failed) to include explicit reference in constitutional text to an option for those Iraqis who so chose to be governed by a civil law rather than religious rules. Deeks and Burton, *supra.* n. 22 at 21-22.

most plausible. First, some within the dominant community almost certainly wished to defer to the sentiments of minority voices that might feel imposed upon with an aggressive formulation.[47]Second, even if there was no sentiment in favor of deference, the possibilities of violence on the part of the minority also had to be considered by the majority community's representatives, who would be keenly aware during constitutional negotiations as to the depth and extent of the minority opposition.

As such, in India, Article 44 was not only devoid of timetables, but after much deliberation and debate, it was placed in the non-justiciable section of its constitution, meaning that at least in theory no court could interfere in the process of realizing it.[48] That it has effectively remained non-justiciable despite the increasing willingness of the Supreme Court of India to consider the sections of the technically non-justiciable Part IV of the Indian Constitution in constitutional adjudication[49] is all the more remarkable.

In Iraq, something similar resulted, though the path was more circuitous. The first proposed formulations of Article 41 read as follows:

Iraqis are free in their obligations concerning their personal status, according to their religions and their sects. This shall be organized by law.

While this did seem to leave something to be a subsequent legislature, neither is it clear what that would be, nor how they would

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47 *See* Austin, *supra.* n. 39 at 80 (suggesting that concern of the fears of Muslims and Sikhs motivated Nehru to argue for the non-justiciabilty of the uniform civil code requirement).

48 INDIA CONST. art. 37. *See supra.* n. 2 respecting the importance of not overemphasizing formal non-justiciabilty as an indicium of promissory fraud.

49 Singhvi, *supra.* n. 3 at 350-53.

organize it. It is also not clear what the judiciary might have done with such a formulation. Certainly nothing in the Constitution suggested that Article 41, or any other provision of the Constitution for that matter, was non-justiciable.[50] Hence, whether this formulation would have been promissory fraud, we will never know, but there is sufficient uncertainty respecting its applicability that the matter is at least in some doubt.

In any event, these early proposals of the Shi'a Islamists met with fierce resistance from both secular and nationalist groups, who dominated among the Kurds and the Sunnis, respectively.[51] The Shi'a on their own could not impose this change on the recalcitrant communities, because the ratification rules made this impossible. If three of Iraq's eighteen provinces rejected the proposed constitution by a vote of 2/3 or more, then the constitution would be defeated.[52]

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[50] India's constitution is unusual, but by no means unique, in having a section of its constitution specifically described as being non-justiciable. In fact, its own provisions inspired other nations from Germany to Spain to Portugal to do the same. For a criticism of the approach, *see* Jeffrey Usman, *Non-Justiciable Directive Principles: A Constitutional Design Defect,* MICH ST. J. INT. L. 637, 645 (2007) (describing the inclusion of non-justiciable directive principles as "undermin[ing] the distinctiveness and purposes of a constitution (or constitutional law) in a constitutional representative democracy.")In any event, it suffices for our purposes to say that Iraq has not adopted the Indian model of including a non-justiciable section in its own constitution.

[51] To be clear, not every Kurd is a secularist, nor is every Sunni a nationalist and every Shi'i an Islamist. To take the simplest example, the leader of the secular and nationalist Iraqiya coalition, Ayad Allawi, is a Shi'i. *See* Allawi, *supra.* n. 20 at 345.The point, ultimately, is not to stereotype but merely to indicate that nationalist leanings *predominated* among Sunni groups even as secular leanings *predominated* among Kurds and Islamist preferences predominated among the Shi'a.

[52] Transitional Administrative Law of Iraq, art. 61(c).

There were considerably more than three provinces where Sunnis, Kurds, or some combination of them predominated.[53]

Hence the Shi'a Islamists were aware that there was no real way that they were going to be able to repeal the Personal Status Code in the Constitution, given the vociferous objection thereto. And surely they were aware that to attempt such a matter in a subsequent legislative session would cause severe social unrest. At the same time, their commitment to repealing the Personal Status Code was so long standing and so well known that they were simply not prepared to waive it, and accept the secularist and nationalist demand to remove Article 41. This would have required them to come to frank terms with the political realities of modern Iraq and the real limitations on their own deeply held visions for it, a difficult task on its own. And even if they could manage it, it would have been difficult to justify such a concession to their own base which continued to agitate for the very change that their leadership had been demanding for decades.

The decision, then, was to adopt for *promissory fraud*. Specifically, the Shi'a Islamists insisted on a formulation that continued to articulate their vision of a repealed Personal Status Code, or at least a dramatically diminished one that could be ignored in favor of religious rules should one so desire. At the same time, the formulation would be chimerical, absolutely incapable of realization for political reasons alone. Hence the representatives could tell their

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[53] As Istrabadi notes, the opposition of the Sunnis alone to the final constitution nearly doomed it. Feisal Amin Rasoul al-Istrabadi, *A Constitution Without Constitutionalism: Reflections on Iraq's Failed Constitutional Process*, 87 TEX. L. REV. 1627, 1641 (2009). The Kurds predominate in three provinces in Iraq's north. Istrabadi, supra at 1630-31. Had they also opposed the constitution, there is simply no way it could have been ratified.

electoral base (and perhaps even fool themselves into believing) that they had not made any concession, and that the Constitution calls for the very change they demand, even as they were surely aware (whether they chose to acknowledge it or not, even privately) that the change would never come to pass.

The promissory fraud took place through a fairly modest change to Article 41, somewhat similar in effect (though certainly not form) to the decision to render Article 44 at least formally non-justiciable in the Indian context. Rather than merely "free" to adopt rules of religion and sect as to matters of personal status, Article 41 broadened the freedom considerably. In its final form, it reads as follows:

> *"Iraqis are free in their obligations concerning their personal status, according to their religions, sects, beliefs and choices. This shall be organized by law."*

The addition of "beliefs" and "choices" effectively renders the provision meaningless in the absence of an organizing law. This is because without such a law, the article would mean that there will be *no* personal status law, save what each individual chooses to obligate upon herself based on her own free choice. Such a formulation could not possibly be made to work in any social order that does not resemble Hobbes' state of nature. Hence the conclusion appears to be to defer to the legislature to organize this freedom and define its contours, and in a highly charged and deeply divisive political context where it is difficult to see how such an organizing law could ever pass.

This is doubly true given that the judiciary would hardly be predisposed to intervene in such a matter as Article 41, particularly in

the Iraqi context. As Hirschl notes, courts quite often act as secularizing agents in societies where religious rules are expected to play some sort of constitutional role.[54] Iraq is no exception. Its Federal Supreme Court is staffed by national judges of prominence who were educated in national law schools and national judicial training institutes.[55] They are practiced in and familiar with the interpretation of law and its application in given factual situations. Irrespective of their own particular piety, they are neither experts in *shari'a*, nor do they necessarily understand in any degree of depth the methodologies of interpretation of clerics and religious scholars.[56] They would hardly be interested in furthering a legal system that weakened the role of state law and increased the role of religious rules promulgated by non state clerics.

As such, the Federal Supreme Court was never likely to want to prod the legislature to take action to cause the state to withdraw from rulemaking over personal law under any conditions, much less those presented in the final version of Article 41.The confirmation of this came in Decision 59 of 2011.In that case, a Shi'i woman was seeking to confirm a divorce by agency, prohibited by Article 24(2) of the Personal Status Code, but permitted by Shi'i jurists.[57] If she had the freedom to live by her own rules of personal status, she argued, then she wished to exercise this freedom and have this religiously recognized divorce be legally enforced.[58] The Court denied the request, holding in relevant part as follows:

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54 RAN HIRSCHL, CONSTITUTIONAL THEOCRACY 50-51 (2010).

55 Haider Ala Hamoudi, *Ornamental Repugnancy: Identitarian Islam and the Iraq Constitution* 7 U. ST. THOM. L. J. 692, 701 (2010).

56 *Id.*

57 Federal Supreme Court of Iraq, *Decision 59 of 2011*, available at http://www.iraqja.iq/viewd.886/.

58 *Id.*

[T]he subject of the litigation requires extensive, specialized study in the opinions of all of the Islamic schools in the process of enacting legislation for personal status in accordance with Article 41 of the Constitution. . . . This is so that there is a text for all Iraqis in light of their differences in their Islamic groups, so that the removal of the requested passage does not exceed or contradict what the various opinions of the matter have agreed upon or whatever is reconciled between them. Based on all of the foregoing, the claim of the litigant to remove the text . . . from Article 24(2) of the Personal Status Code must be in accordance with the mechanism described above and with the notice of the legislative branch in this.[59]

The Court thereby passed on the matter, deferring it to a legislature that plainly will not act on such a highly divisive issue. Even if Iraq's constitution is less than a decade old, it is noteworthy that no proposed law has been presented even once in the legislature,[60] that if it were so presented it would almost surely earn the vociferous denunciation of secular and nationalist groups, who oppose repeal of or exemption from the law now as much as they did earlier. As such, the matter appears to have disappeared from the political agenda nearly entirely. The lessons of India in this regard are also quite instructive, where six decades as a vibrant, successful democracy have not led to any sort of enactment of a uniform civil code, and where strong divisions over the matter remain.

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59 *Id.*

60 The website of Iraq's current legislature, the Council of Representatives, contains the list of laws that have been read in the Council for consideration by the entire Council. A law organizing Personal Status nowhere appears. An obscure reference to amendment to the Personal Status Code does appear under the heading "Recommended Laws," but no draft, or even summary, of such a law is publicly available. *See* Website of the Council of Representatives of Iraq, www.parliament.iq.

Broader Lessons

The primary focus of this paper is to discuss an understudied aspect of constitutional *design;* namely, the use of promissory fraud to commit to a change that quite obviously will never happen in a divided society. Yet the processes of promissory fraud constitutionalism need not be limited to questions of design alone. That is, the increase in understanding unearthed by deeper considerations of promissory fraud constitutionalism are greater than the relatively narrow factual context provided at the start of this Article. In some cases, in societies that are not necessarily divided, subsequent political or judicial actors might work to render a clause that might not have been intended as fraudulent into a form of promissory fraud. The subsequent actors of course do not claim to thwart the promise made in the Constitution, but they do change it to such an extent that the promise is no longer realizable even if recorded on paper.

An instructive example of this is offered by the Supreme Constitutional Court of Egypt, faced with a difficult claim from the historic seat of Sunni Muslim learning, the Azhar, that it would not pay an interest claim on an overdue debt because interest on debt is forbidden by Islam.[61] Egypt's Constitution had been amended in 1980 to indicate that the principles of the *shari'a* were "the main source of legislation."[62] It was hard to see how a provision that permitted something that Islam prohibited could be understood to use *shari'a* as its main source. It seemed positively repugnant to it.

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61 A translation of the decision is available. Supreme Constitutional Court(Egypt) *Shari'a and Riba: Decision No. 20 of 1985*,1 ARAB L.Q. 100 (1985). [hereinafter "SCC Decision"].

62 Lombardi, *supra.* n. 21 at 133.

The Court could have tried to develop an interpretation of *shari'a* that permitted interest. Plausible approaches along these lines have been put forward before,[63] but to do so would have certainly earned the ire of rather powerful political Islamist forces. [64] At the same time, there was an obvious problem in banning the taking of interest in Egypt, though the problem was of a different nature than India would face enacting a uniform civil code or Iraq would face repealing the Personal Status Code. The problem was not that a significant ethnic, religious or sectarian minority passionately committed to a different formulation would resist, leading to broad social unrest. Broadly speaking, support for *shari'a* based legislation in some form is quite strong across Egypt.[65] Rather, the problem would be that the banning of interest would be, quite obviously, devastating economically, particularly in a developing society such as Egypt.

The clever if legally incoherent solution that the Court adopted given these conflicting pressures was to render the constitutional demand of adherence to *shari'a* into a form of promissory fraud, at least as applied to the question of interest. Thus, the Court decided that interest was plainly prohibited by Islam, thereby avoiding any charge that it had somehow contaminated Islam with Westernized understandings of Sacred Text.[66] However, it also held that the challenged legislation was "immune" from judicial review because it

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63 For an interesting example, developed by the drafter of the Iraqi and Egyptian Civil Codes, *see* Haider Ala Hamoudi, *Muhammad's Social Justice or Muslim Cant: Langdellianism and the Failures of Islamic Finance*, 40 CORNELL INT'L L. J. 89, 128-29 (2007).

64 Lombardi, *supra.* n. 21 at 165.

65 *See, e.g.,* Shibley Telhami, *Egypt's Identity Crisis,* WASH. POST, Aug. 16, 2013 (noting divisions as to literal application of *shari'a* and a broader application of its "spirit").

66 SCC Decision, *supra.* n. 61 at 102.

predated the amendment in question.[67] It was the legislature, and not the executive, which had to take action as to such preexisting legislation.[68]

It is worthy to note the extent of the strained reasoning necessary to reach the result. Under such an approach, a constitutional amendment that prohibited slavery would have no effect on existing laws permitting slavery, but would only prohibit future laws. Yet there can be no doubting the Court's intentions. Faced with the prospect of losing all credibility as interpretive agent for *shari'a* by declaring interest religiously permissible, or acceding to the demands of powerful forces and prohibiting it against its own preferences (thereby doing enormous damage to Egypt's economy in the process), the Court rendered the provision into a promise it is fully aware will never be realized. No reasonable person with even a basic understanding of finance, let alone a judge on Egypt's highest court, could believe that any legislature in Egypt would make the foolhardy decision to ban interest no matter how rhetorically popular that might be. The commitment to *shari'a* continued to exist, as did the *promise* to amend legislation to be in conformity with it. Yet at least as concerned legislation permitting interest, the promise was fraudulent, and there was no real intent to enact it.

Conclusion

In these few pages, I have only sought to highlight what has at least been an understudied aspect of the constitutional experience in some states—the constitutionalized *promise* to enact a change, in full expectation that the change will not be enacted. While the most

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67 *Id.*
68 *Id.*

obvious examples of this are in divided societies, the promise of it suggests, indeed almost invites, broader use, particularly by actors and institutions who are aware of unrealizable popular demands and yet sensitive to popular opinion, as nearly all state institutions are to a greater or lesser extent. The promise to *shari'afy* commercial and financial legislation set forth in the last section is but one example of this.

My adoption of a contractual term that includes the word "fraud" is deliberate, as a decision to deceive a constituency is problematic. Far better in an ideal world to be honest and frank, and to discover and declare what is achievable, and to work to achieve it, than it is to make rhetorical promises one has no intention of keeping. Still, it is probably important to qualify the term here, given the obvious differences in use between the contractual setting and the constitutional. As it relates to contract, promissory fraud is tortious for good reason. It involves the willful and knowing deception of a counterparty for personal gain. In the constitutional setting, by contrast, the "fraud", as it were, is almost as much directed internally as it is to any third party. The Shi'a Islamists, that is, are almost as unwilling *to admit to themselves* the reality that the Personal Status Code will never be repealed in favor of *shari'a,* as they are unwilling to admit it to their constituencies. It is difficult, after all, for the elite of a repressed majority community to spend years persecuted under a putatively secular dictatorship, patiently waiting for a day when they might be able to rule, only to find that when such a day comes, one of the most fervently consistent demands of the community is not ever going to be realized.

Moreover, the alternative to contractual promissory fraud is, frankly, fair dealing. The alternative to constitutional promissory

fraud might prove to be broad and serious social unrest. Promissory fraud might be the only way to temper majoritarian demands without explicitly claiming to do so. It would be difficult for a dominant force to refrain from exercising its power to obtain constitutional language to its liking on a matter important to it. Even if the leaders of the movement could be persuaded in the abstract, the rank and file would find the concession rather bewildering and unacceptable, leading to a delegitimization of the representatives if they were to accept it. Yet, under circumstances where an important minority is no less committed to a different formulation, imposition would seemingly be an extremely unwise course of action.

Hence, there should be significant distaste in choosing to adopt promissory fraud, and it is probably overused, though this is probably the subject of a subsequent paper. Still, it is important to note that in some contexts promissory constitutionalism perhaps offers the only avenue available to manage a serious social conflict peacefully—formally in favor of the dominant group, but in effect in favor of the minority forces. Hence, the majoritarian demands are *recognized* in constitutional text, but in a manner that all but ensures that they will have no effect of any kind over a long period of time. It enables, that is, the majority and the dominant forces to claim victory in theory while conceding to the fervent commitments of a minority in practice. Whatever else might be said of this fraudulent means of navigating difficult political and social divides, it does seem to have been effective in blunting majoritarian demands that, if put in effect, could prove destabilizing or worse.

The Concept of Legislation and Participation Rights in European Union Law

Alexander H. Türk[*]

Introduction

The process of European integration over the last 60 years from an international agreement in the field of coal and steel with six Member States into a quasi-federal system in a European Union with 27 Member States has profoundly altered the political and legal landscape in Europe. Successive treaty amendments leading over time to a considerable transfer of competences from the Member States to the European Union have established the European Union as the primary forum of law-making in many policy areas. With the transformation of the nature and effect of these laws, mainly as a result of the Court of Justice's[1] jurisprudence, in the legal orders of the Member States, the lawmaking process at European level was expected to meet the changing demands of a legal order evolving from a regulatory regime to an emerging constitutional legal order.[2] The comforts of a system of executive federalism, in which the governments of the Member States dominate the adoption of European laws was no longer considered adequate to meet the demands for democratic legitimacy of this new constitutional order.

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* Professor of Law, Dickson Poon School of Law, King's College London. The author would like to thank Ms. Esin Kucuk for her research assistance.

1 Since Lisbon the Court of Justice is officially known as Court of Justice of the European Union (CJEU), consisting of the Court of Justice, the General Court and the Civil Service Tribunal.

2 Leonard F. M. Besselink, *The Notion and Nature of the European Constitution after the Lisbon Treaty'*, *in* EUROPEAN CONSTITUTIONALISM BEYOND LISBON 261-282 (Philipp Kiiver, Jan Wouters, & Luc Verhey eds., 1 ed. 2009).

In response to these demands, the Lisbon Treaty has continued the trend towards greater parliamentarisation of the Union's legislative process by further enhancing the role of the directly elected European Parliament.[3] However, while this approach reduces the executive dominance of the Commission and the Council in the legislative process, the increased demand for Union laws, the complexity of risk and market regulation, the need to adapt laws to frequently changing economic circumstances, and the rapid change of the scientific and technical knowledge base reduce Union legislation to providing often only a legal framework, which has to be complemented by administrative rulemaking, making the latter the dominant feature of Union lawmaking. While it has extended the involvement of the European Parliament also in this area, the parliamentarisation of administrative rulemaking is limited by the European Parliament's resources and the need to not undermine the important contribution which national governments make at the Union level in the plethora of committees and agencies which constitute the backbone of Europe's integrated administration.[4] More profoundly, the European Parliament's ability to enhance the democratic legitimacy of Union lawmaking is itself constrained by its unequal representation of the Union's citizens[5] and by the limited public space it provides at present.[6]

The limited, albeit necessary, contribution of further parliamentarisation to enhance the democratic legitimacy of Union

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3 See Alexander H. Türk, *Lawmaking after Lisbon*, inEU LAW AFTER LISBON 62, 66 (Stefanie Ripley, Andrea Biondi, & Piet Eeckhout eds., 2012).

4 Herwig C.H. Hofmann & Alexander H. Türk, *The Development of Integrated Administration in the EU and its Consequences*, EUR. L. JOUR. 253 (2007).

5 *See* the Lisbon judgment of the German Federal Constitutional Court B Verf G, 2 be 2/08 of 30 June 2009.

6 Dieter Grimm, *Does Europe Need a Constitution*, 1 EUR. L. J. 282 (1995).

lawmaking have led to demands of increased opportunities for the involvement of citizens in the Union's lawmaking activities. Interest representation, in the form of institutionalised representation, in the Economic and Social Committee or the Committee of the Regions, or in form of informally consulted committees,[7] has been considered as a pervasive feature of European lawmaking from its beginning.[8] However, while interest representation is still regarded as an indispensable mechanism for efficient lawmaking,[9] the changing nature of the European legal order has brought to the fore the need for the participation of interests, and generally the Union's citizens, as an instrument for enhancing the democratic legitimacy of Union lawmaking.[10] The insertion in the Lisbon Treaty of the principle of participation can be seen as recognition of the contribution participatory mechanisms can make to the democratic legitimacy of the Union.

The principle of participatory democracy is as such however only of value if it can be made operational in the Union legal order. While Union legislation can clearly provide a mechanism for the operationalization of this principle, the role the CJEU in providing participatory rights has come under increased scrutiny.[11] And even

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7 THOMAS CHRISTIANSEN & TORBJÖRN LARSSON (EDS.), THE ROLE OF COMMITTEES IN THE POLICY-PROCESS OF THE EUROPEAN UNION (2007).

8 JOANA MENDES, PARTICIPATION IN EUROPEAN UNION RULEMAKING: A RIGHTS-BASED APPROACH (2011).

9 MENDES, *id.*at 117-118.

10 COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN GOVERNANCE: A WHITE PAPER, COM (2001) 428 FINAL. See also STIJN SMISMANS, LAW LEGITIMACY AND EUROPEAN GOVERNANCE. FUNCTIONAL PATICIPATION IN SOCIAL REGULATION (2004).

11 PAUL CRAIG, THE LISBON TREATY, LAW, POLITICS, AND TREATY REFORM (2010); Joana Mendes, *Participation and the Role of Law after Lisbon: A Legal View on Art 11 TEU*, COMMON MKT. L. REV.1849 (2011).

though they acknowledge the right to a fair hearing in administrative procedures as a fundamental right, the Union courts have refused to grant participation rights, other than those provided in Union legislation, in lawmaking procedures, when they consider such procedures as 'legislative' in nature. This has met with fierce criticism in academic writing, claiming that such an approach undermines participation rights of citizens, the democratic legitimacy of such rules, in particular in light of the newly established constitutional principle of participatory democracy, and the instrumental value of such participation.[12]

While it is helpful in general to highlight the values of participation in Union lawmaking, such criticism generally fails to engage with the Union courts' central argument that the 'legislative' nature of the lawmaking procedures prevents them from granting such participation rights. The aim of this article is to engage with this argument more fully. It will critically assess the Union courts' understanding of the concept of 'legislation'. It will argue that the Union courts have used the concept in an inconsistent and sweeping manner thereby reducing its value to serve as a basis for the exclusion of participation rights in Union lawmaking. It will suggest that greater conceptual clarity is needed for the use of this concept to assess the necessity for the judicial creation of participation rights. It will be argued that the concept has a dual meaning as legislation in form and legislation in substance, each serving different rationales. In consequence, the former has considerable force in excluding participation rights in legislative procedures, while the latter has to be used with caution in denying participation rights, particularly in

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12 MENDES, *supra.* n.8; PAUL CRAIG, EU ADMINISTRATIVE LAW 292-298 (2nd ed. 2012).

Union administrative rulemaking. It is submitted that the Union courts should grant participation rights where administrative rulemaking involves individualised determinations leaving the award of participation rights otherwise to the Union legislator.

The article will proceed as follows. It will first provide a more detailed picture of lawmaking in the EU after Lisbon. It will discuss the Union courts' case-law on the right to a fair hearing in a comparative perspective before critically assessing the Union courts' understanding of the concept of Union legislation as basis for the exclusion of the right to a fair hearing in case of legislation in form, but also in case of legislation in substance. The article will conclude with some reflections on the demands for the Union courts to expand the right to be heard in administrative rulemaking beyond individual determinations.

Union Lawmaking after Lisbon

Even though it formally discarded any constitutional symbolism, the Lisbon Treaty by and large retained the lawmaking reforms of the failed Constitutional Treaty.[13] The introduction of a formal distinction between legislative and non-legislative acts as part of a hierarchy of norms in EU law was designed to make the Union's lawmaking processes more democratically legitimate, and to provide for greater accountability and transparency.[14] The adoption of

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13 *See* generally on the Lisbon Treaty CRAIG, *supra.* n. 11.

14 It should however be noted that, as much as it sought to enhance the democratic legitimacy of the traditional mechanisms for Union lawmaking, the Lisbon Treaty failed to address the Open Method of Co-ordination (OMC), which operates in many areas of Union law, such as economic policy and employment, as alternative to or supplement for the traditional Union lawmaking processes. The OMC allows the Union to operate in areas in which it does not traditionally enjoy lawmaking competences, but the dominance of executive

legislative acts jointly by the European Parliament and the Council of Ministers was considered essential to realise the Union principle of representative democracy, based on the representation of citizens in the European Parliament and the Member States in the Council of Ministers in the legislative process.[15] The Lisbon Treaty seeks to achieve this aim in the provision of the ordinary legislative procedure as standard procedure for the adoption of legislative acts,[16] even though it deviates from this approach in certain, limited cases, by allowing legislative acts to be adopted in special legislative procedures.[17] Despite the almost complete realisation of the formal representation model in the adoption of Union legislation, it was felt that this would not be sufficient to provide the legislative process with sufficient democratic legitimacy. The requirement for the Council to meet in public when deliberating and voting on legislative drafts seemed to address concerns about the transparency of the legislative process.[18] More importantly, the inclusion of elements of participatory democracy in the Lisbon Treaty[19] was seen as a way to strengthen attempts at providing the Union with a public forum of discourse, which could transcend the national policy debates about the Union. The participatory mechanisms, set out in Article 11 TEU, providing for the opportunity for citizens and representative associations to voice their views and

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actors, such as the Council and the Commission, and the lack of openness in its operation have raised concerns about political and legal accountability. Similar concerns have been voiced about the involvement of private parties in the field of social policy or standardisation. See Türk, *supra.* n.3, at 79-84.

15 *See* TEU art. 10.

16 *See* TFEU art. 289(1).

17 *See* TFEU art. 289(2). In some cases basic acts are adopted in a non-legislative procedure.

18 *See* TEU art. 16(8).

19 The Lisbon Treaty also reinforces existing forms of institutionalised interest representation in the Economic and Social Committee (Articles 301 to 304 TFEU) and the Committee of the Regions (Articles 305-307 TFEU).

exchange them publicly, the requirement of an open, transparent and regular dialogue of Union institutions with civil society, the obligation of the Commission to carry out broad consultations to ensure coherent and transparent Union action, might well be seen as constitutional symbolism by merely enshrining at Treaty level the existing consultation practice of the Commission,[20] but it seems more convincing to see them as constitutional standards for Union lawmaking.[21]

A tendency towards greater parliamentarisation can also be found at the level of subordinate, or administrative lawmaking, which the Lisbon Treaty however had to reconcile with the traditional involvement of the Member States in this area. Given the limitations of the legislative process, the Union has since its inception relied to a large extent on administrative rulemaking. Such rules were in the past adopted mainly through the system of comitology, which denotes a process by which the Commission, on a delegation from the legislative authority, adopted administrative rules under the control of committees comprised of representatives of the governments of the Member States.[22] With the increase of its powers in the legislative

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[20] These practices are set out in particular in Commission Communication 'Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission', COM(2002) 704 final. See also European Commission 'Impact Assessment Guidelines', SEC(2009) 92, section 4. The citizens' initiative in Article 11(4) of TEU constitutes a new participatory mechanism and is now set out in Regulation (EU) No211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, 2011 O.J. (L 65/1).

[21] *See* Armin von Bogdandy, *Constitutional Principles*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 11-54 (Armin von Bogdandy & Jürgen Bast eds., 2010); Joana Mendes, *Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design*, EUR. L. J. 22, 26 (2013).

[22] CARL FREDRIK BERGSTRÖM, COMITOLOGY: DELEGATION OF POWERS IN THE EUROPEAN UNION AND THE COMMITTEE SYSTEM (2005); HERWIG C. H.

process, the European Parliament had fought hard to gain greater involvement in the comitology system. The distinction between delegated acts under Article 290 TFEU and implementing acts under Article 291 TFEU for the adoption of subordinate rules in the Lisbon Treaty is therefore mainly to be seen as a political settlement to accommodate the demands of the European Parliament. The dichotomy of subordinate rulemaking has led to sharply differing forms of control to be exercised over such acts reflecting different conceptions of the nature of delegated acts on the one hand and implementing acts on the other hand.[23]

Under Article 290 TFEU, a legislative act may entrust the Commission with the power to adopt delegated acts of general application to amend or supplement non-essential elements of legislative acts.[24] The legislative act can provide the European Parliament and the Council with the power to revoke the delegation, but also with the power to object to the entry into force of such acts. The conception of delegated acts is therefore that of quasi-legislative acts, the adoption of which is entrusted to the Union and subject to control by the Union's legislative authority. This model of lawmaking replaces the structural dialogue between the Commission and the Member States for the adoption of implementing rules in the form of

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HOFMANN, GERARD C. ROWE & ALEXANDER H. TÜRK, ADMINISTRATIVE LAW AND POLICY OF THE EUROPEAN UNION 264–284 (2011); CRAIG, *supra.* n. 12, chapter 5.

23 *See* Herwig C.H. Hofmann, *Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality*, EUR. L. J. 482 (2009); Paul Craig, *Delegated Acts, Implementing Acts and the New Comitology Regulation*, EUR. L. REV. 671 (2011).

24 By reserving the essential elements of an area to the legislative act, Article 290(1) TFEU emphasises the prerogative of the legislative authority over policy formulation. *See* Case C-355/10, *Parliament* v. *Council*, judgment of 5 September 2012.

the comitology system with a more formal system of control. While this model ensures a more equal representation of the branches of the legislative authority, the powers of objection and revocation reduce the involvement of the European Parliament and the Council to formal veto powers without establishing institutionalised forms of an inter-institutional dialogue. Moreover, in addition to removing the traditional involvement of the Member States through comitology, Article 290 TFEU also does not provide for any specific participatory mechanisms for the involvement of civil society.[25]

On the other hand, Article 291 TFEU preserves, with certain modifications, the traditional comitology system for the adoption of implementing acts. As the adoption of implementing acts is in principle within the province of the Member States, Article 291 TFEU only allows a Union act to entrust the Commission, or exceptionally the Council, with the adoption of implementing acts where such acts are needed for achieving uniform conditions for the implementation of Union acts. The Commission's exercise of implementing powers is subject to mechanisms of control by the Member States, which are laid down in Regulation 182/2011 adopted by the European Parliament and the Council.[26] While this approach ensures the continued existence of the comitology regime within the scope of Article 291 TFEU, it alters the power of such committees, the opinion of which the Commission has to seek before adopting an implementing act. Under the pre-Lisbon regime any unfavourable opinion by the committee on the Commission's draft implementing act would merely trigger a

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[25] The constitutional standards set out in Article 11 TEU arguably also, however, apply in this case.

[26] Regulation (EU) 182/2011 of the European Parliament and the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, 2011 O.J. (L 55/13).

referral of the Commission's draft to the Council. Under the new comitology regime, the absence of the Council from the decision-making process endows opinions of the committees, at least *vis-à-vis* the Commission, with a legal finality, which they did not have before.[27] In the absence of any involvement of the European Parliament and the Council in the comitology process, the representative element of the process can only be seen in the constraining effects of the basic act.[28] It would be incompatible with such effects for the opinion of the comitology committee to be based on policy considerations other than those enshrined in the basic act, at least when it is adopted in the ordinary legislative procedure.[29] On the other hand, while the participation of the governments of the Member States in the process for the adoption of implementing acts can be said

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[27] According to Regulation 182/2011, the effect of the committee's opinion depends on whether the Commission has to follow the advisory (Article 4) or the examination procedure (Article 5). Under the former, the Commission merely has to take utmost account of the committee's opinion, whereas under the latter an unfavourable opinion prevents the Commission from adopting an implementing act. While the Commission may submit the draft implementing act to an appeal committee, composed of senior representatives of the governments of the Member States, for further deliberation, a negative opinion in the appeal committee prevents the Commission from adopting the act. In this case the opinion has also indirect effects for third parties, e.g. where the Commission fails to obtain the necessary majority in the responsible committee(s) for the approval of its draft administration act, for which a third party has applied.

[28] In contrast to Article 290 TFEU, any Union act can confer the power to adopt implementing acts under Article 291 TFEU. All the same, in practice the majority of conferrals will be contained in legislative acts.

[29] This consideration also follows from the rule of law, which establishes a hierarchical relationship between the enabling act and the implementing act. Moreover, the principle of the institutional balance would preclude comitology committees to base their opinions on policy considerations which the competent institution which adopted the enabling act did not consider relevant.

to enhance the deliberative quality of the comitology process,[30] Article 291 TFEU lacks any specific participatory mechanisms of civil society.

Despite the limited force of representative elements in the adoption of subordinate acts, neither Article 290 TFEU nor Article 291 TFEU makes provision for any participatory mechanisms. Article 290 TFEU for delegated acts and Article 291 TFEU, and its detailed rules in Regulation 182/2011, for implementing acts focus instead on the procedural aspects of (*ex post*) control of Commission draft acts. Given their focus on achieving a political settlement between the Council and the European Parliament, this is hardly surprising. In the absence of any statutory provisions,[31] participatory mechanisms for the adoption of subordinate acts result therefore mainly from self-imposed commitments by the Commission. The impact assessment process, which applies to a limited degree also to subordinate acts, constitutes such an important commitment, a central feature of which is the consultation of external experts[32] as well as the consultation of interest groups.[33]

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30 It could of course be argued that the participation of the governments of the Member States in the comitology process constitutes a representative element. However, this view is doubtful in two respects. First, Article 10 TEU does not refer to comitology committees as having representative status. Second, comitology committees consist mainly of civil servants of the Member States, which, unlike the ministers in the Council, are not accountable to their national parliaments.

31 The EU does not have at present a general statute setting out participatory mechanisms for administrative rulemaking, as it exists for example in the USA in the form of the Administrative Procedures Act. Also, policy-specific legislation only rarely provides for the participation of interested parties in administrative rulemaking in the EU.

32 *See* European Commission, *Impact Assessment Guidelines*, SEC(2009) 92, section 4.2.

33 *Id.* at section 4.3. The Commission guidelines attach a legitimising function to such consultation. *See* Section 4, at 21.

The provisions for the adoption of subordinate rules under Articles 290 and 291 TFEU has however to be seen in the wider procedural context which characterises EU administrative rulemaking. The EU has established in many policy fields agencies, which have been entrusted with responsibilities in the creation of administrative rules.[34] While agencies have generally no rulemaking powers, their contributions increasingly constitute an integral part of the Union's administrative rulemaking process, be it for the adoption of delegated acts under Article 290 TFEU or for implementing acts under Article 291 TFEU. The legislative acts establishing agencies involved in the Union's normative activities often contain provisions which considerably limit the power of the Commission to modify agency draft regulatory acts, in particular in respect of technical aspects of the draft.[35] Even in the absence of such provisions, the technical and scientific expertise embodied in such drafts imposes considerable

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[34] HOFMANN, ROWE, & TÜRK, *supra.* n. 22 at 285–307.

[35] See Article 17(2) of Regulation 216/2008 of the European Parliament and the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EC, Regulation (EC) 1592/2002 and Directive 2004/36/EC, 2008 O.J. (L 79/1). See also Articles 10(1) and 15(1) of Regulation (EU) 1093/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision 716/2009 and repealing Commission Decision 2009/78/EC, 2010 O.J. (L 331/12); Articles 10(1) and 15(1) of Regulation (EU) 1094/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) amending Decision 716/2009 and repealing Commission Decision 2009/77/EC, 2010 O.J. (L 331/48); Articles 10(1) and 15(1) of Regulation (EU) 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision 716/2009 and repealing Commission Decision 2009/7/EC, 2010 O.J. (L 331/84).

constraints on the Commission's discretion to deviate from them.[36] The importance of the regulatory activities of agencies is reflected in enhanced participatory mechanisms, which are laid down in legislation establishing the agencies or their internal rules. Agencies often provide for extensive mechanisms for the participation of national authorities, experts and the general public.[37] Such participation can take place in the form of networks,[38] or in more institutionalised forms, such as advisory for a and stakeholder groups,[39] or in the form of public consultations.[40]

It has however been argued that 'participation in these cases is a response to the regulatory needs present in each field and to the substantial aims of the corresponding legal regime', but crucially 'is not directed at ensuring procedural protection to concerned persons'.[41] More generally, the point has been made that participation rights enshrined in Union legislation do not provide a sufficient protection of procedural rights, as 'procedural protection is partially perceived as a matter of political choice and is conditioned by the delicate balance that EU decision-making procedures often need to achieve between

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36 *See* Case T-70/99, *Alpharma* v. *Council*, 2002 E.C.R. II-3495.

37 HOFMANN, ROWE, &TÜRK, *supra.* n. 22 at 304–307.

38 *See* e.g. Article 36 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, 2002 O.J. (L 31/1), as amended.

39 *See* Articles 27 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, 2002 O.J. (L 31), or Article 33(4) of Regulation (EC) No 216/2008, *supra.* n. 35.

40 *See* Article 29 of Regulation 178/2002, *Id.,* or Article 52(1) of Regulation 216/2008, *supra.* n. 35.

41 MENDES, *supra.* n. 8 at 110.

competing national and other interests'.[42] Such considerations throw the spotlight on the contribution the Union courts have made for the protection of participation rights in Union law making, in particular through the case-law on the right to a fair hearing, by comparing it with the approach taken in other legal systems inside and outside the EU.

Right of Fair Hearing in EU Law – A Comparative Perspective

The Union courts have developed participation rights within the context of the rights of defence in administrative proceedings, which include, amongst other procedural guarantees,[43] the right to a fair hearing.[44] As fundamental principle derived from the common constitutional traditions of the Member States, the right to a fair hearing cannot be limited or excluded by Union legislation.[45] Consequently, the right is enforced even in the absence of or in case of an insufficient provision for the right in Union legislation.[46] In recognition of its fundamental status in the case law of the Union courts, the right has now been enshrined in Article 41(2) Charter of Fundamental Rights (CFR), as part of the right to good administration.[47] The right entitles individuals to be informed about the case against them and to respond. This means in essence that the responsible institution can only rely on those aspects of the case in regard to which the individuals concerned had an opportunity to make

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42 *Id.* at 161.

43 The rights of defence include the right to be heard, the limited right against self-incrimination, and the limited right of legal professional privilege.

44 See TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW Chapter 8 (2nd ed. 2007) ; CRAIG, *supra.* n. 12 Chapters 11 and 12; HOFMANN, ROWE, &TÜRK, *supra.* n. 22 at 204–221.

45 Case T-260/94, *Air Inter* v. *Commission*, 1997 E.C.R. II-997, ¶60.

46 Case C-32/95 P, *Commission* v. *Lisrestal and others*, 1996 E.C.R. I-5373, ¶30.

47 *See* art. 6(1)(3) TEU.

their views known. It also allows the individual to have access to one's file, now also enshrined in Article 41(2) CFR, and to respond to third-party comments.

What is more difficult to ascertain is how the Union courts determine the scope of application of the right to a fair hearing. In a recent study of the right to a fair hearing it has been observed that 'while analysing the Courts' case law, one is led to conclude that it fails to provide basic criteria that would make the scope of the right to be heard more predictable'.[48] It is therefore not surprising that attempts to provide insights into the Union courts' pragmatically-oriented approach to the scope of the right to be heard mainly centre on its application in various policy sectors, rather than on the presentation of a uniform approach to the limits of this right.[49] As the following survey will show, it is however possible to identify the considerations which guide the Union courts in their determination of the right to be heard.

The Union courts' core formula postulates that the right to be heard applies 'in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person'.[50] While it has been applied with great flexibility across the Union's policy sectors and the Union courts have deviated from it on occasion,[51] this formula encapsulates as guiding considerations the

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48 MENDES, *supra.* n. 8 at 163. See also HANNS PETER NEHL, PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN EC LAW 98 (1998); Barbier de la Serre, *Procedural Justice in the European Community Case-Law Concerning the Rights of the Defence: Essentialist and Instrumental Trends*, 12 EUR. PUB. L., 225, 248-250 (2006).

49 *But see* MENDES, *supra.* n. 8, chapter 4.

50 Case 234/84, *Belgium* v. *Commission*, 1986 E.C.R. 2263, ¶28.

51 *See* HOFMANN, ROWE, & TÜRK, *supra.* n. 22 at 206–214.

requirements of individualisation and adverse effect. The necessary degree of individualisation depends on the extent to which the act has to reflect individual determinations of the conduct of the parties concerned. This is usually determined on the ground of whether they are the parties whose conduct is under investigation by the Union authority in the application of the applicable legal standards of Union law. Such an investigation can be the result of the initiative of the Union authority itself or on application by a third party,[52] or even of the parties concerned themselves, as in case of a compulsory notification of their intended conduct.[53] Also, the parties under investigation need not be the formal addressees of the act resulting from the investigation. It is however necessary that the applicable Union law requires a sufficiently close link of the parties concerned with the investigation to the extent that the act resulting from the proceedings has (also) to be based on determinations of their conduct.[54] While it will therefore more likely arise in bilateral administrative relationships, the right to be heard can also be found in multi-lateral relationships, involving public and private parties, where some or all of the parties can distinguish themselves through a sufficient degree of individualisation.[55] This also explains why the right to be heard has been acknowledged also in proceedings which result in acts of general application. While such acts apply to persons who are defined in their

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52 *See* Case T-65/96, *Kisch Glass* v. *Commission*, 2001 E.C.R. II-3261, ¶ 33.

53 *See* Case 17/74, *Transocean Marine Paint Association* v. *Commission*,1974 E.C.R. 1063; Case C-269/90, *TechnischeUniversitätMünchen* v. *Comission*, 1991 E.C.R. I-5469; Case T-82/01, *VOF Josanne and others* v. *Commission,* 2003 E.C.R. II-2013.

54 *See* Case T-170/06, *Alrosa* v. *Commission*, 2007 E.C.R. II-2601, ¶187; Case C-49/88, *Al-Jubail Fertilizer* v. *Council*, 1991 E.C.R. I-3187, ¶5; Case C-32/95 P, *supra.* n. 46, ¶24.

55 On the idea that the bilateral relationship between decision-maker and person concerned constitutes the essential structural element determining the scope of the right to be heard, see MENDES, *supra.* n.6 at 186 et seq.

objective capacity, a right to be heard is granted to those who can be distinguished on the basis of a sufficient degree of individualisation. One can of course object that this view ignores cases, in which the Union courts omit the 'initiated against' part of the formula and merely require adverse consequences to grant the right to be heard, as in the case of *Transocean Marine Paint Association*, where the right to be heard was merely based on whether a person's interests were 'perceptibly affected by a decision.'[56] *Transocean* and other such cases have, however, in common that the requirement for individualisation was clearly met.[57]

In addition to the need of individualisation, the right to be heard also requires a sufficient degree of adverse consequences resulting from the adoption of the act. The Union courts have not limited the notion of adverse effects to disciplinary sanctions against the Unions' civil servants[58] or sanctions against persons whose behaviour was investigated in antitrust[59] or anti-terrorism[60] cases. They have also acknowledged the impact of an act on the person's legal position, such as the imposition of conditions for obtaining an exemption under antitrust rules,[61] or the denial of benefits.[62] They have even accepted

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56 Case 17/74, *supra.* n.53, ¶15.

57 In Transocean the right to be heard applied to the persons who had applied for an exemption and could therefore be considered the parties under investigation. This is also brought more clearly out in all the other language versions of the case, which in para. 15, refer to 'adressaten' (Dutch), 'destinataires' (French), 'Adressaten' (German),destinatari (Italian), 'adressaterne' (Danish) of decisions, thereby limiting the scope of the right to be heard to the addresses of administrative decisions. This is also the approach in trademark cases, see Case T-79/00, *Rewe-Zentral* v. *OHIM*, 2002 E.C.R. II-705, ¶14.

58 Case 32/62, *Alvis* v. *Council of the EEC*, 1963 E.C.R. 49, at 59.

59 Case 85/76, *Hofmann-La Roche* v. *Commission*, 1979 E.C.R. 461, ¶9.

60 Case C-402/05, *PKadi and Al Barakaat International Foundation* v. *Council and Commission*, 2008 E.C.R. 6351.

61 Case 17/74, *supra.* n.53.

that the economic impact of an act, such as the imposition of anti-dumping duties on imported products[63] or the repayment of structural funds[64], can have effects sufficiently adverse to trigger a right to be heard.

The right to be heard is clearly based on instrumental considerations, ensuring that administrative decisions are made in full cognisance of the relevant facts and the relevant legal aspects.[65] A purely instrumental rationale would however not distinguish the constitutional right to be heard from the duty of the decision-maker 'to examine carefully and impartially all the relevant elements of the case,'[66] a duty which the Union courts regard as an objective procedural guarantee and not as an individual right.[67] The dual requirements of individualisation and adverse effects that engage the right to be heard reflect deeper considerations of fair treatment, based on the fundamental value of respect of persons as autonomous and responsible moral agents, which entitles them to consideration and self-defence, in particular where their conduct is questioned.[68] This explains the recurrent reference of the Union courts to the 'initiated against' formula, which suggests that a right to be heard should be granted where the person's conduct is considered to fall short of an

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62 Case C-269/90, *supra.* n.53.

63 *See* the Opinion of AG Darmon in Case C-49/88, *supra.* n. 54, ¶73, comparing the loss of the Community market as a result of the imposition of a high anti-dumping duty comparable in its financial consequences to a fine in antitrust proceedings.

64 Case C-32/95 P, *supra.* n. 46, ¶33.

65 Case C-269/90, *supra.* n. 53, ¶24.

66 Case T-326/07, *Cheminova and other* v. *Commission*, 2009 E.C.R. II-2685, ¶228.

67 Case T-369/03, *Arizona Chemical and others* v. *Commission*,2005 E.C.R. II-5839, at ¶86.

68 DENIS JAMES GALLIGAN, DUE PROCESS AND FAIR PROCEDURES: A STUDY OF ADMINISTRATIVE PROCEDURES (1996).

expected standard and the proceedings are initiated on the basis of a *prima facie* assumption of wrongdoing. The concern for fair treatment, which is reflected in the requirements of individualisation and adverse effects, goes however further. Where the applicable legal standards require the making of individual determinations of certain persons who are particularly affected, their participation is considered indispensable for the proper application of those standards, irrespective of any implication of wrongdoing.[69]

This would explain why the Union courts are reluctant to apply the right to a fair hearing in a 'legislative' context, in which individuals are mainly considered in an objective or abstract capacity without individual determinations being made. This is also reflected in Article 41(2) CFR, which limits the right to a fair hearing to individual measures. This view is also prevalent in many legal traditions of the Member States of the EU and beyond its borders, restricting as they do hearing rights to administrative acts making individual determinations.

In the European legal tradition,[70] the right to be heard has traditionally been recognised as a constitutional principle in judicial proceedings. Its extension to administrative decisions was mainly driven by the courts' concern about the procedural protection of individuals against an expanding administrative state. National courts in the EU have however shown a tendency to grant the right to be heard in administrative proceedings which in their view are most closely associated with the adjudicative model of court proceedings.

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[69] On the importance of the hearing principle as instrument of fair treatment, *see Id.* at 350.For an account of procedural fairness that it is primarily based on a dignitarian rationale, *see* Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B. U. L. REV. 881 (1981).

[70] For a comparative view, *see* JÜRGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 1243-1320 (2006). *See* also MENDES, *supra.* n. 8 at 46-55.

The English legal principle of *audi alteram partem* has long been applied as part of the principle of natural justice in judicial and quasi-judicial proceedings.[71] And while the English courts have expanded the principle generally to administrative acts[72] which affect an individual's rights, interests, or legitimate expectations,[73] the adjudicative model still casts a shadow over the application of the principle. This can not only be seen in the debate about whether hearing rights in administrative proceedings constitute an extension of the principle of natural justice or are derived from the principle of procedural fairness,[74] but is also influential for the determination of the content and extent of the hearing right.[75] And finally, this also provides an explanation why English courts have limited hearing rights to individual cases and have held them generally not to be required for the adoption of legislative rules.[76] Other national courts in the EU while also recognising the right to be heard as a general principle of law have been more cautious in the expansion of the right to administrative proceedings. The French courts, which consider the right to be heard as a general principle of law forming part of the

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71 *See* PAUL CRAIG, ADMINISTRATIVE LAW (7th ed. 2012); WILLIAM WADE& CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW (10th ed. 2009); STANLEY DE SMITH, HARRY WOOLF, & JEFFREY JOWELL, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (5th ed. 1995). On the application of the principle in Irish law, see SCHWARZE, *supra.* n. 70 at 1306.

72 *Ridge* v. *Baldwin*, [1964] A.C. 40 HL. On the position in Irish law, see SCHWARZE, *supra.* n. 70 at 1306-1307.

73 CRAIG, *supra.* n. 71 at 349-353.

74 *See* the discussion in *Id.* at 345-347.

75 *Id.* at 358; SCHWARZE, *supra.* n. 70 at 1279.

76 *Bates* v. *Lord Hailsham* [1972] 1 W.L.R. 1373 Ch D at 1378. See WILLIAM WADE & CHRISTOPHER FORSYTH, *supra.* n. 71 at 469; CRAIG, *supra.* n. 71 at 450-452 on exceptions from that rule. Compare also *R.* v. *Liverpool Corporation, Ex p. Liverpool Taxi Fleet Operators' Association*, [1972] 2 Q.B. 299 CA (CivDiv); *R. (Greenpeace Ltd)* v. *Secretary of State for Tade and Industry*, [2007] EWHC 311 (Admin).

rights of defence, require for the application of the hearing right an administrative measure of a certain gravity, which includes sanctions and other measures interfering with existing rights.[77] Many national legislators in the EU, often in reaction to the judicial recognition of the hearing principle in administrative proceedings, have by enshrining the right to be heard in administrative proceedings in statutory provisions expanded the scope of the right granted by the courts. Some legislators have decided to include the right in an ever more expansive list of sectoral legislation.[78] Others have provided for the right in a more general statute.[79] And in some Member States of the EU a constitutional provision provides the basis for hearing rights in administrative proceedings.[80] And while this would in turn encourage courts to extensively interpret the statutory rights, a common feature

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77 SCHWARZE, *supra* n.70 at 1247-1249; ANDRE DE LAUBADERE, JEAN-CLAUDE VENEZIA, & YVES GAUDEMET, TRAITE DE DROIT ADMINISTRATIF, TOME 1 682-683 (4th ed. 1996). For a similar position in Belgium, see SCHWARZE, *supra.* n. 70 at 1292-1294, and in Luxembourg, see *Id.* at 1309-1310.

78 This has been the case in Belgium, *see* SCHWARZE, *supra.* n. 70 at 1292-1296. And also the Netherlands, *Id.* at 1311-1314.

79 *See* ¶28 of the German Law on administrative procedure (*Verwaltungsverfahrensgesetz* of May 25, 1976, BGBl. I 1976, p. 1253), as amended; Article 10 of the Italian Law of 7 August, No. 241/90 (G.U., 18 August 1990, No 192), as amended; the Luxembourg Law of December 1, 1978, as supplemented by the Règlement of June 8, 1979, in particular Article 9; Article 84 of the Spanish Law No 30/1992, of 26 November, (B.O. No. 285, 27 November 1992); Article 100(1) of the Portuguese Decree-Law No. 442/91, of 15 November (Diário No. 263, I-A). In French law, see Article 8 of the *Ordonnance* no. 83-1025 of November 28, 1983 concerning relations between the administration and the citizen, J.O. 1983, pp. 3492 *et seq*., which requires a hearing for all acts which have to be reasoned by virtue of Law no. 78-17 of January 6, 1978, J.O. 1978, pp. 227 *et seq*. In Danish law, *see* ¶¶19-21 of the Law no. 571 of December 1985 (*Forvaltningslov*), as amended. The United Kingdom's Tribunals and Inquiries Act 1992 by contrast is much more limited in scope.

80 *See* Article 20(2) of the Greek Constitution; Articles 267(5) and 269(3) of the Portuguese Constitution; Article 105 (c) of the Spanish Constitution; and indirectly in Article 34(1) of the Irish Constitution and Article 97(1) of the Italian Constitution.

of such rights is that they only apply for individualised administrative decisions, but not for generalised administrative rules.[81] Notable exceptions from this general trend can be found in Spain[82] and Portugal.[83]

The distinction between adjudication and legislation is also crucial for the application of hearing rights in India and the USA. While it has been read into several constitutional provisions,[84] the right to a hearing is generally considered in India as an essential component of the principle of natural justice.[85] Similar to English law, its application was initially limited to judicial and quasi-judicial proceedings,[86] but is now firmly recognised as being applicable also in administrative proceedings entailing civil consequences as part of the principle of fairness.[87] On the other hand, the right to a fair hearing, absent any statutory provision to the contrary, cannot be relied on

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81 This is the position in German, French, Italian (see Article 13 of Law 241/90, *supra.* n. 79), Luxembourg, and Danish law.

82 *See* Spanish Const. art.105(a) which requires a law for the hearing (*audiencia*) of citizens in the process of the elaboration of administrative measures of general scope (*disposicionesadministrativas*) which affect them. However a general law to that effect has not yet been passed. *See* MENDES, *supra.* n. 8 at 52-53.

83 *See* Article 117(1) of Decree-Law No 442/91, *supra.* n. 79, grants representatives of affected interests, but not natural persons, a hearing before the imposition by regulation of duties or charges. *See* also Article 4(1) of Law No. 83/95, of 31 August (Diário No. 201, I-A).which allows for the participation of interested citizens in the localisation and realisation of public works. *See* MENDES, *supra.* n.8 at 54-55.

84 Indian Const. art.19 and art.311.

85 *See* M.P. JAIN AND S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW 142 (4th ed. 1986).

86 On the evolution of the *audi alteram partem* principle, see *Id.* at 143-147.

87 *See* Hedge, J., in *A.K. Kraipak* v. *India*, A.I.R. 1970 S.C. 150, at 154; Bhagwati, J., in *Maneka Gandhi* v. *India*, A.I.R. 1978 S.C. 597, at 626; D.K. Jain, J., in *Automotive Tyre Manufacturers* v. *The Designated Authority & Ors.*, judgment of January 7, 2011, at ¶58.

where the act is considered to be legislative in nature.[88] The exclusion of natural justice is not limited to Acts of Parliament, but also extends to subordinate legislation, which is usually distinguished from administrative acts by considering 'the angle of general application, the prospectivity of its effect, the public interest served, and the rights and obligations flowing there from'.[89] In the USA, while they enjoy constitutional protection in the procedural due process clauses of the 5th and 14th Amendments of the US Constitution, hearing rights are similarly limited to adjudication and cannot be relied upon in case of rule-making.[90] The Supreme Court in *Bi-Metallic* suggested that a line needed to be drawn between adjudication, where the courts are entrusted with the protection of procedural due process, and rule-making, where the political process provides the necessary checks.[91] The Court thereby refuses to fashion any form of procedural due process for administrative rule-making, a task that is in its view best placed in the hands of the politically accountable bodies.[92] It has been argued that what matters for the distinction between adjudication and rule-making is less the number of people affected[93] or the nature of the

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88 *See The Tulsipur Sugar Co. Ltd.* v. *The Notified Area Committee*, A.I.R. 1980 S.C. 882; *Union of India* v. *Cynamide India*, A.I.R. 1987 S.C. 1802; *Shri Sitaram Sugar Company &Ors* v. *Union of India,* A.I.R. 1990 S.C. 1277; *State of Tamil Nadu &Anr* v. *P. Krishnamurthy &Ors,* judgment of 24 March 2006. See also the recent judgment by the Appellate Tribunal for Electricity in *M/S Ferro Alloys Corporation Ltd.* v. *Odisha*, judgment of January 2, 2013, para. 67.

89 *See*Chinnappa Reddy, J., in *Union of India* v. *Cynamide India*, 1987 SCR (2) 841, at 854 in relation to price fixation.

90 *See*Londoner v. *City and County of Denver,* 201 U.S. 373 (1908) and *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915).

91 *Bi-Metallic,supra.* n.90 at 445. For a critique of the political checks argument, see KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW 116-117 (2008).

92 Section 553 (c) of the Administrative Procedure Act 1946 provides for notice and comment as default procedure for administrative rule-making.

93 *See* the decision of the 10th Circuit in *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973), where procedural due process was denied despite the fact that

effects on individuals,[94] but 'the generalised nature of an agency's decision, and the general applicability of that decision.'[95] Others have pointed towards the importance of whether 'potential factual issues exist concerning a particular individual or group'.[96]

It is therefore clear that the jurisprudence of the Union courts by excluding the right to be heard in a legislative context 'embodies a normative choice,'[97] which is also adopted by many national legal systems. Nevertheless, as the following section of the case-law of the Union courts will show, it is often not quite clear what the Union courts mean by 'legislative' and the rationale for the exclusion of the right to a fair hearing appears to shift with whatever meaning is attached to the definition of the term. This is compounded by the fact that the use of the notion of legislation, which seems to be inextricably linked to national constitutional states, requires more consideration when used in the context of the law of a supranational organisation such as the EU.

Atlanta and the Concept of Union Legislation

In the leading case for the exclusion of the right to be heard, the General Court in *Atlanta*[98] held that 'the right to be heard in an administrative procedure affecting a specific person cannot be

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Anaconda was the only entity affected by a regulation of the EPA limiting the emissions of sulphur oxide in a Montana county.

94 Generally applicable rules can of course have a variable impact. See *Air Line Pilots Association* v. *Quesada*, 276 F.2d 892 (2nd Cir. 1960), which the 2nd Circuit denied procedural due process against a regulation of the FAA establishing a mandatory retirement age of 60 for all air line pilots.

95 WERHAN, *supra.* n.91 at 116.

96 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW – PRINCIPLES AND POLICIES 557 (2nd ed. 2002).

97 CRAIG, *supra.* n.12 at 318–319.

98 Case T-521/93, , 1996 E.C.R. II-1707.

transposed to the context of a legislative process leading to the adoption of general laws'[99] and hence the right to be heard is excluded 'in the context of a Community legislative process culminating in the enactment of legislation involving a choice of economic policy and applying to the generality of the traders concerned.'[100] The General Court placed considerable emphasis on the fact that the act in issue was adopted by the Community legislator on the basis of the then EC Treaty and found that 'the only obligations of consultation incumbent on the Community legislature are those laid down in the [Treaty] article in question.'[101] The General Court made the point that the mandatory consultation of the EP satisfied the democratic principle, while the equally mandatory consultation of the Economic and Social Committee (ESC) ensured the representation of various groups of economic and social life. Consultation of other parties, such as traders engaged in the banana trade, was not obligatory. This argumentation seems to place considerable emphasis on the fact that the act was adopted in a legislative procedure providing for the mandatory consultation of the EP and the ESC, rather than the general applicability of the Act.[102]

The importance of the characterisation of legal acts as legislative lies in the legal consequences which are attached to such a finding. In national constitutional systems which embrace the principle of representative democracy, legislative acts are accorded in the national legal order a privileged position, which excludes the

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99 *Id.*¶70.

100 *Id.*¶70.

101 *Id.*¶71.

102 On appeal the Court upheld this position of the General Court, *see* C-104/97P, *Atlanta and others* v. *Commission and Council*, 1999 E.C.R. I-6983, ¶¶37 and 38. *See* however MENDES, *supra.* n.8 at 196.

application of any procedural rights.[103] The rationale for this exclusion is that the legislative procedure is believed to ensure (procedural) due process through the equal representation of the citizens.[104] This raises the question as to whether similar considerations can justify the exclusion of the right to be heard in case of acts adopted in the Union's legislative procedure.

It can be acknowledged that the Union after Lisbon still does not constitute a state and that the Union Treaties even lack the formal and substantive characteristics of a Constitution found in nation states. From this does however not follow that the term 'legislation' cannot validly be used in Union law provided it serves a purpose which is functionally equivalent to that employed in states. It has been convincingly argued elsewhere that the European Union has evolved into a constitutional legal order.[105] An autonomous legal order can exist beyond the nation state[106] and therefore also within the Union. Also, the objection that the Union lacks a *demos* as basis for an autonomous legal order[107] is based on the questionable assumption that

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103 *See* the discussion of the English, French and German legal systems in ALEXANDER H. TÜRK, THE CONCEPT OF LEGISLATION IN EUROPEAN COMMUNITY LAW: A COMPARATIVE PERSPECTIVE (2006).

104 TÜRK, *Id*. For a discussion in US literature see MASHAW, *supra.* n.69, in particular at 921-925; Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, GEO. WASH. L. REV.577, 610-611 (2011); Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV.117, 168-169 (2011).

105 Paul Craig, *Constitutions, Constitutionalism, and the European Union*, EUR L. J. 125 (2001); AMARYLLIS VERHOEVEN, THE EUROPEAN UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY (2002).

106 *See* Neil McCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1–19 (1993); VERHOEVEN, *supra.* n.105 at 296; TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, (Christian Joerges, Inger-Johanne Sand, & Gunther Teubner eds., 2004).

107 *See* Grimm, *supra.* n.6 at 282–302; Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European*

a *demos* can only exist within the confines of a nation state and cannot be based, as in the Union's case, instead on a civic understanding of *demos*.[108] It is therefore equally possible to perceive the constitutional nature of the Union in non-statal terms[109] and to classify it 'among the non-revolutionary, historical types of constitutions.'[110]

While the nature of the Union does not *a priori* exclude the characterisation of Union acts as legislation, it could be argued that none of the Union's institutions can be considered as being sufficiently representative in the traditional sense of a national parliament to justify the term legislation for Union acts.[111] The Union is however not characterised by the traditional view of national parliaments as representing the nation. Instead each institution represents a particular interest in the law-making process that allows the Union to form a system of functional representation.[112] Despite its distinguishing features, similarities with the national system become apparent when bearing in mind that the legislative process in the nation state also comprises all constitutionally relevant institutions in a deliberative process of law-making.[113] Consequently the functional equivalent of legislation at Union level to that of national legislation exists, where the Union institutions participate in the law-making process in

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Community, 99 COLUM. L. REV. 628 (1999); Giandomenico Majone, *Delegation of Regulatory Powers in a Mixed Polity*, 8 EUR L. J. 319 (2002).

108 *See* Joseph H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR L. J. 219, 256 (1995); VERHOEVEN, *supra.* n.105 at 160.

109 McCormick, *supra.* n.106 at 2; VERHOEVEN, *supra.* n.105 at 122.

110 Besselink, *supra.* n.2 at 262.

111 BVerfG, *supra.* n.5. *See also*MENDES, *supra.* n.8 at 215-220.

112 See TÜRK, *supra.* n.103, at 217-218.

113 This argument addresses Mendes's objection in MENDES, *supra.* n.8 at 215-220, that the EP is not representative in the sense of a national parliament.

accordance with the specific function they represent in the Union.[114] Union acts can therefore be considered as legislative where the procedure for the adoption of such acts provides for a sufficient representation of these interests.

The rationale for the exclusion of the right to be heard in Union law is ultimately based on the presumption that the legislative procedure ensures (procedural) due process through the equal representation of its states and citizens. It would therefore be incompatible with the Union's principle of representative democracy to allow individuals privileged access to the legislative procedure through the right to be heard. This view is not inconsistent with the principle of participatory democracy, as set out in Article 11 TEU, which has as rationale the enhancement of the Union's democratic legitimacy rather than the protection of privileged access of individuals to the Union's legislative procedure. While Article 11 TEU can, and possibly should, be read as imposing on the Union institutions, an obligation to observe minimum standards of public consultation[115], such an obligation exists, however, in the public interest and can

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[114] The Commission represents 'the general interest of the Union' (see Art 17(1) TEU), the interests of the Member States are represented in the Council (see Art 10(2) TEU) and the citizens are represented by the European Parliament (see Art 10(2) TEU). The European Parliament is best placed to protect minority interests and to provide a public forum of communication. Despite efforts to subject Council debates to greater openness (see Art 16(8) TEU), it is still doubtful that the Council can provide such a forum (*see* Magdalena E. de Leeuw, *Openness in the Legislative Process in the European Union*, 32 EUR L. REV. 295 (2007)).

[115] As has been pointed out by MENDES, *supra.* n. 8 at 218, the principle of institutional balance is not undermined by this approach, as such consultation requirements merely affect the relationship between the respective Union institution and the public, but not the relationship between the Union institutions.

therefore not ground participation rights for the benefit of specific individuals.

While acts adopted in the ordinary legislative procedure in Article 294 TFEU clearly satisfy the requirements of equal representation, the picture is more complicated for acts adopted in one of the special legislative procedures. One could argue that the special legislative procedures which provide for the adoption of an act by the Council with the consent of the European Parliament or by the European Parliament with the consent of the Council provide both institutions with sufficient participation. This is however not the case for special legislative procedures which merely provide for the consultation of the European Parliament. The latter procedure is indeed indistinguishable from Treaty procedures which lead to the adoption of non-legislative acts, such as that provided under Article 103(1) TFEU, which provides for the adoption of Council acts after consultation of the European Parliament.[116] It follows that, contrary to the position taken by the Union courts in *Atlanta*, the procedure leading to the adoption of the act in issue, in which the European Parliament merely had to be consulted,[117] could not be considered as legislative and could therefore not justify the exclusion of the right to be heard on the procedural characteristics of the act.

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[116] *See* Case C-3/00, *Commission* v. *Denmark*, 2003 E.C.R. I-2643, at paras. 42 to 50. The Court held that an act based on Article 95(4) and (6) EC (now 114(4) and (6) TFEU) could not be considered as legislative, as it was not adopted in the co-decision procedure, but rather in a procedure in which the Commission had to assess the specific needs of a Member State. See also Joined Cases C-439/05P and C-454/05P, Land Oberösterreich, 2007 E.C.R. I-07141 paras. 28 to 44, for requests made under Article 95(5) EC (now 114(5) TFEU).

[117] Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas, 1993 O.J. (L 47/1), was adopted on the basis of Article 43 EEC Treaty, which provided for the adoption of the act by the Council after consultation of the EP.

The Right to a Fair Hearing and Acts of General Application

The Union courts in *Atlanta* seemed to have based the exclusion of the right to the heard mainly on their perception of the nature of the procedure in which the act was adopted and rather less on the general applicability of the act. All the same, this latter aspect assumed greater importance in later judgments of the Union courts as ground for excluding the right to be heard. The extension of the exclusion of the right to be heard to acts of general application was also based on the understanding of such acts as legislative, not only on ground of the procedure followed for their adoption, but their substance.

The General Court's ruling in *Arizona Chemical* provides a good example for the exclusion of the right to be heard in case of acts of general application. The applicant in this case had requested the adoption by the Commission of an act requiring the adaptation of Council Directive 67/548[118] to technical progress. Council Directive 67/548, adopted on the basis of the EEC Treaty, had delegated to the Commission the power to adopt such an act in accordance with the regulatory procedure laid down in Article 5 of Council Decision 1999/468.[119] The General Court rejected the right to be heard on the ground that 'according to the general principles of Community law such as the right to a fair hearing, neither the process of enacting acts

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[118] Council Directive 67/548/EEC of 27 June 1867 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances, 1967 O.J. English Special Edition, at 234, as amended.

[119] Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, 1999 O.J. (L 184/23).

of general application nor the nature of those acts themselves require the participation of the persons affected'.[120]

The General Court's first argument in *Arizona Chemical* that the process of enacting acts of general application did not warrant a right to be heard seems to be based on its understanding of the implementing procedure followed by the Commission as legislative in nature. The General Court asserts in this respect that '[u]nder that procedure, the Commission enjoys ... a power of initiative as part of the *legislative* process.'[121] This view seems misguided in light of the discussion above on *Atlanta* and Union legislation. On the one hand, the involvement of the Commission, through its power of initiative, ensures the representation of the Union interest and therefore constitutes a necessary condition for regarding a procedure as legislative. On the other hand, since the characterisation of a procedure as legislative is only justified where it ensures the functional representation of all the constitutionally relevant interests, the participation of the Commission is on its own insufficient to consider a procedure as legislative. The regulatory procedure did not provide for any participation of the European Parliament[122] and only for the limited involvement of the Council.[123] This also makes unsustainable

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120 Case T-369/03, *supra.* n.67, para. 73. See also Case T-122/96, *Federolio* v. *Commission*, 1997 E.C.R. II-1559, ¶75; Case T-199/96, *Bergaderm and Goupil* v. *Commission*, 1998 E.C.R. II-2805, ¶58; Case T-13/99, *Pfizer Animal Health* v. *Council*, 2002 E.C.R. II-3305, ¶487; Case T-70/99, *Alpharma* v. *Council*, 2002 E.C.R. II-3495, ¶388.

121 Case T-369/03, *supra.* n.67, ¶51. Emphasis added.

122 Articles 5(5) and 8 of Council Decision 1999/468 merely allowed the European Parliament to raise an *ultra vires* objection.

123 Article 5 of Council Decision 1999/468 provided for the involvement of the Council only in those cases, where the Commission could not obtain a positive (qualified majority) opinion in the comitology committee. On the point as to whether the comitology committee can be considered as adequate substitute for the involvement of the Council, see *supra.* n.30.

the argument of the General Court that 'the interests of those persons are deemed to be represented by the political bodies called to adopt those acts.'[124] It follows that the regulatory procedure, contrary to the view taken by the General Court, could not be considered as legislative.

These considerations also make it difficult to consider the new procedural regimes for the adoption of subordinate rules in Articles 290 and Article 291 TFEU as legislative in nature. This is obvious in case of the new comitology procedures, set out in Regulation 182/2011, leading to the adoption of implementing acts under Article 291 TFEU. Since they do not provide for any participation of the European Parliament and the Council, these procedures cannot be regarded as legislative. Despite the characterisation of delegated acts as 'quasi-legislative,'[125] it is submitted that the procedure leading to the adoption of such acts under Article 290 does also not qualify them as legislative. As discussed above in, the involvement of the European Parliament and the Council is limited in this procedure to a formal system of *ex-post* control and does not allow for a sufficient reflection of the interests which they represent.

The General Court's second argument in *Arizona Chemical* for the exclusion of the right to be heard for acts of general application is

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[124] Case T-369/03, *supra.* n.67, ¶73. It is interesting to note that the statement cites in support the ruling of the General Court in Case T-199/96, *supra.* n.120, which in turn refers to the General Court's ruling in *Atlanta* for support. As discussed above, the General Court's ruling in *Atlanta* does however not offer any support for the view that the right of a fair hearing does not apply in a procedure, which is not based on the Treaty itself.

[125] EUROPEAN COMMISSION, Communication from the Commission to the European Parliament and the Council – Delegated Acts – Implementation of Article 290 of the Treaty of the Functioning of the European Union, COM(2009) 673 final, at 3.

based on the notion that 'the nature of such acts themselves' does not require the right to be heard. This argument seems to be supported by the wording of Article 41(2) CFR, which provides for the right to be heard only in case of an 'individual measure' being taken. Also, as mentioned before, many national legal systems exclude the right to be heard for acts of general application, which are regarded as legislation in substance.

The notion of acts of general application as legislation in substance has been developed in EU law mainly in the Union courts' case-law, where it has formed the basis for the exclusion of standing of private parties seeking judicial review of Union acts. The Union courts have defined acts of general application as being 'applicable to objectively determined situations.'[126] An act can therefore only not be considered as being of general application where it has been adopted 'on the basis of and with exclusive application to the situation of specific individuals.'[127] The understanding of such acts as being 'essentially of a legislative nature'[128] is here not based on the procedure in which an act is adopted, but is derived from its scope of application. This notion of legislation in substance can also be found in many national legal systems[129] and is based on the idea that 'legislation should be adopted in general and abstract terms to ensure the equal treatment of those subjected to its rules.'[130]

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126 Joined Cases 16 and 17/62, *Producteurs de Fruits* v. *Council*, 1962 E.C.R. 471, at 479.

127 TÜRK, *supra.* n.103, at 240.

128 Joined Cases 16 and 17/62, *supra.* n.126 at 478.

129 TÜRK, *supra.* n.103, at 11-61.

130 *Id*., at 162. *See* JEAN-JACQUES ROUSSEAU, DU CONTRACT SOCIAL Book II (1992).

While acts drafted in a general and abstract nature can contribute to ensuring the application of the principle of equality in the abstract, they do not, however, take account of the varying impact they can have on their addressees. An act of general application can therefore have a greater impact on specific individuals, be it because of the procedural or substantive guarantees they enjoy under Union law or because of the special impact of the act on their rights or interests. The Union courts have therefore, in certain limited circumstances, also considered a private party as individually concerned, and therefore as having standing to challenge a Union act, even though the act did not exclusively apply to that person and was therefore an act of general application.[131] A similar trend can be seen in the case law on the right to be heard, which has used the notion of individual concern to grant hearing rights to individuals also in case of acts of general application. The Court made it clear in *Al-Jubail* that the requirements of the right to a fair hearing 'must be observed not only in the course of proceedings which may result in the imposition of penalties, but also in investigative proceedings prior to the adoption of anti-dumping regulations which, despite their general scope, may directly and individually affect the undertakings concerned and entail adverse consequences for them.'[132] The Court's statement in *Al-Jubail* acknowledges that an act, despite its general nature can have a specific impact on certain individuals. A similar approach was taken by the General Court in *Yusuf*[133] when it emphasised, again with reference to *Atlanta* that 'the contested regulation is not of an exclusively *legislative*

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131 For a detailed assessment of the case-law of the Union courts on the relationship between the notion of acts of general application and the notion of individual concern, see ALEXANDER H. TÜRK, JUDICIAL REVIEW IN EU LAW 45-100 (2009).

132 Case C-49/88, *supra.* n. 54 at ¶15.

133 In Case T-306/01, *Yusuf and Al Barakaat International Foundation* v. *Council and Commission*, 2005 E.C.R. II-3533.

nature. While applying to the generality of economic operators concerned [...] it is of direct and individual concern to the applicants, to whom it refers by name, indicating that sanctions must be imposed on them'[134].

The case-law is however not consistent. *Al-Jubail* and *Yusuf* are difficult to reconcile with the ruling of the General Court in *Pfizer*.[135] In this case the General Court made it clear that the applicant had to be considered as being individually concerned on the basis that the applicant had instigated the procedure and benefited from procedural guarantees, such as the right to be notified during the procedure under Article 4 of Directive 70/524, as amended by Directive 96/51. However, the General Court with reference to *Atlanta* excluded the right to a fair hearing on the ground that the contested regulation was of general application. It pointed out that '[t]he fact that *Pfizer* – unlike the farmers in particular – is directly and individually concerned by the contested regulation does not alter that finding.'[136]

The general trend in the case-law suggests that the Union courts base the application of the right to be heard on the dual considerations of individualisation and adverse effects. An *a priori* exclusion of the

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[134] *Id.*¶324. Emphasis added. On appeal (Joined Cases C-402/05P and C-415/05P, *supra.* n. 60), the Court rejected the finding of the General Court that the Council regulation enjoyed immunity from judicial review save for a breach of *jus cogens* and found that the right to be heard was indeed breached. The Court did however not revisit the discussion raised in the General Court in *Yusuf* whether the legislative nature of the regulation prevented the application of the right to fair hearing. It seems a fair conclusion that the Court implicitly agreed with the position of the General Court on the point that despite its general application the contested act was not of an exclusively legislative nature.

[135] Case T-13/99, *supra.* n.120.

[136] *Id.*¶487. It seems difficult to draw an inference from the fact that the Court on appeal in *Atlanta* denied that the applicant was directly and individually concerned.

right in case of acts of general application would be incompatible with this approach. As the cases in *Al-Jubail* and *Yusuf* show, an act can be based on individual determinations even if its scope is of general application.[137] The premise of equal treatment on which the exclusion of the right is based does not hold true in this case. It is similarly irrelevant that legislation in substance is mainly concerned with policy, in which case procedural rights are only those granted by statute.[138] Apart from the fact that policy considerations can also be relevant for the adoption of individual acts, the normative basis for the Union courts to uphold the constitutional right to a fair hearing is based on the principle of fair treatment of the individuals affected by Union rules which are based on individual determinations, irrespective of the nature of such rules as legislation in substance. This has been succinctly put by Lawrence H. Tribe:

> 'The case for due protection grows stronger as the identity of the persons affected by a government choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual comes more determinately within the decision maker's purview. For when government acts in a way that singles out identifiable individuals- in a way that is likely to be premised on suppositions about specific persons- it activates the special concern about being personally *talked to* about the decision rather than simply being *dealt with*.'[139]

While the Union courts are therefore right not to exclude *a priori* the right to be heard in case of acts of general application, it is

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137 The act would be adopted on the basis of, but not with exclusive application to specific individuals.

138 *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 98-103 (1985).

139 LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 503-504 (1978).

submitted that the concepts of direct and individual concern, which the Union courts often employ for granting the right to be heard in such cases is inadequate.[140] The notion of individual concern, which the Union courts have developed in the context of granting standing to challenge Union acts, in its *Plaumann* interpretation often depends on the procedural guarantees, which the person enjoys by grace of Union legislation.[141] This would be incompatible with the constitutional nature of the right to be heard. Also, an approach based on the investigative nature of administrative proceedings to establish the right of a fair hearing is not sufficient. While such an approach would trigger the right to be heard in anti-dumping and sanctions cases, but not in those cases where individuals initiate the proceedings through notification. Instead, the Union courts should focus on the dual considerations of individualisation and adverse effects, which already underpin much of the case of law of the Union courts, also within the context of the acts of general application.

Conclusion

The evolutionary development of the European Union's legal system has made it necessary for the Union courts to adapt the legal principles which they had created to meet the legal challenges posed by the Union's transformation into a constitutional legal order to which the creation of these principles has in no small measure contributed itself. This is also true for the right to be heard, which the Court had

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[140] The Union courts have also been more generous in granting the rights of defence against acts of general application in case of challenges of Commission acts deciding on the inclusion of active substances in Annex I of Directive 91/414 as condition for the authorisation of plant protection products. *See* Case T-420/05, *Vischim* v. *Commission*, 2009 E.C.R. II-3841.

[141] *See* the different outcomes in Case T-13/99, *supra.* n.120, and Case T-420/05, *supra.* n.140.

created for the protection of individuals in an administrative context and which had greatly contributed to promoting the rule of law in European law. The evolution of the right to be heard from an administrative law principle to a fundamental right reflects the changing nature of the European Union itself. The application and adaptation of the principle has been largely dependent on the perception by the Union courts of the nature of the legal system in which the principle has been applied. This has not only affected the content of the right to be heard, but also its scope. As this article has shown the exclusion of the right to be heard in *Atlanta* was based on a (mis)conception of the nature of the procedure used for the adoption of the act in issue as legislative, a conception which seemed to have resulted from an overly generous view as to the democratic legitimacy of Union lawmaking.

The greatly enhanced role of the European Parliament in the adoption of Union laws has however made it justifiable in the Lisbon Treaty to refer as legislative to those procedures which allow for a sufficient functional representation of the relevant Union interests. It has been submitted that it is this functional representation which legitimately excludes the right to be heard in the adoption of such acts. The notion of legislation in form is however limited to acts adopted in the ordinary legislative procedure and, arguably, also the consent-variants of the special legislative procedures. It cannot be extended to the Union's administrative rules, since they do not provide for a sufficient representation of the relevant Union interests in the decision-making process. The Union courts' assertion that the nature of the procedure of such acts warrants the exclusion of the right to be heard must therefore be rejected. It has been submitted that this assessment is not affected by the enhanced role of the European Parliament in the adoption of delegated acts under Article 290 TFEU.

It has also been argued that the nature of an act as being of general application does not *a priori* justify the exclusion of the right to be heard, to which affected persons should be entitled where the act is based on individual determinations, irrespective of the conception of such acts as legislation in substance. This would be in line with what has been identified as the general trend in the case law of making the right to be heard dependent on the dual considerations of individualisation and adverse effects. The normative justification of these considerations lies in their reflection of deeper values of fair treatment based on respect for the individual affected in the proper application of the legal standards which require the making of individual determinations.

On the other hand, the Union courts should resist the demands for expanding the right to be heard beyond the dual considerations of individualisation and adverse effects.[142] It is of course the case that rules can affect individuals as much as individual determinations,[143] but this does not provide a sound reason for the application of the constitutional right to be heard. Such a justification is said to be based on the argument that instrumental and dignitarian rationales also apply where a rule affects the rights or legitimate interests of individuals.[144] Apart from the fact that the notion of rights is still far from settled in Union law,[145] the argument makes ambiguous use of the meaning of 'right'. It is of course the case that Union rules can embody rights which individuals can invoke in national courts. The justiciability of rules underlying the doctrine of direct effect, does

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142 MENDES, *supra.* n. 8, advocating a rights-based approach to participation.

143 CRAIG, *supra.* n.12 at 295-296.

144 *Id.* at 296. See also MENDES, *supra.* n. 8, at 229-240.

145 JULIA KÖNIG, DER ÄQUIVALENZ- UND EFFEKTIVITÄSGRUNDSATZ IN DER RECHTSPRECHUNG DES EUROPÄISCHEN GERICHTSHOFS 57-82 (2010).

however say little about the nature of the right and its protection against modification or even removal in the legal order and any participation rights that would have to be granted as a result. A Union rule which stipulates a certain mesh size for fishing nets could be considered as being directly effective, meaning that it could be invoked in national courts against incompatible national law. Even if it can be argued that the rule confers a right,[146] it does however not follow that such a right is immune to change by the Union body competent to alter the rule. As the rule is based on a policy choice of that body, it can be replaced by a different policy choice and the individual concerned has in principle no legitimate expectation that the policy will not change.[147] The right to be heard cannot be said to derive from some more fundamental principle or deeper value of the legal order, which would justify the intervention of the courts to grant (constitutional) rights regardless of any statutory basis.[148]

This does however not mean that administrative rulemaking, in the absence of the right to be heard based on the considerations of individualisation and adverse effect, is not subject to any judicially enforceable procedural constraints. The principle of careful and impartial examination as objective procedural guarantee endows the Union courts with the power to review the legality of administrative rules. In addition, the principle of participatory democracy, which has

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146 For the purpose of direct effect it is not necessary for the rule to confer a right, a legitimate interest would be sufficient. *See* Case C-194/94,*CIA Security International* v. *Signalson and Securitel*, 1996 E.C.R. I-2201.

147 *See* also DWORKIN, *supra.* n.138.

148 On the limits of liberal theory to provide process values, *see* Mashaw, *supra.* n.69, in particular at 930. See however the arguments for a normative justification for the rights-based approach in MENDES, *supra.* n.8, Chapter 2. For a discussion on procedural fairness in the policy process, see GALLIGAN, *supra.* n.68, Chapter 15.

been incorporated in the Lisbon Treaty to enhance the democratic legitimacy of the Union, imposes constraints on administrative rulemaking which the Union courts are bound to enforce. To be sure, given its abstract nature it does not on its own create any constitutional participation rights for citizens, which the Union courts are competent to develop. It is the responsibility of the political bodies of the Union to give concrete expression to this principle. It is however the role of the Union courts to ensure that the Union legislator complies with its constitutional duty to provide for sufficient participation of citizens in the Union's lawmaking processes, in particular for the adoption of administrative rules, and to interpret any participation rights which the Union legislator establishes in light of the principle of participatory democracy.[149]

[149] Generally on the role of the courts in rule-making, *See* GALLIGAN, *supra.* n.68 at 489.

Constitutions, Gay Rights, and Asian Cultures: A Comparison of Singapore, India and Nepal's Experiences with Sodomy Laws[†]

Manav Kapur[*]

Introduction

The way we conceive of 'gay rights' today is largely a 20th century phenomenon. In 1900, the conception of a LGBT movement would have struck people as ludicrous—Oscar Wilde had just been tried for being a "somdomite" (sic), and homosexuality was still the "love that dare not speak its name". By 2000, much of the "first" and "second" world had legalized homosexuality—the debate was moving on, now, to 'gay marriage. Interestingly, and perhaps not entirely coincidentally, the battle for LGBT rights has largely been a political and legal battle. Lawyers and courts have often been at the forefront of such struggles.[1] Furthermore, the "wave of constitutionalism"[2] since World War II has meant that, as Constitutions have started incorporating a bill of 'fundamental' rights in their texts, there has been a greater degree of reliance on them in order to carve out rights and freedoms for LGBT people. Eskridge, for instance, has referred to

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[†]This article does not reflect the changes brought to the Indian equality jurisprudence post the Supreme Court's verdict in *Suresh Kumar Koushal & Anr.* v. *NAZ Foundation & Ors.*

[*] B.A. LL.B. (Hons.), NALSAR, LL.M. (NYU), Asst. Professor, NALSAR University of Law. I would like to acknowledge Prof. Ran Hirschl, without whose guidance this paper would never have been written, and Prof. Amita Dhanda, for having given me comments on an earlier draft of this paper.

1 For a detailed understanding of how this struggle played out, for instance, in the United States, *see* Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, *79* VA. L. REV.1551 (1993).

2 A brief account of this is provided in Ran Hirschl, *The Continued Renaissance of Comparative Constitutional Law,* 45 TULSA L. REV. 71-2 (2011).

how LGBT communities are merely one of a series of identity-based movements that use such texts in their struggles.[3]

Constitutions have usually been considered to be uniquely 'national' texts, but cross-national discourse plays a major role when contested rights are adjudicated upon. As courts- and Constitutions, have started "talking with one another"[4], this has become a greater reality. One has only to look at European or American[5] precedents to see how strongly 'comparative' constitutional law has figured when dealing with LGBT rights- either through the prism of non-discrimination or equality of marriage. Unfortunately, the bulk of these developments have taken place in "Western" or "first world" jurisdictions, and most literature has also concentrated on these countries.

This paper seeks to examine Asian jurisprudence in regard to LGBT rights by looking at India, Nepal and Singapore. The choice of these countries is, to my mind, significant since all three are countries that have had a significant degree of tension between 'traditional values' and 'modernity', which have been reflected in their constitutional choices and various subsequent judicial and political tensions. Versteeg and Goderis[6] suggest that the texts of Constitutions are similar when countries either share a colonial past, legal origins or similar religions. This paper looks, not only at the text of

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3 William Eskridge, *Some Aspects of Identity-Based Movements in Constitutional Law in the 20th Century,* 1000 MICH. L. REV. 2061 (2002); S*ee* William Eskridge, *Channeling: Identity-Based Movements and Public Law,* 150 U. PENN. L. REV. 419 (2001).

4 Ran Hirschl, *The Rise of Comparative Constitutional Law: Thoughts on Substance and Method*¸ 2 INDIAN JOUR. OF CONST'L LAW 11, at 12 (2008).

5 *Lawrence* v. *Texas,* 539 U.S. 558 (2003).

6 Benedikt Goderis and Mila Versteeg, *The Transnational Origins of Constitutions: An Empirical Investigation,* (Aug 8, 2011). Copy on file with the author.

Constitutions, but also at the way Courts and political organs adjudicate upon and examine these issues. All three countries examined above are Asian countries with strong cultural similarities. All three have, however, considered issues of human rights in different ways, chiefly due to the difference in socio-political circumstances.

Singapore is considered to be uniquely isolationist, strongly emphasizing on 'communitarian' Asian values, though arguments have sought to prove that this is not an accurate reflection of the country's actual status[7]- in fact, Singapore's basic criminal law originates in the Indian Penal Code- a colonial imposition (including, verbatim, the law that criminalizes sodomy). In Nepal's case, the fact that the Constitution is in a state of flux (as of now, the country has a draft interim Constitution, rather than a formal one even after repeated extensions) has influenced its Constitutional status. As the country struggles to find its feet after years of revolution and political uprising, the Constituent assembly has adopted a liberal 'rights-based' model, though its future impact remains doubtful till now.[8] India's judiciary, conversely, has been comfortable with the use of comparative law since the promulgation of the Constitution in 1950, with the Indian Supreme Court (and others)[9] being considered one of the most progressive jurisdictions in the usage of foreign law. As the subsequent analysis demonstrates, though, the discourse on judicial activism in India has become paramount since the 1970s.

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7 *See*, for instance, Victor Ramraj, *Comparative Constitutional Law in Singapore,* 6 SING. J. INT'L & COMP. LAW 206 (2003) 209.

8 *See* the latter part of the paper, which describes constitutional developments in Nepal.

9 Including the Delhi High Court, which dealt with the issue of decriminalization of homosexuality in India in the case of*Naz Foundation* v. *Government of NCT of Delhi and Others*,2009 (160) DLT 277.

While the bulk of this analysis is descriptive, the normative aspect of this will also be looked into. Importantly, the analysis will not be confined to courts, since they are, though the most visible, not the only sites of constitutional adjudication. A recognition of what scholars call the 'judicialisation of politics'[10] has seen a movement towards the appreciation of the argument that courts are not the sole arenas where constitutional (especially rights-based) arguments take place. Hence, I plan to examine the political impact of LGBT movements as well, especially in Singapore, where Courts have taken a hands-off approach to these issues.

The commonalities and differences make a comparative examination of these countries a fascinating enterprise. The paper will open by describing briefly the constitutional and cultural attributes of each of these countries. Subsequently, the history, culture, and politics behind the struggle for LGBT rights and its outcomes will be examined. Importantly, lawyers who have argued for the legalization of these rights have, as subsequent sections will show, relied greatly on comparative foreign law precedents while judiciaries and politicians have taken conflicting stands.

In examining this, I shall look at what justifications Courts (and other Constitutional for a) have relied on when dealing either with the retention or abolition of these values. This would necessarily include a critique of the Singaporean thesis of 'Asian values', while at the same time critically examine attempts that the Delhi High Court and the Nepalese Supreme Court have made while relying on comparative law.

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10 Ran Hirschl, *The Judicialisation of Politics,* in THE OXFORD HANDBOOK ON LAW AND POLITICS 124 (Whittington, ed., 2008).

Some preliminary notes though. The paper does not effect a fundamental distinction between gay marriage and legalization- largely because two of the jurisdictions have not yet legalized marriage, and a third does not effect such a distinction in the judgment that dealt with this issue. Similarly, the anti-sodomy and gross indecency provisions that have been referred to only deal with men who have sex with other men- lesbian women and transgendered people are not included in that analysis, though analyses of the LGBT movement in all three countries shall also refer to them.

Constitutional Texts, Polities, and 'Constitutional Cultures': A Brief Summary

A brief understanding of the culture and constitutional history of each country is significant to understand *how* decisions on LGBT rights issues are made, whether by Courts or governments. As Vicki Jackson has pointed out, the framing and interpretation of constitutional texts is significantly shaped by its context and, the values embodied in the constitution often have a strong bearing on national identities and self-expression.[11] This in turn influences the way decisions are made. Any examination of judicial and political precedent, especially in an issue as divisive as LGBT rights, would necessarily require an understanding of these basic aspects.

In examining this, I will touch upon the background to the Constitutions of all three countries (including briefly, its history and demography), and shall see each Constitutions' equivalent of the bill of rights in order to understand their *textual* provisions- significant in understanding the politics of the issue. My use of the term

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[11] Vicki Jackson, *Methodological Challenges in Comparative Constitutional Law,* 28 PENN ST. INT'L REV 319, 322.

'constitutional culture' assumes that a constitution is not defined as merely its text, but also as a wider concept which includes the polity, judicial values, and social context which informs the interpretation of the constitution, and the various narratives it gives rise to.

To first discuss the commonalities- all three countries have significantly been influenced by colonialism (though Nepal was never formally a colony, the suzerainty of the British meant that its legal system saw profound Western influence)[12], and all three Constitutions have been formulated after the United Nations Declaration on Human Rights had been ratified. All three contain a version of 'fundamental rights', and the Constitutions of both Nepal and Singapore demonstrate significant "borrowing" from the Indian experience.[13] This is not entirely coincidental, considering India's geographical and cultural closeness to Singapore (including its experience with imperialism) and Nepal's virtual dwarfing by its gigantic neighbour. Finally, this paper demonstrates that, despite the importance of constitutional texts, constitutions are much more than their text.

Singapore: 'Enlightened' Isolationalism

Singapore is one of the most diverse countries in Asia, located at the tip of the Malayan peninsula. An otherwise nondescript island, its colonization in 1819 and its significance as an international entrepôt meant that it is now home to an extensively multicultural population, with a majority of persons of Chinese origins (74%), and substantial minorities of Malay (13%) and Indian (10%) populations. Major economic booms since independence have led to Singapore being one

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12 *See*, for example, Leonhard Adam, *Criminal Law and Procedure in Nepal a Century Ago: Notes Left by Brian H. Hodgson*, 9 THE FAR E.Q. 146.

13 Thio-Li An and Kevin Tan (eds.), EVOLUTION OF A REVOLUTION: 40 YEARS OF THE SINGAPORE CONSTITUTION 53 (2009).

of the wealthiest nations in Asia, and a developed country in all senses of the term. However, there exists a dichotomy between its capitalist, liberalized economy, and its legal and political system which has continued to be authoritarian, intolerant, and not particularly strong on civil and political rights.

Singapore's legal system is broadly similar to most other Commonwealth countries, involving a common-law system with a three-stage appellate process- the Supreme Court is the final Court of Appeal. The bulk of its criminal and civil law is derived from British and colonial legislation- the Indian Penal Code, as promulgated in Singapore, forms the basis of its substantive criminal law, and the Singapore Code of Criminal Procedure is substantially similar to the code of British India, despite important differences that have emerged as it evolved an "autochthonous legal system".[14]

Singapore's Constitution, promulgated in 1965, immediately after its independence from Malaysia, provided for a continuation of the Westminster-style democracy that formed part of the British legacy, though this increasingly moved towards a one-party rule.[15] Part IV of the Constitution provides for a set of 'fundamental liberties' (an interesting terminology, considering the linguistic difference between the uses of the terms 'rights' and 'liberties').[16] That said, the content of

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[14] *See*, for instance, K Y L TAN AND THIO LI-ANN, CONSTITUTIONAL LAW IN MALAYSIA AND SINGAPORE 5(2nd ed., 1997). *Also see* WC Cheong and A Phang, *The Development of Criminal Law and Criminal Justice in Singapore,* Research Collection School of Law, Paper 191, available at http://ink.library.smu.edu.sg/sol_research/191.

[15] Thio Li-Ann, *The Post-Colonial Constitutional Evolution of the Singapore Legislature: A Case Study,* 19 SING. JOUR. LEGAL STUD. 80, 87 (1993).

[16] Given that the notion of rights is understood as something intrinsic to humanity, a 'trump' as it were. 'Liberties', on the other hand, suggest autonomous zones for citizens, strongly bounded by the state.

these liberties is similar to most other 'liberal' constitutions, providing for personal liberty[17], a right against slavery and forced labour[18], an iteration of all persons being 'equal before the law and entitled to the equal protection of the law'[19] and freedom of speech, assembly, and association.[20]

Despite these essential transnational borrowings, Singapore is considered to be a relatively isolationist country. The decision in *State of Kelantan* v. *Government of the Federation of Malaya*[21] which argued for the 'four-wall doctrine,' that "the Constitution is primarily to be interpreted within its four walls" and not according to other countries, has been cited with approval in various Singaporean judgments[22]. Ramraj suggests that Singaporean judges have been comfortable with relying on international precedents when they seem to be connected to the law by "history or descent".[23] What it has been much more cautious in doing, however, is borrowing based on a 'universalist idea of rights and constitutional law.'[24]

There are strong reasons for this. Singapore has considered the 'universal' human rights idea with skepticism, and has been a strong

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17 CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 9

18 *Id*., art. 10

19 *Id.* art. 12.

20 *Id.* art. 14.

21 1963 MIA 355. Quoted with approval as recently as 2005, in the case of *Chee Siok Chin* v. *Ministry of Home Affairs,* [2005] SGHC 216.

22 *See,* for example, *Chee Siok Chin* [2006] 1 S.L.R. 582, where the Singaporean court said that standards laid down could not be applied *de hors* context.

23 An example is Singapore's law on murder, which has been profoundly influenced by the Indian decision in *Virsa Singh* v. *State of Punjab,* [1958] SCR 1495, or for that matter, the bulk of Singapore's Contract law, which is influenced by British precedent; Victor Ramraj, *Comparative Constitutional Law in Singapore,* 6 SING. JOUR. IN'TL & COMP. LAW 206, 208 (2002).

24 *Id*.

proponent of the idea of a unique communitarian set of 'Asian values' that it argues are common to most Asian countries. These define values in the *collective*- collective norm, collective benefit and collective duties.[25] In this system, the state acts in a paternalistic manner, deciding what is good for the people.[26] This cannot be considered an accident- as Beng-Huat and Kuo[27] suggest, Singapore's colonial history, ethnic isolation, and its troubled absorption and expulsion as part of the Malayan Union led to an urgent need to found a country and national identity virtually from scratch. While doing so, they refer to the need to create a 'disciplined work force' as being seen as paramount by the nations' leaders.[28] While economically sound, the creation of a 'disciplined work force' does not usually permit for diversity; Singapore was no exception to the rule.

There exists a substantial body of persons, both in Singapore and abroad, who relate this with the economic development of Singapore.[29] It has been acknowledged as such by the former Prime

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25 Thio Li-Ann, *Pragmatism and Realism do not mean Abdication: A Critical and Empirical Inquiry into Singapore's Engagement with International Human Rights Law.* 8 SYBIL 41-91(2004). S*ee* Eugene Kheng-Boon Tan, *"We"* v. *"I": Communitarian Legalism in Singapore*, 4 AUSTRALIAN J. OF ASIAN L. 1, 11-18 (2002).

26 K.Y. Lee, *Address by then Prime Minister Lee Kuan Yew at the Opening of the Singapore Academy of Law*, (1990) 2 S. AC. L. J.155.

27 Chua Beng-Huat and Eddie Kuo, *The Making of a New Nation: Cultural Construction and National Identity in Singapore in* FROM BEIJING TO PORT MORESBY: THE POLITICS OF NATIONAL IDENTITY IN CULTURAL PROCESSES 36 (Virginia R. Dominguez and David Woo eds., 1998).

28 *Id.,* at 42.

29 Prominent among such persons is Prime Minister Lee Kuan-Yew, who has articulated this view in many for a. *See*, for instance, Fareed Zakaria, *Culture is Destiny: A Conversation with Lee-Kwan Yew,* FOREIGN AFFAIRS, (1994) No. 73, Vol II.

Minister of Singapore[30], who has advocated the use of the term 'Asian Values' in order to understand Singapore's path to development. These values derive from Confucianism - including "*reverence for the institution of a family, deference to societal interests, respect for authority, and conservatism*".[31] These values do not support individualism, the right to dissent, or the notion of rights as claims against the state. In practice, the state acts as the custodian of "collective" morality, and the law is used as a coercive means of enforcing such morality.[32] As we see, therefore, Legislations such as Section 377-A and the Miscellaneous Offences (Public Order and Morality) Act, 1990 are used to enforce such "communal values".[33] However, the collapse of the 'tiger' economies in 1998 led to people articulating fears that these values were "finished"[34] which is hardly a ringing endorsement for their 'shared, traditional nature'.

The classification of a set of values as 'Asian Values' is problematic at the level of adjudication, since it fails to recognize Singapore's pluralist population and heritage. With a population part Chinese, part ethnic Malay and part Indian, along with a huge expatriate population, Singapore is far more diverse than its size suggests. At another level, the *content* of Asian values is also problematic- who decides what comes within the idea of Asian values?

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30 *Id.* "In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did not accord with the customs and values of Singapore society".

31 *Asian Values Revisited: What Would Confucius Say Now?*, available at http://www.wright.edu/~tdung/asianvalues_economist.htm.

32 *See* Jack Donnelly, *Human Rights And Asian Values: A Defense of 'Western Universalism', In* THE EAST ASIAN CHALLENGE TO HUMAN RIGHTS (Joanne R. Bauer and Daniel A. Bell eds.,1999).

33 *Id.*

34 Frank Cheng, *Are Asian Values Finished,* 161 FAR EASTERN ECON. REV. 32, 1998.

Keeping the historical context of Singapore in mind, one sees various ways in which Singapore's economic and cultural values have migrated from traditional Hindu, Confucian or Malay notions.[35] It is not too hard to conclude that the argument of shared Asian values, à la Singapore, is a self-serving one propagated by an authoritarian regime.

Singapore's legal regime provides further evidence of this authoritarianism. Studies of the *role* of law in Singapore demonstrate that law is considered to be a coercive mechanism to bring the state to order and there is little belief in the law, especially constitutional law, as a guarantor of rights and dignities.[36] In fact, the idea of Singapore being a "Fine city"- one where there are huge fines for any behaviour considered unworthy by its political masters, for even something as innocuous as chewing gum, and the harsh penalties that are a necessary corollary to this (Singapore remains one of the few countries that still allow caning)[37] demonstrate a strong continuum with its colonial past. Conversely, Singapore's judiciary has performed well in *economic* matters- being consistently ranked in the top three most 'efficient' judicial systems in Asia in enforcing contracts. This testifies to the speed with which matters are disposed of, especially those that deal with property or criminal rights.[38] This duality, hence, is central to the conundrum of Singapore's political and economic structure- how can a Western-style liberal judiciary (in commercial law) coexist so

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35 Donelly, s*upra* n. 33, 77-84.

36 R. HICKLING, ESSAYS IN SINGAPORE LAW45 (1992). *See* C. Tremevan, THE POLITICAL ECONOMY OF SOCIAL CONTROL IN SINGAPORE 23-25 (1996).

37 SINGAPORE CRIMINAL PROCEDURE CODE, 2010, Sections 335-332

38 Francis T Seow, *The Politics of Judicial Institutions in Singapore*, http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan002727.pdf. In 2010, Singapore was ranked first in the World Competitive Yearbook. *See* INTERNATIONAL INSTITUTE FOR MANAGEMENT DEVELOPMENT, WORLD COMPETITIVE YEARBOOK 1 (2010), available at http://www.imd.ch/research/publications/wcy/upload/scoreboard.pdf.

completely with a communitarian 'Asian values' oriented approach to individual rights?

In conclusion, one can see that Singapore's independence and initial fragility was coupled with little political debate on its future and few alternatives to the Lee Kwan Yew model of development, one that has been (economically, at least) remarkably successful.[39] With these facts in mind, though, one finds little evidence of a transformative 'Constitutional moment' as the Ackermanian thesis on constitutional law suggests,[40] where the judiciary attempted to evolve a constitutional rights-based framework.

The Indian Experience: Strong Rights Articulations, but Institutional Constraints

The second-largest country in the world in terms of population, India is extremely diverse. More than 80% of its population is Hindu, but it has the world's second-largest population of Muslims, and significant communities of Christians, Sikhs and Buddhist people. As a vibrant multi-party democracy, the Indian judiciary has emerged as a significant player in India's polity over the last few years.

Despite a long history of some form of 'rule of law', extending over what have been called the 'Hindu' and 'Islamic' periods of Indian history, the Indian legal system is strongly influenced by the British. Like Singapore, India is a Westminster-style parliamentary democracy

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[39] Singapore's economic growth since its independence has been immense. This, along with its strides in education, healthcare, and housing has led to commentators across the board referring to it as an 'economic miracle'. *See*, for example, Joseph Stiglitz, *Singapore's Lessons for an Unequal America*, NEW YORK TIMES, March 18, 2013.

[40] Bruce Ackerman, *Constitutional Politics/Constitutional Law,* 99 YALE L. J. 453.

which has been stable since the promulgation of its Constitution in 1950. As mentioned before, both India and Singapore share a common-law tradition, with the Indian court system, civil and criminal codes, and substantive law having a strong connection with the UK's legal system. Despite various strains due to massive overloading, the system is believed to have been reasonably successful.

Promulgated in the years immediately after the Second World War, the Indian Constitution emerged at the beginning of what has been considered the international 'age of Constitutionalism'.[41] Derived from the Government of India Act, 1935, it nevertheless contained several departures from the imperial law that had preceded it. For example, as one of the longest constitutions in the world, it had a set of 'fundamental rights' enshrined within it in Part III of the Constitution. These included the right to life and personal liberty[42], the right to equality[43], the freedom of speech and expression[44], and religious and minority rights.[45] These rights are enforceable in the Supreme Court and other high courts, and the right to judicial remedies[46] is recognized as part of the unamendable 'basic structure' (a judicial, rather than constitutional term) of the Indian constitution.

The *origins* of the Constitution might well have been colonial but such a charge cannot as easily be levied against its jurisprudence. The Indian Supreme Court has increasingly taken an 'activist' role in constitutional adjudication. This aspect has led it to be labeled one of

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41 *Supra* n. 7.
42 INDIA CONST. art. 21.
43 *Id.,* art. 14.
44 *Id*., art. 19(1)(a); art. 19(1)(b).
45 *Id.*, art. 25-28.
46 *Id.,* art. 32.

the most powerful courts in the world,[47] especially after the 1970s, when an authoritarian government threatened to curtail civil liberties in India. In the field of human rights, its contribution has been much-acclaimed. In a series of judgments since 1978, the Court extended the right to life (couched in 'negative' terms) to include within its ambit substantive due process,[48] and a variety of socio-economic rights such as the right to health[49], education[50], work, and livelihood.[51] Further developments saw the right to privacy emerging in Indian law[52], in a manner similar to the 'penumbra rights' articulated by the US Supreme Court in *Griswold* v. *State of Connecticut.*[53] The power of the Supreme Court has been associated with various innovative steps that have been taken to enhance its jurisdiction like Public Interest Litigation (which relaxes the traditional rule of *locus standi)* and, in a recent case, a 'direction' (couched as a plea) to the Supreme Court of Pakistan[54], have been some of the most inventive strategies that the Court has adopted. As coalition governments have increased in India, the judiciary has become increasingly powerful.

As the Supreme Court has become more powerful, it has been known for the massive extent to which it has relied on comparative

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47 SP SATHE, JUDICIAL ACTIVISM IN INDIA: TRANGRESSING BORDERS AND ENFORCING LIMITS 99(2002).

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

49 *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal,* (1996) 4 SCC 37.

50 *Mohini Jain* v. *State of Karnataka,* (1992) 3 SCC 666;*Unnikrishnan JP* v. *State of Andhra Pradesh,* (1993) 1 SCC 645. This has subsequently been made a fundamental right by an amendment of the Constitution.

51 *Olga Tellis* v. *Bombay Municipal Corporation,* [1985] 3 SCC 545; *Sodan Singh* v. *Municipal Corporaton of Delhi,*[1989] 4 SCC 155.

52 *Kharak Singh* v. *State of UP*, where the Court held that Article 21 could be broad enough to cover privacy as well; *R. Rajagopal* v. *State of Tamil Nadu,* (1994) 6 SCC 632.

53 381 US 479 [1965].

54 *Gopal Dass* v. *Union of India,* W.P. 16 of 2010. Copy on file with the author.

law, in general,[55] and comparative constitutional law in particular. Indeed, commentators have (in my opinion, unfairly) gone so far as to argue that the Indian Constitution does not have any essential jurisprudence of its own, that all its ideas have been borrowed from international precedents.[56] Other criticisms, while less trenchant, have focused on the 'unimaginative' nature of such borrowings, and the 'methodological thinness' of such approaches. These criticisms, while not entirely unfounded, have also been exaggerated. Indian Courts have by and large continued to accept the 'universalist' model of constitutional adjudication, and have, in general, supported judicial activism. In fact, a recent 'conservative' judge has asserted the importance of being "*restraintivist in economic measures, though activist in cases of civil liberties.*"[57]

As judicial activism increases, though, Indian courts have increasingly shown signs of being unable to cope. The Indian judiciary is one of the most overloaded systems in the world and the large number of pending cases has meant that the courts routinely take generations in deciding cases[58]. In fact, judges have now increasingly sought to render *locus standi* procedures stricter, detracting from the language of the Constitution.

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55 For the extent to which Indian Courts have relied on comparative law, *see* generally Adam Smith, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case,* 24 BERK. J. INT'L L. 218 (2006).

56 GOBIND DAS, SUPREME COURT: IN QUEST OF AN IDENTITY 1 (1987). Quoted in Arun Thiruvengadam, *In Pursuit of the Common Illumination of Our House: Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia,* 2 INDIAN JOURNAL OF CONST'L LAW 67, 79 (2009).

57 Justice Markandey Katju, *Judicial Review in the US and UK, A Comparison,* Unpublished, copy on file with the author.

58 Scott Shackelford, *In the Name of Efficiency: The Role of Lok Adalats in the Indian Justice System and Power Infrastructure,* available at http://baseswiki.org/w/images/en/e/ec/SHACKLEFORD_Indian_Lok_Adats.pdf.

Nepal: New Constitutions, New Structures

The former kingdom of Nepal, in contrast to India and Singapore, is going through a turbulent time in its history. A small Himalayan country with a population of 27,000,000, the vast majority of its population is Hindu, though Buddhists and Muslims constitute substantial minorities. In contrast to India and Singapore, Nepal has never been formally colonized since its inception in 1768, though being virtually a protectorate of the British before India's independence undoubtedly had some influence on its social and political structure.[59] However, as Siera Tamang points out, the state and bureaucratic framework that emerged in Nepal have a lesser degree of the colonial bureaucracy that is a feature of other countries in the subcontinent.[60]

As an absolute monarchy until recently, Nepal has had an interesting constitutional history. Currently governed by an interim Constitution as the drafting committee struggles with reinventing the nation as a secular democracy, it has had four (or five) Constitutional texts since the 1850s. In some ways, Nepal demonstrates both the virtues and the pitfalls of increasing constitutionalisation and borrowings on an autochthonous system, demonstrating how attempts need to be made to make constitutional structures relevant to local socio-cultural patterns if these are to sustain themselves. The first 'constitutional' text in the country, the *Muluki Ain* of 1853, can be

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[59] *See,* for instance P BLAKIE ET AL, NEPAL IN CRISIS: GROWTH AND STAGNATION AT THE PERIPHERY (1992); *See* M. C. REGMI, A STUDY IN NEPALI ECONOMIC HISTORY 201 (1988).

[60] Siera Tamang, *Disembedding the Sexual/Social Contract: Citizenship and Gender Studies in Nepal:* 6 JOUR. OF CITIZENSHIP STUD. 202 (2002).

considered more in the nature of a civil, political and social code[61] in accordance with traditional Hindu structures where no distinction was effected between religion and the state. Indian independence, though, saw Nepal's first attempt at formulating a modern constitution, albeit an undemocratic one.[62] This Constitution was rapidly succeeded by an interim constitution of 1951, which has been described as "*a hastily prepared adaptation of the Indian Constitution, with no thought to the lack of prerequisites…which gave meaning to the Indian document*",[63] in turn succeeded by the Constitution of 1959, the Constitution of 1962 which first established Nepal as a Hindu state, and finally, the Constitution of 1990.

The Constitution of 1990 was Nepal's first consensus-based constitution.[64] This text demonstrated heavy trans-judicial borrowing, influenced as it is from the Indian Constitution. Included within these Constitutions were a set of fundamental rights[65], the adoption of a constitutional monarchy taking on from the British model of a King-in Parliament, and a limited recognition (as Nepal continued to officially be a Hindu state) of Nepal's status as a multi-ethnic and multi-lingual state.[66] Despite initial successes, the death of the hugely popular King Birendra in 2001 and the increasingly authoritarian rule of King

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61 JOHN WHELPTON, KINGS, SOLDIERS, AND PRIESTS: NEPALESE POLITICS 1830-57 23 (1991).

62 Mara Malagodi, *Constitutional Developments in a Himalayan Kingdom: The Experience of Nepal*, (2010, SOAS Law School, Unpublished, on file with the Author).

63 BHUVAN JOSHI & LEO ROSE, DEMOCRATIC INNOVATIONS IN NEPAL 488 (2002).

64 Malagodi, *supra* n. 62.

65 With the most significant being Article 11, which guaranteed the right to equality and equal protection, and Article 88, which granted the Nepalese government the right to judicial review. *Nepal Adhirajyako Sanvidhan*, 2040 B.S. (Constitution of Nepal, 1990 AD).

66 *Id.*, Article 4.

Gyanendra led to a second revolution in 2008, which deposed the monarchy.

The current interim Constitution is a step away from the earlier Constitutions, seeking to ensure 'consensus and stability' in a multicultural state, rather than asserting and privileging earlier identities.[67] Nepal is officially a 'sovereign, secular, and fully democratic state'.[68] The fundamental rights chapter guarantees the 'right to freedom',[69] the 'right to equality,[70] and the rights of women[71], and officially allows for a 'right to constitutional remedies,' the language of which is uncannily similar to that of the Indian Constitution. While the drafting process continues to seek annual (and bi-annual) extensions,[72] the interim Constitution is increasingly filling in as a national constitution.

The Supreme Court of Nepal, established under the 1959 Constitution, has played an interesting role during this crisis, veering towards conservatism and judicial restraint at some points, tending towards liberalism at others.[73] As Malagodi suggests, the Supreme Court has been slightly activist in regard to women's rights,[74] though it

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67 Malagodi, s*upra* n. 62.at 22.

68 Preamble, Interim Constitution of Nepal, http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf.

69 *Id.,* art. 12.

70 *Id.,* art. 13.

71 *Id.,* art. 25.

72 Kiran Chapagain, *Nepal Averts Crisis over Constitutional Deadline,* N.Y. TIMES, May 29, 2011.

73 Malagodi, s*upra* n. 62.

74 *Chandra Bajracharya* v. *Secretariat of Parliament,* NKP 2053 (1996 AD) 537 (A case dealing with the rights of women in marriage and divorce); *Meera Dhungana* v. *Ministry of Law and Justice,* NKP 2052 (1995 AD) (A case dealing with Inheritance and the right of daughters to inherit property under Hindu law). *See*

has seen itself as constrained, until the promulgation of the interim constitution, by the overarching Hindu nature of the 1990 Constitution.[75] By and large, its history has been one of judicial restraint.

Post-2007 developments, though, seem to demonstrate a more assertive Supreme Court which attempts to deal with the governance deficit in Nepal. As this happens, however, worries emerge on whether the Court's strategy can backfire, in fact, commentators[76] have commented on whether the Supreme Court should wait until it becomes more powerful, entrusting potentially divisive political issues to a Constitutional Court in the meantime.

Criminalising Sodomy in Asian Countries: 'Traditional Culture' or 'Colonial Imposition'

This section takes off from the earlier understanding of the three Constitutions and legal systems to examine the legal prohibitions against homosexuality in the three countries. In doing so, I first seek to give a flavour of how homosexual relations have traditionally been perceived in these jurisdictions which gives one an interesting perspective into how colonial rule has intersected with traditional values. I look at the historical context of Section 377 (in India and Singapore) and Section 377-A in Singapore, as well as looking at the 'offences against marriage' section in the Nepalese *Muluki Ain*. This would help us understand how the *idea* of legal prohibition on sodomy

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Sapana Pradhan Mulla v. *Ministry of Law and Justice*(Unpublished, a copy on file with the author).

75 Hence a number of petitions dealing with marital rape, the rights of prostitutes, conversion rights, etc were rejected.

76 David Pimentel, *Judicial Independence at the Crossroads: Grappling with Ideology and Independence in the New Nepali Constitution,* 5 INDIAN JOURNAL OF CONST'L LAW 77 (2011).

(and, for that matter, the creation of the 'homosexual' as a distinct entity as beyond the pale of society) is a Western, rather than 'indigenous' creation. This strikes a blow for those who argue that public morality and 'traditional' values are essential reasons for criminalizing sodomy.

This is not, however, to suggest that the problem is not cultural since Section 377's colonial imposition only poses an academic counter to arguing that a prohibition on homosexuality is not traditional- societies and communities construct their own ideas of tradition. Arvind Narrain's linkage of the prohibition against homosexual intercourse and the larger Hindu nationalist project of nation-building is significant; reams have been written about how far the Hindu right conception of gender and nationality is interlinked[77]. Demonizing differences, especially religious and sexual, form a major part of this concept of nationhood. Further, an examination of *how* homosexuality has historically been viewed is significant.

Asian Cultures, Homosexual Relations, and Gendered Narratives

There exists substantial information to prove that homosexuality, if not looked upon with approval, was tolerated in India, Singapore, and the region that subsequently became Nepal. India has had a historical tradition of different sexualities which have by and large been accepted in society[78]- indeed, it is home to the largest

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77 *See* Tanika Sarkar, *Birth of A Goddess: Vande Mataram, Ananda Math, and Hindu Nationhood,* 41 (37) ECON. & POL. WEEKLY, Sept 16, 2006.

78 Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals* 41 ECON. & POL. WEEKLY 4815, 4816 (2006); Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM97, 120-122 (2002), Ratna Kapur, *Post-Colonial Erotic Disruptions: Legal Narratives of Culture, Sex and Nationalityin India,* 10 COLUM. J. GENDER & L.333, 370 (2001).*See* Judith Avery Faucette, *Human Rights in Context: The*

population of transsexuals in the world![79] This kind of understanding detracts from arguments of a cultural and socio-legal prohibition of homosexuality- under the Manusmriti, which provides a 'Hindu moral and legal code', a duty of a man was to bear children and not to stray- homosexual relations were not explicitly mentioned. Contrary to those who believe that a 'Hindu' tolerance and libertarianism found its collapse under Muslim rule in India[80], there is substantial evidence of homosexual love in seminal texts of Muslim India, whether literary[81], or biographical[82].

The Nepalese example is illustrative- Sunil Babu Pant, the 'founder' of a modern gay movement in Nepal, brings out that the classical difficulty with regard to gay rights has not been a cultural opposition, but a failure to comprehend what the term 'homosexual' means- there exists no term in Nepali for 'gay' as we understand it.[83] This should not be interpreted as a way of buttressing the 'homosexuality-is-contrary-to-our-heritage' argument that rightwing conservatives make in these jurisdictions, but rather, as an assertion

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Lessons of Section 377 Challenges for Western Gay Rights Legal Refomers in the Developing World, 13 J. GENDER RACE & JUST.210, 212 (2010).

79 *Hijras*, or intersex people, are considered to be auspicious- as a result, there is a cultural significance to these communities in both India and Nepal.

80 Aniruddha Dutta, *Section 377 and the Retrospective Consolidation of Homophilia*, in LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW 162-174 (Arvind Narrain and Alok Gupta ed. 2010).

81 The poems of Shah Hussain, a 15th century mystic in Punjab, to take merely one example, are replete with his love for a Hindu Brahmin boy, hardly a love one could express in countries where any form of homosexual relations was looked upon in contempt.

82 The love of Sultan Mahmood of Ghazni for his slave Ayaz has been dealt with in various biographies of the emperor, some even commissioned when he was reigning. The physical attributes of Ayaz, described in these texts, make it clear that there is a significant homosexual undertone to the poetry.

83 Richard Ammon, *Gay Nepal: A Struggle Against History*, (2003) Unpublished, Copy on file with the author.

that, despite the existence of *homosexuality,* society did not consider the 'homosexual' as a distinct figure. The Metis of Nepal were considered to be a third gender, considered by some to be a sub-continental example of the global tradition of bedarche. In an analysis exclusively for Nepal, though equally significant for India as well, Bochenek and Knight[84] suggest that these communities have been given significant religious sanction- the concept of Shiva as Ardhanaarishva (half-man, half-woman), and Arjuna's experiences in the Mahabharata point to their religious importance.

There exists ample literature to prove that China's population (from which Singapore derives much of its famed 'Asian values'- considered homosexuality to be an aberration, but not a particularly deviant one. In fact, the Chinese term for oral sex, referenced without demonstrable contempt, is 'playing the flute'- hardly a pejorative term![85] A historical study of homosexuality in China demonstrates various literary references[86]- and the condemnation of homosexuality in contemporary China as a 'Western, capitalist phenomenon' reeks excessively of the Cultural Revolution. The legal prohibition in both Singapore and India hence, appears largely to be a colonial imposition.

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84 Michael Bochenek and Kyle Knight, *Establishing a Third Gender Category in Nepal: Process and Prognosis,* (Forthcoming Publication; Copy on file with the author).

85 Lawrence Wai-TangLeong, *Singapore,* in A SOCIO-LEGAL CONTROL OF HOMOSEXUALITY: MULTI-LEGAL PERSPECTIVES (Donald .J. West and Richard Green ed 1987).

86 Fang-Fu Ruan, *China,* 57-64, in A SOCIO-LEGAL CONTROL OF HOMOSEXUALITY: MULTI-LEGAL PERSPECTIVES (J. West and Richard Green ed. 1987).

The Long Life of Section 377 (and its Cognates) in India and Singapore: Colonial Transplantations?

Section 377 (in the Indian and Singapore Penal Code) penalises *Unnatural Offences*- imposing a maximum penalty for life, along with a fine, for any sexual intercourse *against the order of nature.*[87] The language of the section was ambiguous, as the scope of the words 'unnatural offences' were left to be defined by the Courts- as we shall see later, *any* form of intercourse (heterosexual or homosexual) came within its ambit other than male-female vaginal intercourse. This lack of specificity was not an oversight- as might appear at first instance, but rather was intended by the drafters of the code- who were of the opinion that such a "revolting subject" was too abominable to even be mentioned by name.[88]

Ironically for those in India and Singapore who have considered the legalization of homosexuality to be an assault on Asian 'traditional' values, Section 377 which criminalizes 'unnatural intercourse' in India (and did in Singapore until 2007) is itself a Western imposition. The present-day Singapore Penal Code- which criminalizes homosexuality- owes its origins directly to the Indian Penal Code, 1860, a colonial legislation relying almost completely on contemporaneous English law. It is not perhaps wholly irrelevant to

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87 The Section reads as follows: "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal shall be punished with imprisonment for life, or which imprisonment of either description for a term which: may extend for 10 years, and shall be liable to fine". The text was identical in Singapore, though now repealed.

88 *See* arguments for the prosecution in *Naz Foundation* v. *Government of NCT of Delhi,* which are available online at http://www.lawyerscollective.org/hiv-aids/anti-sodomy/18sept; THOMAS MACAULAY, THE WORKS OF LORD MACAULAY: SPEECHES, WRITINGS AND MISCELLANEOUS OPINIONS144 (Vol. 11, 1898).

this paper that the person in charge of drafting the Indian Penal code had, on an earlier occasion, announced his intention to create a set of persons nominally Indian, but "*English in taste, in opinions, in morals, and in intellect*"[89], nor that the notion of the 'civilising mission', originally propagated by France, was eagerly lapped up by all colonial powers during this period.[90]

Importantly, the colonies were considered to be 'passive laboratories' for the imposition of colonial values- the authoritarian imperial regime enabling this by discouraging any dialogues with local elites on these issues. The utilitarian movement in Britain led by Bentham and Mill, which sought to codify law[91] was also significant in its adoption, of laws such as the Buggery Act, 1533- during the Victorian era in England[92] where (as Foucault argues)[93] increasing knowledge and information about 'a science of sexuality' as it then developed; led to greater awareness and also a greater monitoring of sexual relations.

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89 With respect to the educational reforms he proposed.

90 This necessitated the imposition, not only of a set of foreign governors, but an entirely different legal and moral system. This also ties up with the Foucaultian notion of the desire for wider control over the lives of people by the State, which found a reflection in colonies across the world, whether through the propagation of the Criminal Tribes Act, 1872 in India, or through the criminalisation of sodomy.

91 Douglas Sanders, *Section 377: The Unnatural Afterlife of British Colonialism* (2000), available at www.fridae.com/download/douglas_sanders_377_unnatural_afterlife.pdf.

92 Between the period 1800-1900, an average of 90 men a year were imprisoned in England for a variety of same-sex crimes- including 'indecent assault', 'sodomy', 'solicitation' and other 'unnatural offences' *Id*.; H.G. COCKS, HOMOSEXUAL DESIRE IN THE 19TH AND 20TH CENTURY (2003).

93 Michel Foucault, *We "Other Victorians";* in THE FOUCAULT READER (Paul Rabinow, ed. 2000).

The use of the term 'unnatural offences' was not new, however. Statutes in Europe had referred to homosexuality as "*unchastity contrary to nature*" as early as 1532.[94] This notion had its origins in the ecclesiastical belief that all 'natural" sexual intercourse was to aim at procreation. Hence, carried to its logical end, the section would prohibit any sexual intercourse that had no possibility of resulting in procreation.[95] By the broadest definition of the section, even sexual intercourse between two consenting heterosexuals, one of which were infertile, would be struck by the law! However, its meaning has been limited to include anal intercourse, fellatio[96] and bestiality,[97] whether homosexual or heterosexual. This question assumed significance in Singapore in the *Anis Abdullah* case[98] where a policeman was convicted of having oral sex (while on duty) with an underage girl, though the *act* of oral sex, rather than the age of the girl, was instrumental in the conviction of the policeman. This led to an outcry, and Section 377 was ultimately abolished in Singapore after heated debate in parliament.

This, however, was little cause for celebration for the LGBT community in Singapore. An additional section, introduced as a

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94 *Constitutio Criminalis Carolina, 1532* promulgated by Charles V of the Holy Roman Empire, DAVID FGREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 303 (1988).

95 Linnet Shing, *Saying No: Section 377 and Section 377-A of the Penal Code,* 2003 SING. J.LEGAL STUD. 209 (2003).

96 Though whether oral sex was within the ambit of Section 377 was relatively controversial, and proved an important reason for the repeal of the law in October 2007, it was nevertheless upheld in a number of cases- including *Khanu*v. *King-Emperor,* AIR 1925 Sind. 286, *Kanagasuntharam* v. *P.P.* [1992] 1 Sing. L.R. 81 (C.A), *P.P.* v. *Ong Li Xia and Yeo Kim Han*(July 24 2000), C.C. No. 50 of 2000 (H.C.).

97 *P.P.* v. *Kwan Kwong Weng***,** [1997],1 Sing. L.R. 697.

98 *Anis Abdullah* v. *Attorney-General*. As a lower Court judgment, the case has not been reported in any official journal, though *see* BADEN 120, *infra*.

consequence of the Labouchere amendment in 1885 in the United Kingdom, was codified in Singaporean law in 1938. Now termed Section 377A, this provision further criminalizes the commission or attempt to commit '*gross indecency*'. Taking a cue from Macaulay's justification almost a century before, no attempt was made to explain *what* gross indecency would mean, though it was understood to include homosexual relations between two men, whether in public or in private. This law, ironically, was allowed to stand a debate which shall be covered extensively later.

In both India and Singapore, though, there have been few instances of the law actually being enforced for consensual sodomy. The section is mainly been used in case of rape, heterosexual oral sex,[99] and incest. In India, for example, only about 4 cases have dealt with sodomy in 150 years. Similarly, in Singapore, there has been acknowledgment that the law (Section 377-A) should continue to be unenforced,[100] though information noted in 1997 suggests that this is actually an oversimplification (over 67 *convictions* were recognized in a three year period)[101] sentences of three-six months have been common for such offences.

Being 'unenforced', however, does not necessarily mean that the law benignly lies in the statute books. As Arvind Narrain and Gautam Bhan point out, the impact of these legislations is felt outside the court-rooms[102], in the numerous ways in which people are denied their dignity, in the ways in which physical and social violence operates against LGBT people. Similarly, in Singapore, Thio Li-Ann

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99 Including the famous *Anis Abdullah* case.

100 Thio Li-Ann, i*nfra* n. 103.

101 *Supra* n. 99, 131-32.

102 GAUTAM BHAN AND ARVIND NARRAIN, BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA 79-81 (2008).

argues that the reason why Section 377-A should be retained is to ensure that "homosexuals and their relationships" are not treated at par with heterosexual people.[103] The Prime Minister himself has said retaining the law without enforcing it would allow homosexuals to 'live quiet lives' while preventing activism as it emerged in the West.[104] Ironically, this goes against the Singaporean Constitution's insistence on equality, equal protection, and freedom of expression. Furthermore, police entrapment is routine[105] and takes various forms. In some cases, people have been trapped by police officers, dressed in 'cruising attire', after sexual contact has taken place.[106] In India, there is evidence of police entrapment not taking the form of prosecution, but letting people off after they have been forced (with varying degrees of violence) to perform sexual favours for them.[107] This, hence, is an assault on the rights of gay people in many ways.

A recognition that there is some degree of 'consent'[108] in such entrapments by the Singapore judiciary, though reducing the severity of the sentence, reinforced the notion of homosexual citizens as third class citizens- the criminal 'act' reinforces the conception of a criminal populace- similar to legislation against transgender people and

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103 Speech of M.P. Thio Li-Ann. Sing, *Parliamentary Debates,* vol. 83, col. 2242 (Oct 23, 2007).

104 Sing, *Parliamentary Debates,* vol. 83, col. 2469-72 (23rd October 2007); Yvonne C.K. Lee, *'Don't ever take a Fence Down Unless You Know The Reason Why It Was Put Up "– Singapore Communitarianism and the Case for Preserving 377A,* SING. J. LEGAL STUD. 347, 351 (2008).

105 Thio Li-Ann, s*upra* n. 103 at 132.

106 *Id*.

107 Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals,* ECON. AND POL. WEEKLY, 4815-4823, Nov 18, 2006.

108 As in the case of *Tan Boon Hok* v. *PP, Singapore,* (1994) 2 SLR 150, where the punishment was reduced to a fine.

'criminal tribes' that was enforced by the British in India during the highlight of the colonial 'civilising mission'.

'Indigenous' Yet Borrowed: The Nepalese Experience

There is little literature on Nepal as distinct from India in the pre-colonial era. In some ways, the wider social and cultural system in the country was analogous to India- its giant neighbour to the south. As a Hindu country, the cultural values can largely be considered the same. The indigenous traditions of 'Hijras' and 'Metis' (transgender men) has by and large been accepted in society- there was little doubt about their place in society. Similarly, Western Nepal has a tradition of 'maarunis'[109]- men who dance in women's clothes and presumably behave in ways different from 'conventional' heterosexuality. Tibetan culture, which has influenced Nepal, also has traditions of same-sex love, as does the indigenous custom of *Mits* and *Mitnis,* referring to sexualized 'best friends' widely accepted in Nepali society.[110]

It would be a mistake, however, to characterize this situation as similar to the international gay rights movement. There was acceptance, certainly, of queer sexualities, but from a distance- there was no concept of equal rights similar to what prevails in the international human rights movement. With increasing tourism in Nepal and its growing interaction with the global human rights regime, this equilibrium is coming to a head- two contradictory movements are emerging. The first seeks to incorporate Nepali traditions within the larger framework of 'equal rights', and has culminated in the Court decision to which reference will be made

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109 Charles Haviland, *Crossing Sexual Boundaries in Nepal*, BBC NEWS, Jan 26 2005, available at http://news.bbc.co.uk/2/hi/south_asia/4202893.stm.

110 Ammon, *supra* n. 83.

subsequently, while the second has led to increased violence against LGBT groups.[111]

The prohibition on homosexuality under Nepali law is similar, in a sense to the Indian law- referring to 'unnatural' intercourse[112]. The scope of the term, however, is unclear- while the Indian preparatory texts can be used to supply context for Section 377, the *Muluki Ain* refers to unnatural intercourse immediately after proscribing any "sex with female cattle" in a Chapter that deals with 'bestiality'![113] The punishment for this unnatural intercourse is "one year, and a fine not exceeding Rs. 5000".[114]

Cognate with the Indian and Singaporean experience, the number of prosecutions under the law, if any, is minimal- the researcher was unable to find any evidence of full-fledged prosecutions that had gone to higher courts. This, however, does not mean that the law is toothless. There is evidence of the almost routine beating up of gay people, metis, and Hijras.[115] Assault, violence with batons, cigarette burns, rape, and sexual harassment has been common.[116] Interestingly, the police and the law enforcement authorities used terms like "*curse on society*" and "*pollutants*" during an incident in Lucknow.[117] Similarly, a 'gay bar' catering to tourists was raided, and

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111 *See* Bhandari *infra.* 118, 119.

112 Nepali *Muluki Ain* 2020, Chapter 16, Section 1, Copy on file with the author

113 *Id*.

114 Nepali *Muluki Ain* 2020, Chapter 16, Section 4.

115 *See Nepal: Police on Sexual Cleansing Drive,* HRW 12 Jan. 2006, available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/south_asia/4610772.stm.

116 *Sexual Cleansing Continues in Nepal: 26 New Arrests.* Blue Diamond Society, March 17, 2006, available at www.bds.co.np; Sudeshna Sarkar, *Nepal Government Begins Crackdown (Again) on Gays,* HINDUSTAN TIMES, Delhi, Sept 14, 2006.

117 Saleem Kidwai, *Aliens in Lucknow,* NEW INTERNATIONALIST, available at http://newint.org/features/2002/06/01/aliens/.

Nepali people in the bar was subject to verbal and physical abuse.[118] This demonstrates how strong the bias against homosexuality has become in the region. Reports have also started coming in from rural parts of Nepal, which have hitherto maintained indigenous traditions, of a movement against those who express their sexuality in varied ways.[119] With the political instability and growth of 'Hindu fundamentalism' in Nepal, as in India, traditional structures seem to be giving way extremely fast. The question then arises- what will follow?

These facts have seen a concerted attempt by LGBT activists in all three countries to use guaranteed Constitutional rights to secure a rights-based paradigm. In all these instances, activists have relied on international human rights texts and comparative laws. The success of these, however, has differed, leading to the next aspect of the paper.

Gay Rights, Constitutional Texts, and the Struggle for Legitimacy: Different Countries, Different Methodologies

Typically, constitutions provide for a set of rights without specifying rights-holders. As these values (usually representing a substantial break with the past) are applied to pre-Constitutional legislations, or even post-Constitutional legislations, marginalised communities attempt to use these as a means of 'reclaiming constitutional texts', attempting to secure these rights for themselves.

While most constitutional struggles happen in courts, there has been criticism when considering courts to be the sole sites where

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118 For a detailed, though depressing, account of all the brutalities that are faced by LGBT people, *see* Raja Ram Bhandari, *Documentation of Human Rights Abuse and Media Reports: A Review,* available at http://www.bds.org.np/publications/Human%20rights%20violations%20and%20media%20report_Review.pdf.

119 *Id*.

important 'rights-based' constitutional questions are dealt with. Leckey, for instance, argues that Constitutions are not necessarily 'rule-based' texts, and that the law must be understood as a 'tool for sustaining or changing aspects of social life'.[120] He believes, in fact, that the executive is far more powerful in this regard.[121] In countries where the judiciary has largely been subservient to the wills of an elected parliament, there is little to be gained from expecting the judiciary to adopt a pro-rights stand and move away from earlier commitments that have already been made. In such countries, the narratives of Constitutional values may be put to better use in other decision-making points. However, as a constitutional challenge is currently sub-judice in the Singapore Supreme Court, the facts of that case shall also be discussed.

As the struggle for the gay rights movement grew in all three countries, innovative use was sought to be made of Constitutions and the forum where Constitutions intersect with politics- the Parliament. In India, the challenge came through the judiciary- the *Naz Foundation* case (with its chequered history) represented the first attempt that was made to deal with these issues. In Singapore, the abolition of Section 377 as a result of *Anis Abdullah* saw a major attempt made to support the elimination of Section 377-A- while the judiciary did not play a major role in this regard, a strong campaign was made by a legislator to remove the section through a massive set of petitions. In Nepal, attempts had chiefly been made by an NGO that was forced, due to lack of awareness of the issue, to masquerade as an organization working for 'male sexual health'.

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120 Robert Leckey, *Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights,* 40 COLUM. HUM. RTS. L. REV. 426. 552 (2009).

121 *Id.* at 453.

This paper, hence, will examine the different strategies used in India, Nepal, and Singapore- and their reliance on Constitutional texts and values- whether effected in the courts, or in parliaments and general political sites. In doing so, I will try to point out that the debates on the issue- in courts or parliament- take off not strictly from a legal point, but from the intersections between law and politics- the way the Constitutional *texts* are imagined through the creation of narratives play out in the way the polity and judiciary decide on these contested issues.

Singapore: Activism and Parliamentary Discussions

As mentioned before, Singapore has had to deal with two contradictory movements in its polity- the distinction between its "haven of modernity" image, assiduously cultivated by its political elite, along with a strongly articulated notion of the Western-ness of human rights. This has been reflected in its debates on LGBT rights- especially with regard to the repeal of Section 377-A. Ironically, despite Singapore's strong stand on homosexuality, it is also the first country in this analysis where a 'modern' LGBT-rights movement emerged.

Batocabe identifies a subtle distinction that had emerged between the indigenous, flamboyant 'lady-man' traditions of 'queer' sexuality and Singapore's Western-educated 'gay' community in the 1970s.[122] This cleavage- with economic, educational and cultural reasons- continued until the police started actively persecuting what in the Western world would be called 'gay hangouts', along with

[122] Jan Wendell Castilla Batocabe, *Where the Bakla Fight Back: Looking at how the Collective Identity of the LGBT Movement in the Philippines and Singapore is Created and Used,* available at http://scholarbank.nus.sg/bitstream/handle/10635/29540/Batocabe JWC.pdf?sequence=1 at 36.

censorship.[123] Ironically, thus, the state *assisted* in the creation of LGBT activist groups- the lack of queer spaces ended up not only forcing people out of the closet, but also reexamining the way their intersections with law operated.[124] The first group, called People Like Us (PLU), was created in 1993, though attempts to register this were rejected twice.[125] Over the next few years, a profusion of such organizations led to creation of a substantial movement in favour of repealing Section 377-A, which received an unexpected fillip after the Anis Abdullah case.

The *Anis Abdullah* case marked a breakthrough in the debate on Section 377-A, as the matter was debated in Parliament for the first time.[126] Questions were posed on the "changed societal norms and values" and the need for reviewing or amending the legislation.[127] The spokesperson for the government, however, confined her reply to a promised 'review' and dealt with proposals that sought an amendment of Section 377, ignoring the question of Section 377-A. Subsequent arguments in Parliament, then, dealt with the 'victimless' nature of the crime, the uncertain nature of prosecutions- there was no evidence that could categorically prove that all those who had been caught were convicted, and the gender-specific nature of Section 377-A.[128] In response, the government suggested that the gender-specific nature was not unwarranted because apparently "men were usually the aggressive

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123 *Id*.

124 R.C. Heng. *Tiptoe Out of the Closet: The Before and After of the Increasingly Visible Gay Community in Singapore*in GAY AND LESBIAN ASIA: CULTURE, IDENTITY, COMMUNITY 81-98 (G. Sullivan and P. Jackson ed, 2001).

125 BADEN OFFORD, HOMOSEXUAL RIGHTS AS HUMAN RIGHTS: ACTIVISM IN INDONESIA, SINGAPORE AND AUSTRALIA 163-65 (2003).

126 *The Anis Abdullah Redux* available at http://www.yawningbread.org/arch_2005/yax-458.htm.

127 *Id*.

128 *Id*. *See Parliamentary Debates*, *supra* n. 103,

parties" which is an outdated concept that explains why rape in the Indian and Singapore Penal Code is defined solely from a man-raping-woman perspective.[129]

In 2007, when Section 377 was repealed, there was a further discussion- now that the naturalness of the legislation was no longer in dispute. A spirited argument took place in Parliament in this regard which, interestingly, relied on legal claims as well as political ones. Arguing 'as a lawyer', an MP argued that the law was neither clear, consistent, or concrete, and that keeping a 'toothless' law on the statute-books had little significance except to devalue citizens who happened to not be entirely heterosexual. Reference was also made to its discriminatory provisions that, for instance, it did not deal with women.

This, however, came into conflict with Singapore's Asian Values scheme, to which reference has already been made. To the argument that the law provided moral support for family values and the heterosexual life, the example of adultery and marital rape was given. Thio Li-Ann, a parliamentarian who had expressed her strong condemnation of the "homosexual agenda[130]", argued on constitutional as well as social grounds for its retention:[131] Singapore only allowed for 'racial and religious' minorities, not sexual minorities. Furthermore, as a classification of 'conduct', not of 'persons', there could be no

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[129] *See* Section376 of both penal codes. Importantly, the man referred to in the section is not the woman's husband- the Indian Penal Code has, despite amendments made in 2013, still not recognized the existence of marital rape.

[130] During the debate, she also referred to a medical justification of the law- anal sex, being a "use of the anus to which it is not suited", can lead to a number of health conditions.

[131] *Section 377-A Serves Public Morality: Thio Li-Ann*¸ Transcript of her Parliamentary Speech, Oct 23, 2007, http://theonlinecitizen.com/2007/10/377a-serves-public-morality-nmp-thio-li-ann/. *See Parliamentary Debates, supra* n. 93.

discrimination- as she stated. "*not all human conduct can be considered equally worthy*".

The anomaly with the legalisation of Section 377, making consensual anal sex legal amongst straight people is sought to be justified by her claim that the same standards do not apply to *heterosexual* anal sex, owing to the fact that such intercourse is not as frequent among straight people, and that straight people are less promiscuous than gay people![132] The criminalisation of such acts, thus, acts as a deterrent to the practice of sodomy. The link between higher rates of sexually-transmitted diseases and homosexuality is seen as a *cause,* not an *effe*ct of criminalisation, and a half-hearted attempt is made to prove homosexuals mentally abnormal, on the basis of hate mail received by her and some of her colleagues.[133] Her argument, hence, is similar to the majority of all parliamentarians who debated on the issue: Equality, a relative term, depends on the values and ethics of a particular society. A number of social surveys were referred to to demonstrate Singaporean disapproval of homosexuality.[134]While these may eventually change, until they do, "gay citizens should just put up with the discrimination they face and hope things would get better".[135]

The argument of conservatism is risible- the debates were happening in the backdrop of legislation that had been passed to allow any other form of what had hitherto been called 'unnatural' sex.[136]

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[132] Speech by Professor Thio in Parliament, 2007, available at http://theonlinecitizen.com/2007/10/23/377a-serves-public-morality-nmp-thio-li-ann/#more-556.

[133] *Id*.

[134] *See* Wai-Tang, *supra* n. 85, 135-138 for a fuller account of the attitudes against homosexuality.

[135] *When You Should Vote PAP,* April 13, 2011, available at http://yawningbread.wordpress.com/2011/03/16/when-you-should-vote-pap/.

[136] *Id*.

Likewise, the idea of 'public opinion' being a valid ground for retaining the law falls short of being entirely convincing- as was pointed out, a large amount of the populace was ignorant of the ramifications of Section 377-A, and of the burdens that were placed on gay men as a result of it[137]. On a more fundamental level, the very idea of entrenching a bill of rights in constitutions is to provide for a counter majoritarian security for minority groups. By arbitrarily restricting the scope of the 'equality' provision in its interpretation, certain MPs did their own constitution a disservice.

What is most curious about the Singaporean example is its selective reading of human rights texts and foreign precedents. Often derided as 'rampant patriarchalism'[138], Thio Li-Ann brings out certain essential aspects of the Singaporean Human Rights regime which she classifies as closer to the Latin American 'dignitarian' model when compared to the Western model- an understanding that takes off from Glendon's examination of whether human rights could actually be considered to be universal.[139] These, she argues, derive from pragmatism- as a small country, change in the field of human rights will be paced *andante* and spoken *sotto voce*[140] to prevent the collapse of the country. While not ignoring the polity and judiciary's role in the securing of socio-economic rights, which has been praiseworthy,[141] Singapore remains one of the last countries where caning is allowed- and that too for minor offences.

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137 *See* Baey Yam Keng's argument, *Id*.

138 Anthony Woodwiss, *Singapore and the Possibility of Enforceable Benevolence,* in GLOBALISATION, HUMAN RIGHTS, AND LABOUR LAW IN PACIFIC ASIA 208 (1998).

139 Thio Li-Ann¸ *supra* n. 25, at 43.

140 *Id*, at 91.

141 *See* generally Simon Tay, *Human Rights, Culture, and the Singapore Example,* 41 MCGILL L. J. 743 (1995-96).

Singapore's legal system also displays a strong deference to the legislature, which is coupled by 'legislative authoritarianism'- in cases where the judiciary *has* taken an authoritative stand, the legislature has merely amended legislation to reach the position the judiciary considered unconstitutional.[142] The use of transnational sources is usually to posit 'anti-models' rather than to demonstrate respect for foreign constitutional law. As a country which has a strong common-law model of adjudication, foreign precedents are used liberally, including in all cases that have dealt with Section 377[143] where Indian cases have been critically engaged with in the creation of a 'traditionally' Singaporean code of morality![144] It remains to be seen, however, whether this approach will continue to be taken after the *Naz* decision- thereby providing a valuable point of departure from earlier cases.

There may be an occasion to test this soon. In March 2010, two men were found having oral sex in the toilet of a shopping centre. In a manner that reminds one of *Lawrence,* the men were caught when a policeman climbed onto a toilet bowl to peer into what was happening in an adjoining cubicle.[145] Arrested under Section 377-A, the policy of the government which does not allow Section 377-A to be used "*unless*

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142 *See*, for instance, *Chang SuanTze* v. *Minister for Home Affairs,* 1 SING. L. REV. 132 (1988). For a fuller understanding of how this plays out, refer to Thio Li-Ann, *Beyond the Four Walls In an age of Trans-national Judicial Conversations: Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore.* 19 COLUM. J. INT'L LAW 430, 451-55 (2006).

143 Cases like *Khanu* v. *Emperor,* AIR 1925 Sind. 286, *Nowshirwan* v. *Emperor,* AIR 1934 Sind. 206, *Government* v. *Bapoji Bhatt*,(1884 (7) Mysore L R 280) have all been used in Singapore's judiciary.

144 All earlier proceedings on homosexuality in Singapore have engaged with, and followed the precedent of, all the cases that were cited above.

145 *Singapore Man Fined S$3000 for Sex in Public Toilet,* Nov 10, 2010 available at http://www.fridae.asia/newsfeatures/2010/11/10/10428.singapore-man-fined-s-3000-for-oral-sex-in-public-toilet.

dealing with other offences"[146] meant that the prosecution carried on under Section 284 of the Singapore Penal Code, which forbids obscenity in public places. As a result of this, both men were fined S$ 3000[147]. A constitutional challenge was nevertheless mounted against Section 377-A, and a case[148] commenced.

The High Court, however, dismissed the matter out of hand-holding that, as the parties were not being charged under Section 377-A, they lacked standing to discuss the issue. Not content with this decision, one of the affected parties filed another case in the Constitutional Court, relying on various comparative texts.[149] In the petition, the challenge that was mounted argued, inter alia, that the existence of the law prevented "any group activities or community life for gay people"[150] and that, as it stood, it was an affront to Article 9 (the right to life with dignity)[151] and Article 12[152] (equality) of the Constitution. The matter is still sub-judice.

India: Constitutional Vis-À-Vis Public Morality

In stark contrast to the Singaporean experience, Indian courts have often been at the forefront of social change, especially when dealing with minority groups. Since the 1970s, which marked the

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146 *Singapore Gay Advocacy Group Questions Use of Ss. 377A*. 27th September 2010 available at http://www.fridae.asia/newsfeatures/2010/09/27/10325.singapore-gay-advocacy-group-questions-use-of-section-377a.

147 *Supra* n. 143.

148 *Tan Eng Hong* v. *Attorney-General,* High Court of Singapore OS No 994 of 2010. Copy on file with the author.

149 Including the Indian and Nepalese decisions referred to later! For an online copy of the petition, *see* http://sgwiki.com/wiki/Tan_Eng_Hong's_appeal_against_High_Court_decision_(27_Jun_11).

150 *Id.* at ¶109.

151 *Id.* at ¶124.

152 *Id.* at ¶129.

lowest point of judicial deference- the Courts ruled that the right to life could be suspended, constitutionally, under an emergency,[153] the judiciary has ruled on the rights of impoverished workers, religious minorities, and affirmative action policies, with little deference to the legislature.

Gay rights activism in India, as in Singapore, is very much a product of the 1990s, though as mentioned before, sexual minorities have occupied an important place in India's culture. The movement, however, as we know it, originated as late as 1986, with India's first conference on issues that plague *Hijras*.[154] By the early 1990s, a gay magazine had been founded (only incidentally dealing with issues of the 'community' as a whole), as had a lesbian collective.[155] Problems, however, remained of intersections- the nascent movement was split across economic lines as well as a huge urban-rural-metropolitan divide.[156] Language remained a strong schism- the English-speaking elite versus the vernacular-speaking LGBT (though they didn't know the term then!) population. While cities like Delhi, Mumbai and Calcutta have started to organize 'gay pride' marches[157] similar to those in the West, these remain a feature of the metropolises, in rural India, the *act* was not (and has not been) the problem- the construction of a homosexual identity was. In societies with extreme gendered

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153 *ADM Jabalpur* v. *Shivkant Shukla,* AIR 1976 SC 1207.

154 Arvind Narrain, *The Articulation of Rights Around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva,* in 7 (2) HEALTH AND HUMAN RIGHTS145 (2004).

155 *Id*.

156 A fascinating account of the differences is given in Alok Gupta, *Englishpur Ki Kothi: Class Dynamics in the Queer Movement in India,* in BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA. (Arvind Narrain & Gautam Bhan ed. 2008).

157 Coincidentally, the first pride march, in June 2009, was barely four days before the *Naz* verdict came out.

segregation, the possibility of homosexual encounters is obvious.[158] However, any possibility of acceptance for homosexual love remains bleak- to that extent, Section 377 can be understood to have been a successful importation of culture.

Arvind Narrain identifies the HIV-AIDS pandemic campaign for safer sexual health as marking a turning point in the history of LGBT rights. In both India and Nepal, as it turns out, NGOs dealing with homosexuality have attempted to 'sell' themselves as fighting the growing international AIDS pandemic. In this context, a crackdown on LGBT people in India in 2001, where police, acting on a tipoff about cruising areas in Lucknow, took the opportunity to close down offices of two NGOs which dealt with these 'curses upon society'.[159] Members of the NGO were arrested despite their being no evidence of sodomy having been committed- a classic case of conflation of act and person. A similar case five years later meant that people were arrested under Section 377- no evidence of any sexual act existed- but one of the accused had put his phone number on a gay dating site.[160]

This incident led to massive media and public attention, the bulk of it homophobic.[161] Recognising that there simply could not be any HIV activism as long as Section 377 was allowed to stand in India, a constitutional challenge was mounted against Section 377. An earlier

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158 As an activist said during a conference on LGBT rights in India: In traditional societies, you can have all the sex you want, as long as you don't try to assert your sexuality.

159 *Supra* n. 117.

160 *Id*.

161 Claims were made about a (fictitious) call-boy racket, and about Gay Clubsin conservative Lucknow. The police claimed that what was happening was contrary to Indian morality.

challenge, *AIDS Bhedbhav Virodhi Andolan* v. *Union of India,*[162] which had been launched to read down Section 377 in the context of prisoners, had not even come to trial- the petitioner group had disintegrated before the matter had come for hearing.[163] As a result, the second petition was filed by Naz Foundation.

This petition contained some very noteworthy aspects- it argued for a reading-down of Section 377, arguing that the law, while still applicable for forced sexual intercourse, could be read to include consent in private as an exception.[164] Furthermore, it was the first petition to argue that a prohibition against sodomy was not 'traditional' in Indian society[165]. As such, the challenge was based on the right to equality (Article 14), the right to life (Article 21) and the right to privacy- which, though not explicitly mentioned in the Constitution, has been treated as part of the right to live with dignity. While originally introduced in the Delhi High Court under a constitutional provision that allows High Courts the powers to issue writs, this was dismissed under a technicality, requiring an approach to the Supreme Court. The Supreme Court, however, remanded the matter back to the Delhi High Court.

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[162] The name of the petitioner group literally translates as the Anti-Discrimination for AIDS Patients Forum.

[163] R Dhir, *Men Who Have Sex With Men in India,* available at http://www.hri.ca/partners/le/unit/homosexuality.shtml. Also, *see* Ruth Vanita, *Homosexuality in India: Past and Present.* November 2002, available at http://www.iias.nl/iiasn/29/IIASNL29_10_Vanita.pdf *and* Gautam Bhan, *Challenging the Limits of Law, in* BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA 44 (Arvind Narrain, Gautam Bhan ed. 2008). As Narrain points out, though, there seemed little possibility that there would be any positive development, the prison simply refused to accept that any sexual intercourse could take place in male-male dorms.

[164] Narrain, *supra* n. 154 at 157.

[165] Vikram Raghavan, *Navigating the Noteworthy and Nebulous in Naz¸* 2 NUJS L. REV. 397 (2009).

The judgment in the *Naz Foundation* case was groundbreaking, for a number of reasons. Not only was this the first time the Court looked at the right to life and dignity under the Constitution, but also showed a contrast from the earlier judgments when a 'medical' understanding had been taken to preclude rights for gay people[166]- here, where medical justifications were given, they supported the *decriminalization* of homosexuality.[167] Under the ambit of 'personal liberty', the Court looked at the criteria of dignity to explain that dignity meant "acknowledging the value and worth of all individuals as members of our society."[168] Section 377, then, violated the privacy and dignity aspect of constitutional rights in the following ways: *first* by criminalizing deeply personal and private expressions of sexuality,[169] *secondly,* by the deeply negative impact of such laws upon the lives of gay people,[170] and *thirdly,* by the humiliation, oppression and degrading treatment these people suffer at the hands of police officials.[171] Furthermore, Article 14's argument of equality was read in conjunction with Article 15(1)'s prohibition of discrimination on the

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166 *Naz Foundation* (at ¶5) decision deals with earlier decisions on Section 377, such as *Lohana Vasantlal Devchand* v. *State,* AIR 1968 Guj. 152 (where it was held that the 'orifice of the mouth is not, according to nature, meant for sexual or carnal enjoyment'.) or *Calvin Francis* v. *Orissa,* 1992 (2) Crimes 455 and *Fazal Rab Choudhary* v. *State of UP,* AIR 1983 SC 323 (where it was held that oral sex was symptomatic of a perverted, psychological mind.).

167 *Naz,* at ¶¶72-75.

168 *Id.* at ¶26.

169 *Id.* at ¶43.

170 *Id.*at ¶49.

171 *Id.* at ¶52. In doing so, the judge quoted from the South African judgment *The National Commission of Gay and Lesbian Unity* v. *Minister of Justice and Ors,* South African Constitutional Court C Ct. 11/98 where the court observed that "as a result of the criminal offence, gay men are at risk or arrest, prosecution and conviction simply because they seek to engage in sexual conduct that is part of their experience of being human".

basis of sex to include 'sexual orientation' as a prohibited ground under India's Constitution.[172]

The most important (or controversial, depending upon one's standpoint) aspect of the judgment, stresses on the difference between 'public' morality and 'constitutional' morality. This distinction was made in order to ensure that the "compelling state interest" argument would not be used to justify the prohibition against Section 377. In doing so, an attempt was made to synthesize all the international precedents that had been referred to before, and integrate them with India's constitutional ethos. The term, used by Ambedkar at the drafting of the Constitution, was interpreted to mean that "moral indignation, however strong, could not be used as a valid basis for overriding an individual's fundamental right of dignity and privacy"[173] *unless* it simultaneously came into conflict with some constitutional value.

This portion of the judgment is illustrative, not only for what it says about Section 377, but for what it says about the Court's conception of the Indian Constitution. Relying on the premise that the Constitution is fundamentally a social document, it stresses that its values are primarily, the creation of a liberal society which "supports, creates, and celebrates" diversity.[174] In sharp contrast to Singapore's reliance on 'Asian' values, the judgment explicitly negates the Asian-ness of the values in question, referring to literature that supports the transplantation thesis.[175] In quoting from Nehru's speech in 1947 at the beginning of the drafting process, the Delhi High Court refers to how

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172 *Naz,*at ¶104.
173 *Id.*at ¶86.
174 *Id.*at ¶80.
175 *Id.*at ¶81.

the 'fundamental rights'- values that might be considered alien by some- have their roots *"deeply ingrained in Indian society, nurtured over several generations"*[176] where those perceived as "*deviants...cannot on that score be excluded [from society*]."[177]

This portion of the judgment can be seen as the construction of a narrative of constitution-making and constitutional values- one that is, as Balkin suggests, similar to a performing art.[178] Furthermore, the idea of the Constitution being a monolithic text with a clearly defined set of values, while certainly appealing, ignores the history of India's constitution- the give-and-take that necessarily formed a part of its drafting necessarily meant that it was a product of innumerable compromises- a "site of struggle."[179] In fact, an analysis of the text of India's Constitution represents fundamental continuities with colonial laws- an analysis that is distressingly confirmed by looking at the earliest cases dealing with fundamental rights.[180] How then, is meaning to be given to such a Constitution? Bhat's argument, taking off from

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176 *Id.*at ¶71.

177 *Id.*

178 SANFORD LEVINSON & J.M. BALKIN, LAW, MUSIC, AND OTHER PERFORMING ARTS(1991).

179 *See* Rajeev Dhavan, *Book Review: Sarbani Sen, Popular Sovereignty and Democratic Transformations: The Constitution of India*, 2 INDIAN JOURNAL OF CONST'L LAW 204, 220 (2008). For a wider understanding *see* Mohsin Alam Bhat, *Speaking in the Name of the People: Constitutional Populism and Legitimacy in India*, (Unpublished, copy on file with the author).

180 An illustrative example is *A.K. Gopalan* v. *Union of India*, AIR 1950 SC 28 where a colonial-era law was used to justify preventive detention of a communist politician in newly post-Independence India. Likewise, a study of the origins of the Indian Supreme Court confirms that it was, in all but name, a continuation of the old Federal Court- very little was new.

Cover[181], is that the main tool used to construct these narratives is *interpretation.*

The question, in the context of *Naz* that then arises pertains to the role of comparative constitutional law in such exercise. The extent of comparative law used in the judgment was commented upon by many scholars of comparative constitutional law. Sujit Choudhry commented on how the court used comparative materials in a justificatory exercise to deal with the various substantive issues[182]- specifically, case law was cited *only* from the US Supreme Court and South African Constitutional Court to hold that 'public morality' could not be used as an excuse to deny the right to live with dignity, no matter how harsh the public condemnation would be.[183] India had not yet explicitly evolved such a strong understanding of human rights. Furthermore, Madhav Khosla points out that the Court also used comparative precedents, in particular from the American Supreme Court, to rule that Section 377, though ostensibly gender neutral, was *only* used against LGBT people.[184] However, Choudhry's identification of the role of these precedents is bolstered by the constitutional values that were discussed in the decision- in particular, he relies upon an analogy that was created between 'untouchability'

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181 *See* Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 833 (1986) ("In law to be an interpreter is to be a force, an actor who creates effects even through or in the face of violence. To stop short of suffering or imposing violence is to give law up to those who are willing to so act.").

182 Sujit Choudhry, *How to do Comparative Constitutional Law in India:* Naz Foundation, *Same-Sex Rights, and Dialogical Interpretation*, in COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA (S. Khilnani, V. Raghavan and A. Thiruvengadam eds., 2010).

183 *Naz*, at ¶¶76-78.

184 Madhav Khosla, *Inclusive Constitutional Comparison: Reflection on India's Sodomy Law*, 59 AM. J. INT'L L. 909, 916 (2011).

and Section 377's criminalization of sodomy during the arguments[185]- the constitutional and criminal prohibition on untouchability, despite the majority of India's population supporting it, was considered analogous to the creation of a criminal class through Section 377.[186] This, for him, situates the role of foreign sources- they provide a forum to "nourish and restrain the judges reading of internal constitutional law".[187] In an understanding of comparative texts that would be equally applicable to both Nepal, discussed later, and India, Madhav Khosla points out how the use of decisions from Nepal, Fiji, and Hong Kong was added to demonstrate the geographical neutrality of the values that were sought to be dealt with- thereby widening the value of the comparative exercise.[188]

Jubilation aside, the success of the *Naz* decision, however, still remains uncertain. The Government announced its intention not to challenge the verdict- thereby demonstrating tacit approval for the decision. Within weeks, though, conservatives (including representatives of all major religious groups in India) decided to challenge the verdict, arguing that this would lead to the rise of "*gay parlours, prostitution and even (horrors of horrors!) gay marriage!*"[189] The Supreme Court, where the matter is still sub-judice, refused to stay the matter.

As we have seen, Singapore and India represent very different processes of decision-making (whether in the legislature or judiciary) not due to differences in the constitutional *texts,* but in the varied way

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185 Choudhry, *supra* n. 182 at 24.
186 *Id*.
187 *Id*. at 34.
188 Khosla, *supra* n. 184, at 918.
189 *Suresh Kumar Kaushal* v. *Naz Foundation,* SLP(C) No. 15436/2009. Copy in file with the author.

that the Constitutions have been understood. Interestingly, both decisions then do not come as too much of a surprise- they represent a fundamental continuity in terms of constitutional thought in each country- as a commentator has noted, the least surprising thing in *Naz* was the actual decision.[190]

From this point, we move to a different country- one which is undergoing a state of flux as its Constitution and political text undergoes a see change. In doing so, we shall understand how the LGBT movement has been created and dealt with in its judiciary.

Something Borrowed, Something New: The Nepalese LGBT Movement:

The history of Nepal's LGBT movement demonstrates some characteristic features. *First,* there has been a massive intersection between traditional and modern expressions of non-heterosexual behaviour in the movement- the Blue Diamond Society has focused not only on gay people, but also on *Meti* and *Hijra* rights. *Secondly,* the movement has attained momentum with the political instability in the country- as the LGBT community has tried to represent itself as a significant political force. *Thirdly,* there are certain worrying trends for LGBT activists- the movement towards drafting a Constitution with equal rights for sexual minorities[191] has also had to deal with an increased right-wing condemnation of sexual minorities.

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[190] Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for India's Minorities,* 2 NUJS L. REV. 419, 420 (2009).

[191] If eventually incorporated in the Constitution, this would make Nepal the second country in the world to have this provision - after South Africa.

The movement started in Nepal in 1993 with the creation of the Nepal Queer Group.[192] Presumably, the HIV epidemic along with tourism had a role to play in its creation. The most significant organization- and certainly the most visible- is the Blue Diamond Society (BDS) that was established in 2001. As the founder mentioned, the greatest problem it faced at the beginning was the 'invisibility' and marginalization of LGBT groups- the lack of a term in Nepali for 'gay' meant that the movement had to be created from first principles. Sunil Babu Pant, the president, has discussed how hard the registration of the NGO was- for want of a better term, the NGO had to be registered as one that dealt with sexual health.[193] Interviews with Pant repeatedly suggest that the identity politics of the LGBT movement in Nepal relies greatly on his exposure to the international 'gay scene'- though- similarly to India, the bulk of its work takes place with cross-dressing and transsexual men[194], rather than the conventionally understood MSM groups. Over the last few years, Nepal has been successful in creating an inclusive LGBT movement.

Though the work of BDS was initially confined to support, and combating police harassment and violence, it soon aroused the ire of conservative groups. A law student, Achyut Kharel, filed a petition against the work of BDS- arguing that homosexuality amounted to bestiality- a claim he seemed to base on the close juxtaposition of 'unnatural sex' and 'sex with cows' in the *Muluki Ain*.[195] This petition required the Supreme Court of Nepal to give express instructions criminalizing homosexuality. Interestingly, the petition did not only argue on the 'traditional values' that Nepal claimed to espouse, but

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[192] Elizabeth Schroeder, *Nepal,* available at http://www2.hu-berlin.de/sexology/IES/nepal.html.

[193] Kaveri Rajaraman, *An Interview with Sunil Pant,* available at http://himalmag.com/blogs/blog/2010/06/04/sunil-pant-interview-part-1/.

[194] *About Us* available at www.bds.org.np.

[195] Petition filed on 4 Asadh 2061, (July 2004 AD) by Achyut Prasat Kharel. Excerpts on file with the author.

also referred to international instruments to argue that 'homosexuality had never been considered a human right'.[196] Unfortunately, however, the bulk of international jurisprudence in recent years on the issue seemed to pass him by.

As a (then) restraintivist Supreme Court, the court ran true to type. As a conservative court, its reaction was mildly surprising. It forwarded the petition to the Home Ministry, requiring them to show cause as to why this petition would not succeed. The Home Ministry responded by stating that there had been no historical criminalization; there the matter was allowed to rest.[197] Needless to say, this decision didn't make a difference to the routine police harassment that was taking place- media reports during the period are rife with news of LGBT bashing[198] causing, among other international organizations, HRW to intervene against repeated "arbitrary arrests and police violence" against transsexual people.[199] In fact, Kyle and Bochenek[200] identify a spike in arrests and harassment of transsexual people that followed the petition, though there is little evidence of what occurred after it.

A definitive political moment came in 2006, when the LGBT community realized that grouping together could have political advantages more long-term than merely escaping violence. In April 2006, the BDS and its lesbian wing- Mitni Nepali, joined the growing republican movement against the King.[201] A significant political move, this was an attempt by the community to secure for itself a place in the

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196 *Id*.

197 Malagodi, *supra* n. 62 at 19.

198 *See* generally Bhandari, supra n. 118, for an overview of such issues.

199 Christopher Curtis, *Human Rights Watch Petitions Nepal on Transgender Rights,* available at http://archive.globalgayz.com/asia/nepal/gay-nepal-news-and-reports-200-2/#article5.

200 Kyle and Bochenek, *supra* n. 84 at 8.

201 *Nepal's Gay Community Joins Anti-King Protests,* TIMES OF INDIA, April 16, 2006, available at http://timesofindia.indiatimes.com/articleshow/1495930.cms.

Constitution drafting procedure. Another consideration, perhaps, was the importance of 'pink' money- Nepal's fragile economy depends largely on tourism, and the insurgency had sharply affected tourism. Selling itself as a gay-friendly country, then, could be a useful economic and political factor in dealing with Nepal's economic decline since the revolution.[202]

Be as it may, though, the Blue Diamond Society presented a petition to the Supreme Court of Nepal in 2007 arguing that they were oppressed by social and state mechanisms from achieving "a proper place in society".[203] This social and legal 'boycott' then operated in many ways to deny them the fundamental human rights that were granted under the interim constitution of Nepal, 2007. In threshing out the scope of the rights, the petitioners referred to Article 9 of the Interim Constitution of Nepal,[204] which does not effect a distinction between international and national law. Reference, thus, was made to the fact that Nepal was a ratifier of the UDHR, ICCPR and ICESCR- and decisions of the Canadian, South African and United States Supreme Courts were further used to buttress this argument.

As an advocacy strategy, it was thorough, though unsurprising. The surprise actually was the decision of the Supreme Court of Nepal, which anticipated the Delhi High Court by two years. This marked a

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202 *See*, for instance, *Same-Sex Marriage in the Himalayas: Nepal Targets Gay Travellers to Boost Tourism Dollars*, 3rd March 2010, available athttp://articles.nydailynews.com/2010-03-16/entertainment/27059153_1_gay-travelers-gay-tourists-gay-rights.; Deepak Adhikari, *Can Nepal Sell Itself as a Gay Wedding Destination*, TIME, July 19, 2011, available at http://www.time.com/time/world/article/0,8599,2083711,00.html.; *Nepal Traps Gay Market to Develop Tourism*, SYDNEY MORNING HERALD,Jan 25, 2010,available at http://www.smh.com.au/travel/travel-news/nepal-taps-gay-market-to-develop-tourism-20100124-msjv.html.

203 *Sunil Babu Pant and Ors* v. *Nepal Government, Office of the Prime Minister and Council of Ministers and Ors*, Writ No. 917 of 2064 BS (2007 AD). Copy on file with the author.

204 Hereafter, for this section 'Constitution'.

departure from a half-century of judicial conservatism as the Court looked into the Fundamental Rights to stress on the inclusiveness of the new constitution.[205] The petitioners' arguments dealing with the use of international instruments were accepted unquestioningly- the Court directed the executive to keep these issues in mind while decisions were being made on issues of sexual minorities. Similarly, while dealing with issues of prejudice and discrimination that were faced by transsexual people, the Court stated that as full citizens, there was no way *any* sexual minority could be criminalized or subject to anything other than the full enjoyment of all fundamental rights.[206] In doing so, it issued instructions to the executive to amend the definition of 'unnatural coition', though it stopped short of identifying what such definition would be. In fact, the question of gay marriage was also dealt with, with the Court giving directions to the executive that would allow marriage to be defined in ways other than the conventional "man-marrying-woman". This would, again, have required an amendment of the *Muluki Ain*.

Another significant aspect of the decision dealt with the articulation of the rights of transsexual and transgender people. The Court dealt with a variety of international judgments and a variety of sources (including the Cambridge Advanced Learners Dictionary!) to hold that gender identity should be determined according to persons' 'physical and psychological' conditions, rather than simply being a matter of genitalia. There was a refutation, thus, of what the judges considered to be "old ways of thinking". A distinction, hence, must be drawn between the Indian and Nepalese decision- the Delhi High Court merely 'read down' Article 377, the Supreme Court of Nepal

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205 *Pant* v. *Nepal*, *supra* n. 203.

206 The Court held that "old notions (of transsexuals and gay and lesbian people being sexual perverts) have no value if one holds the view that welfare states, dedicated to the value ofhuman rights, should attempt to protect the right to life of every citizen". *Id*.

went ahead to argue for the *substance* of constitutional rights to be made available for everyone- including transsexuals.

The massive degree of transnational influence that the decision represented was probably a significant breakthrough in what had been a restraintivist court so far. Not only Indian decisions on the role of Public Interest Litigation and fundamental rights[207] (which might have seen appropriate when seen how much the Nepalese Constitution owes to its Indian precursor), but European Court of Human Rights decisions,[208] South African decisions,[209] the famous *Lawrence* v. *Texas,*[210]Australian decisions on gender identity[211], and others were liberally quoted in the decision. An attempt, however, was made to situate these precedents as symptomatic of the universal values which the Court seemed determined to consider as its own. Article 13, which deals with the right to privacy, and Article 12, which deals with the right to live with dignity and fundamental freedoms, was interpreted in light of all these precedents. The notion of 'Asian' or 'traditional values' found little place in this decision, though a number of the property rights for women decisions referenced in the first part of this essay had referred to Nepal's status as a 'patriarchal, Hindu country' which were rejected in rejecting these petitions.

In most other countries, such a decision would have been criticized as an exercise of judicial activism 'at its worst'. Scalia, J., for instance, would have condemned it outright- it placed little emphasis on the democratic process- public opinion was completely ignored in

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207 *S.P. Gupta* v. *Union of India,* AIR 1982 SC 149.

208 *Van Kuck* v. *Germany,*(2003) 37 EHRR 51; *Goodwin* v. *United Kingdom,* (2002) 35 EHRR 18; *I* v. *United Kingdom,(*2002) 2 FLR 518.

209 *National Coalition for Gay and Lesbian Equality and Ors* v. *Minister of Justice,* 1999 (1) SA 6.

210 *Supra.* n. 5.

211 *Re Kevin,*(2001) FLC 93-087.

the decision's ethos.[212] It is important to remember the context of the decision- Nepal was being governed under an Interim Constitution as a half-decade of instability, culminating in a revolution that removed the King and altered Nepal's status as a 'Hindu' country, showed little signs of abating. This situation can be considered akin to the *Makwanyane*[213] decision in South Africa, where Ackerman, J. attempted to draw a distinction between the past and the post-Apartheid present of the Constitution. This may also be understood in a wider context. Helmke[214] has written of the Argentine Supreme Court, where she argues that the possibility of an oppressive regime falling and institutional insecurity may see the judiciary taking an assertive role to 'fill the gap', and also to ingratiate itself with the new regime. The 'narrative' that the Court tries to situate the new constitutional ethos in is one that acknowledges the dignity and worth of all people- regardless of any differences. Such an approach would obviously require that international precedents are looked at far more than indigenous ones, a sign of Nepal having 'arrived'- a break from the past.

Madhav Khosla's[215] analysis of the *Naz* decision is instructive when we try to understand the reasons for the *Pant* decision. Madhav suggests that international opinion was not entirely irrelevant to *Naz*¸ but that the Delhi High Court was also influenced by the impact the decision would have on India's international image.[216] When we see *Pant's* strong reliance on international precedents, this impression- that

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212 For a succinct summary of Scalia, J.'s position on the role of foreign law in national constitutional courts, *see* http://www.freerepublic.com /focus/news/1352357/posts. where he debated this with Justice Breyer on Jan 13, 2005.

213 *S* v. *Makwanyane,* 1995 (3) SA 391.

214 Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy,* 96 AM. POL. SCI. REV. 291, 293 (2002).

215 Khosla, *supra* n. 184.

216 *Id*. at 223.

the Court was playing 'with an eye to the gallery'- is undoubtedly heightened. Another reason he picks up on is the importance of conforming to international standards[217]- a fact Versteeg and Goderis[218] describe as acculturation when dealing with Constitutional 'texts'. Is it so improbable that, as judiciaries become law-makers and interpret Constitutions in their own way, the judgments they write also reflect this set of values?

The politics of the movement, in Nepal, has received a boost with Sunil Pant having been elected to the Nepalese Constituent Assembly. As such, many drafts of the Constitution have referred to an equal-rights paradigm- there have been proposals for the Constitution to include a clause specifically outlawing discrimination on the basis of 'gender identity' or 'sexual orientation'. This, however, has not gone unchallenged as questions have been raised about the cultural aspect of the issue. More uncontroversial, and mirroring an Indian law to the effect, has been the recognition of a third sex exemplified by identity cards in Nepal which now have an option other than 'male' or 'female' when dealing with sex.[219]

Amendments that have recently been proposed by the Ministry of Law, however, are worrying for those who support LGBT rights. Ironically, the Nepalese government seems be debating a proposal to criminalise homosexuality[220] explicitly, borrowing from the Indian law

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[217] Khosla explicitly uses the example of Turkey's legislative reforms in order to project itself as possessing the 'values' necessary for inclusion into the European Union. Id, 224.

[218] *Versteeg*, *supra* n. 6.

[219] Manesh Shreshta, *Nepal's Census Recognises 'Third Gender'*, CNN World, May 31, 2011 availale athttp://www.cnn.com/2011/WORLD/asiapcf/05/31/nepal.census.gender/index.html. *See* Kyle and Bochenek, *supra* n. 84 at 14.

[220] *New Law Threatens to Crush Nepal's Gays*, TIMES OF INDIA, June 11, 2011, available at http://articles.timesofindia.indiatimes.com/2011-06-09/south-asia/29638154_1_sunil-babu-pant-gay-rights-gay-bar.

at a point where the law is currently not applicable in India[221]. This perhaps, is a natural result of the steps the Court had taken- there is only so far Courts can go in the absence of a supportive executive or a strong institutional structure.

Analysis and Conclusion

The final part of the paper examines how these three judiciaries, in the opinion of the researcher, ought to deal with LGBT-rights issues and how social and moral claims should be balanced. This portion examines the benefits and pitfalls of the way all three countries have dealt with the issue, and tries to ascribe reasons for why Courts and Parliaments have done what they have done.

As the Indian and Nepalese decisions demonstrate, the courts played a strong role in the adjudication and recognition of the rights of gay people and transsexuals in both countries, often in the face of much public opposition. This may not necessarily be an accident- the very idea of embedding a set of Constitutional rights is a counter-majoritarian impulse to ensure rights get protected. Again, it depends upon the judiciary as to how it shall interpret these- the United States, over a 17 year period, threw up both *Bowers* v. *Hardwick*[222] and *Lawrence* v. *Texas*.[223] Both these decisions looked at the issue of LGBT rights in very different ways.

When we consider Singapore's example, it is important to realize *why* the Court behaved as it did. In both India and Nepal, the LGBT movement was not a sharply divisive political agenda- though there had been systematic violence against LGBT people, as discussed earlier, the 'community' in the sense in which it is understood in

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221 As, however, the matter is sub-judice in the Indian Supreme Court, there is a possibility that the Supreme Court might reinstate the law.

222 478 U.S. 186 (1986).

223 539 U.S. 558 (2003).

conventional Western understandings was largely invisible and confined to the urban areas. Further, the Indian decision, though novel in terms of the sheer depth of reliance on international standards used in the judgment, can be considered to be one in a series of judicial decisions that have been considered activist- its 'trial by fire' was in the 1970s, when the Court adopted a wider definition of the right to life in *Maneka Gandhi*[224] after being a mute spectator to the abrogation of India's fundamental rights during the emergency. The Nepalese Court, similarly, has taken advantage of the political imbalance in Nepal to attempt to define what it believes would be the values that the Nepalese constitution would espouse, a set of values that might be endangered by the attempts to introduce a law cognate to Section 377.

In contrast, we have seen that the Singaporean judiciary has simply not had the opportunity to evolve an understanding of Singaporean society different from that of the executive. Largely, this is due to excessive political control of appointments[225] Seow identifies strategies like sudden transfers, judicial accommodations by acquiescing in coercive techniques and whittling the right of habeas corpus[226] to identify the extent to which the judiciary and executive come together in dealing with political or 'social' dissidents, despite periodic claims that are made for judicial independence.[227] In fact, when the Singapore executive considered a Privy Council decision (In 1990, then largely independent from Singapore's politics) to be

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224 *Supra* n. 48.

225 Ross Worthington, *Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore*, 28 J. L. & SOC. 490, 496 (2002). *See* Francis Seow, *The Politics of Judicial Institutions in Singapore*,http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan002727.pdf and Cameron Sim, *The Singapore Chill: Political Defamation and the Normalisation of a Statist Rule of Law*, 20 PAC. RIM L. & POL'Y J.319, 321. (2001).

226 *Id*.

227 Seow, *supra* n. 225.

contrary to its interests, it eliminated all appeals to the Privy Council itself![228]

The current case being dealt with in Singapore's Supreme Court can be a path breaker- indeed, preliminary reports from the Court suggest that the Court has been much less homophobic while hearing these issues.[229] If the Court actually does this, though, it will be a historic judgment, equal if not more valuable than the Indian one. One way that the Court could do this is to question the fundamental 'notion' of human rights itself, and seek to demonstrate how these choices are no longer as sacrosanct as they were. Beck[230], who argues this point, seeks to demonstrate that, in today's world, with religion failing to provide an adequate justification of the law as well as the loss of faith in a universal ethical framework, the notion of *what* precisely comes within the ambit of rights itself becomes an Essentially Contested Concept (ECC)[231]. In such a situation, Beck argues, wherein two rights conflict, the approach that should be taken is one that recognises value pluralism- thereby supporting an understanding which allows maximum freedom of individuals. The other approach, obviously, could be that taken by the Delhi High Court

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228 As happened with Mr. Jeyaratnam, an opposition leader of Singapore who was imprisoned for libel. *See* Ross Worthington, supra. *LeeKuan Yew* v. J*eyaretnam* JB (No. 1), 1 SING. L. REP. 688 (1990).

229 Ng Yi-Sheng, *One Step Closer to the Abolition of S377-A in Singapore,* Sept 27, 2011, available at http://www.fridae.asia/newsfeatures/printable.php?articleid=11214.

230 *See*, for instance, Gunnar Beck, *The Idea of Human Rights: Between Value Pluralism and Conceptual Vagueness,* 25 PENN ST. INT'L LAW REVIEW 615 (2006-2007*).* Gunnar Beck, *Human Rights Adjudication under the ECHR: Between Value Pluralism and Essential Contestability***,** 2 EUR. H. R. L. REV. 214 (2008).

231 As proposed by Gallie, an Essentially Contested Concept must fulfill the following criteria. *First,* it must be an evaluative concept- by which he means there must be a 'moral' value attached to it. *Secondly,* it must be complex, and must also be capable of being rationally explicable. W.B. Gallie, *Essentially Contested Concepts*, *in* LVI PROCEEDINGS OF THE ARISTOTELIAN SOCIETY167 (1955-56).

(constitutional morality) and Nepalese Supreme Court (reliance on international texts). It remains to be seen what the Court will ultimately do.

Another aspect of this is how far the Court can and should go in this regard. The counterargument to what I have earlier identified of courts being a preferred forum may be negated if Courts go too far- the *Roe* effect as it has been called in the United States. The rise of violence against gay people in Nepal *after* the decision, and the attempts to criminalise homosexuality may be seen as the political impact of a court having ignored existing standards. This, thus, might serve to advocate a more gradual approach, especially considering Nepal's turbulent polity; the Supreme Court should attempt to save itself as far as possible.

A related feature of decisions like *Naz* and *Pant* would be the way that they would situate gay politics within the wider issues that LGBT communities deal with. In India, especially, there has been a distinction between the transgender movement and the rights of gay men- especially in the judicial arena. *Naz*, unfortunately, perhaps necessarily in keeping with the limitations of the petition, does not examine the rights of transgender people in any great detail. While much has been written about *Naz* as offering Swaraj (self-rule) to all minorities, there is little *directly* in the decision that deals with issues that these communities have to combat- Siddharth Narrain, though, has identified various points of intersection between *Naz* and India's transgender community.[232] The gap in Singapore, identified earlier in the paper, has only grown wider with time. In this context as well, *Pant* v. *Nepal* could be a trendsetter.

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[232] Siddharth Narrain, *Crystallising Queer Politics: The* Naz Foundation *Case and Its Implications for India's Transgender Communities,* 2 NUJS L. REV. 454 (2009).

In conclusion, I suggest that, as Singapore grapples with the vexed issue of Section 377-A, the Indian and Nepalese examples could-nay *must* be engaged with by the judiciary, regardless of the decision they come up with. It is only in doing so that the interests of comparative constitutional law, and by extension, constitutional law will be better served.

Equal Opportunity Commission Bill: An Analysis

Pushan Dwivedi[*]

Introduction

The paper attempts a legislative analysis of the Equal Opportunity Commission Bill[1] included in the report "Equal Opportunity Commission: What, Why and How?"[2] by the expert group headed by Professor Madhav Menon. The expert group was set up by the Ministry of Minority Affairs on 31st August, 2007 to "*examine the structure and functions of an Equal Opportunity Commission".* The Menon report emanated from the Sachar Committee report[3] which first envisaged the concept of an equal opportunity commission "*to look into the grievances of a deprived groups*" in course of its study of the state of the Muslim community. It was of the opinion that an attempt to resolve the growing inequities in the country required state action to provide for equality of opportunity and prevention of depravedness arising from factors beyond the control of such deprived groups.

The recommended Bill attempts to advance the existing set of equal opportunity-based norms imbibed in Part III, more specifically under Article 15 and Article 16 of the Constitution of India. An attempt to enact constitutional norms automatically results in location of the statute in constitutional law orbits.[4] The few other instances of

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[*] IV Year, BA LLB (Hons.) student at National Law School of India University, Bangalore.

1 Equal Opportunity Bill (2008) [hereinafter referred to as Bill].

2 *Equal Opportunity Commission: What, Why and How* (2008), *available at* http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/eoc_wwh.pdf (last updated 14th October, 2013) [hereinafter referred to as Menon Committee Report].

3 Social, Economic and Educational Status of the Muslim Community in India: A Report (2006),*available at* http://www.zakatindia.org/images/Sachar-Report-05-March-2012.pdf.

4 Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits,* 79 (1) VA. L.R. 1, 3 (1993).

enactment of equal opportunity-based norms such as the Equal Remuneration Act[5] and the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act[6] had been grounded in Part IV of the constitution. The Bill's invocation of state action, to horizontally enforce an advanced, progressive conceptualisation of non-discrimination, stretches the limits of the existing judiciary-induced jurisprudence of the equal protection provisions. However, an analysis of the Bill drafted by the Menon report reveals that the Bill has been directly located within the judicial frame of reference with regard to the constitutional law orbit referred earlier. Thus situated, the resultant enforcement would be far removed from the original progressive intent of removing, and arguably compensating, for the increasing social inequities since the contemporary judicial frame has not yet evolved to the required levels.

This legislative comment would attempt to discern the drafters' intents and motives in formulating a theoretically flexible yet functionally restrained Bill. The enquiry would subsequently opine on the reason for the absence of engagement with the contending rights to associational freedoms. The first segment provides an overview of the enforcement mechanism of the Bill, focussing on the lack of an express anti-discrimination law and its implications. Then a legisprudential analysis of the framing of the Bill is provided based on the possible repercussions of the legislature conceding its role of providing a functional interpretational framework to the judiciary and the motives behind such concession. Next an interpretation of the extent of regulation of the EOC in the housing sector and the nature of such regulation within the functional interpretational framework provided by the judiciary is made. After this a comparative study with the Fair Housing Act of the United States is made.

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5 Equal Remuneration Act 25 of 1976 [hereinafter referred to as ERA].

6 Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1 of 1996 [hereinafter referred to as PDA].

Structural Analysis

The Equal Opportunity Commission Bill provides for an inclusive definition of 'discrimination' under Section 2 (k)(i)[7] which includes discrimination on the basis of sex, caste, language, religion, disability, descent, place of birth, residence and race. The Bill has also differentiated between direct and indirect discrimination which forms part of its focus on ensuring substantive equality of opportunity.[8] However, it does not itself prohibit discrimination. The drafters have grounded enforcement of anti-discriminatory provisions[9] in Article 15 and Article 16 of the Constitution, which have fewer number of prohibited grounds of discrimination.[10] This leads to ambiguity with respect to the prohibited grounds of discrimination itself.

Similarly, the Bill poses problems with the jurisdiction. Under Section 3(i)[11], the Bill restricts the ambit of enforcement to the

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7 Section 2 (k)(i), EQUAL OPPORTUNITY COMMISSION BILL, 2008:
"*'Discrimination' means any distinction, exclusion or restriction made on the basis of sex, caste, language, religion, disability, descent, place of birth, residence, race or any other which results in less favourable treatment which is unjustified or has the effect of impairing or nullifying the recognition, enjoyment or exercise of equality of opportunity, but does not include favourable treatment given in fulfillment of constitutional obligations towards Scheduled Castes, Scheduled Tribes, backward classes, women and children.*"

8 ¶2.5, Equal Opportunity Commission: What, Why and How(2008) *available at* http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/eoc_wwh.pdf.

9 *See* Sections 23(a), 37 and 39(b) of the EQUAL OPPORTUNITY COMMISSION BILL, 2008.

10 Preamble, EQUAL OPPORTUNITY COMMISSION BILL, 2008:
"*Whereas discrimination on grounds only of religion, race, caste, sex or place of birth is constitutionally prohibited and equality of opportunity for all citizens in matters of public employment is constitutionally guaranteed as part of the Right to Equality (Articles 15 and 16)*".

11 Section 3(i), EQUAL OPPORTUNITY COMMISSION BILL, 2008:
"*Discrimination against any citizen on grounds only of religion, race, caste, sex or place of birth is expressly forbidden by the Constitution itself. Arbitrariness is against the spirit of equal opportunity. There is therefore no need for a separate anti-*

definition of state as interpreted by the courts under Article 12 of the Constitution, by tying up the legal obligation to practise non-discrimination to the equal protection clauses of Part III. In this manner, the jurisdiction of the EOC would be within the limits of judicially-interpreted state action[12]. On the other hand, Section 3(vi)[13] moves on to provide a more comprehensive and wider definition of "*state*" to include enterprises which could not have carried on their activity without the delegation, license or authorisation by State, thereby granting the commission jurisdiction over such entities.

The reluctance of the drafters in providing a statute-based anti-discrimination law along with delineating a congruous ambit of jurisdiction is unique in comparison to other related statutes mandating non-discrimination such as the Equal Remuneration Act, 1976 and the Persons with Disabilities Act, 1995. Sections 4 and 5 of the ERA provide for clearly delineated obligations on part of the employer to not discriminate in either remuneration or recruitment on the basis of sex. PDA classifies different types of protection, including that of non-discrimination and reservation, under specific chapters.

The drafters in both, ERA and PDA, did not depend on judicial interpretation to extend constitutional obligations to cover private enterprises. Such autonomy was facilitated by the grounding of the enforcement provisions such as the obligation of non-

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discrimination law to afford equal opportunity to citizens against the State or State-sanctioned private enterprises".

12 State action doctrine, conceptualized in the Civil Rights Cases 109 U.S. 3 (1883), restricted the guarantees of equal protection clause solely to acts executed or whose execution was sanctioned by the State.

13 Section 3(vi), EQUAL OPPORTUNITY COMMISSION BILL, 2008:
"*Private and autonomous enterprises which could not have carried on the activity concerned excepting through delegation, licence or authorization by State under the laws in force, shall be deemed to be 'State' for the purposes of anti-discrimination and equal opportunity laws and the Commission will have jurisdiction over them*".

discrimination in the statute itself as opposed to its location within a strict constitutional orbit.

Delegated Legislation and Constitutional Market Place

There exist numerous incentives for drafters to have included an apparently conflicting set of provisions. First, the location of a statute within a tight constitutional orbit allows the proposing party to better negotiate the passing of the Bill since conflicting legislative interests are felt to be mediated in a neutral fashion if the statutory dynamics adhere to contemporary judicial precedents on the subject matter. In addition, it allows the legislature to delegate the need of taking hard policy decisions on to the judiciary. Consequently, this also provides a safe harbour from judicial invalidation in future as the judiciary is more likely to adjudicate based on pre-existing set of judge-made laws. The discernment of such incentives is not merely to state that the legislative drafting may be responsive to judicial decisions but to emphasize a covert delegation of the legislative mandate onto the judiciary.[14]

Such an approach to the framing of a statute presents its own set of difficulties. In case of the EOC, grounding of the obligation to non-discriminate in the equal protection clauses leads to the "accordion" problem wherein the statute is susceptible to changing interpretations based on judicial expansion or contraction of the constitutional protection of discrimination.[15] This phenomenon is evident in both the jurisdictional ambit of the Bill and prohibited grounds of discrimination. *First,* Section 3 (i) might lead to the EOC having jurisdiction over a smaller number of entities as opposed to the wider ambit provided for under Section 3 (vi). This is so because the enforcement mechanisms of EOC are contingent on the applicability

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[14] Lupu, *supra.* n. 4, at 19, 21-23.

[15] Lupu, *supra* n. 4, at 26.

of Article 15 and Article 16 which are enforceable only within the ambit of state under Article 12. Therefore, a judiciary-induced contraction of 'state' under Article 12 would directly influence the enforceable jurisdiction of EOC. Such nature of susceptibility is induced due to the absence of a specific law prohibiting discrimination. On the other hand, the ERA and PDA are immune from any judicial interpretations of Part III due to the enactment of specific provisions respectively, prohibiting discrimination in the corresponding fields. As stated before, the anti-discrimination provisions of the ERA and PDA have been grounded in the directive principles of state policy.

Secondly, the ambit of the prohibited grounds of discrimination under Article 15 has also been subject to re-interpretation by the judiciary.[16] In *Naz Foundation* v. *Government of NCT of Delhi,*[17] the Delhi High Court included sexuality as one of the prohibited grounds of discrimination stating that "*discrimination on the basis of sexual orientation is itself grounded in stereotypical judgements and generalisations about the conduct of either sex*"[18]. Further, *Naz* provided for extending scope of Article 15 to other analogous grounds based on a purposive interpretation and stated that "*personal autonomy is inherent in the grounds mentioned in article 15. The grounds that are not specified in Article 15 but are analogous to those specified therein, will be those which have the potential to impair the personal autonomy of an individual*"[19] even though such extension of Article 15 was not necessary for decriminalisation of Section 377 of the Indian Penal Code, 1860 which could have been obtained through a reasonability test under Article 14 itself. While *Naz* is a seminal judgement in Indian constitutional jurisprudence, it is yet to gain the legitimacy of the apex court. Further, it is noteworthy that *Naz* was decided *after* the

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16 Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for All Minorities*, 2(3) NUJS L. REV, 419 (2009).

17 *Naz Foundation* v. *Government of NCT of Delhi*, (160) 2009 DLT 227 ("Naz").

18 *Id.* at ¶99.

19 *Id.* at ¶112.

publication of the report. The drafters were not in a position to predict the outcome, especially relating to the reasoning employed in *Naz* which led to the broad reading of the prohibited grounds under Article 15. A contradictory or narrower reading would have placed the extension of equal opportunity norms espoused by the Bill at odds with judicial case-law, resulting in sub-optimal enforcement of the Bill. This serves to prove that sole dependence on judicial interpretation in the constitutional market place may lead to contradictory results, such as the lack of consistent and unambiguous identification of the constitutionally prohibited grounds of discrimination under Article 15. Location of the Bill in the constitutional law orbit which has been prescribed through case-laws may result in uncertainty and inadequate guidance to officials and lower court judges, leading to unproductive allocation of power or invidious ways.[20] More importantly, the enterprises themselves would have uncertainty with regard to the exact nature and extent of prohibited grounds of discrimination.

Equal Opportunity and the Housing Sector

The Menon Committee report included housing as one of the priority areas for protecting deprived groups.[21] This stems from a valid identification of the problem of ghettoization spreading in major metropolitan areas.[22] In view of the onerous mandate upon EOC to protect equal opportunity in all spheres of life[23] and housing being identified as one of the areas where discriminatory practices continue

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20 Lupu, *supra* n. 4, at 26.

21 ¶4.7, Equal Opportunity Commission: What, Why and How(2008) *available at* http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/eoc_wwh.pdf.

22 Tarunabh Khaitan, Discrimination By Housing Societies – Possible Legal Responses, *available at*http://indianmuslims.in/discrimination-by-housing-societies-possible-legal-responses/.

23 Equal Opportunity Commission: What, Why and How, 3(2008) *available at* http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/eoc_wwh.pdf.

to be practised against deprived sections of the society,[24] the commission would be obligated to extend its jurisdiction to the housing sector under Section 22. However, it is submitted that the proposed legislative framework is incapable of accounting for the various issues present in the regulation of the housing sector.

Regulation of the housing sector with regard to discrimination through the EOC would also suffer from the accordion problem. As discussed earlier, the scope of the EOC is defined by the constitutional restraints imposed by judicial interpretations of Article 12. The prohibition on private entities to discriminate on grounds enumerated under Section 3(i) or Section 2 (k)(i) would be difficult to sustain in view of the present judicial interpretation of the Constitution. Apart from *Naz,* there are not many decisions which provide for a wide interpretation of the nature and extent of application of Article 15 and Article 16 which are the grounding provisions of anti-discrimination obligation under the Bill.

However, it would be wrong to identify this issue as an instance of the legislative intent being circumvented due to judicial intervention for there exists ambiguity with regard to the legislative intent itself. Although, enforcement of the non-discrimination norms in housing would also involve private individuals and not just private enterprises, there is no mention of an individual being subject to such enforcement in the Act. Even with regard to employment of incentives and disincentives, the Bill allows the inclusion of only "*enterprise*" in "*public services and non-state sector*".[25] Further, the regulating by-laws of the commission in the form of the Equal Opportunity Practices Code have been termed to be in the nature of

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[24] Statement of Objects and Reasons, EQUAL OPPORTUNITY COMMISSION BILL, 2008: "*Discriminatory practices reportedly continue to exist in education, employment, housing and other areas where women, dalits, tribals, disabled persons, minorities and other "deprived sections" are sometimes denied of equal opportunity*".

[25] Section 37, EQUAL OPPORTUNITY COMMISSION BILL, 2008.

"*Standing Orders*" binding on establishments under the Industrial Disputes Act.[26] Part I of the Menon Committee report has also repeatedly made use of the term "*enterprises*".[27] Indeed, the need to bring about equality of opportunity has been limited to private enterprises only. More importantly, there has been no discussion in either the report or the proposed Bill regarding the justification for violation of the right of property owner to discriminate between prospective buyers/tenants.

I submit that the express inclusion of only enterprises and formulation of the enforcement mechanisms in the form of industry-based "standing orders" is indicative of an express exclusion of the EOC jurisdiction upon private property owners, notwithstanding the wide ambit under Section 3(vi). The majority of opportunity costs being incurred by the "*deprived groups*"[28] of the society due to discrimination in housing emanates from the prejudices of the private property owner. Therefore, the exclusion of private owners from the realm of housing regulation undermines the effort to curb discrimination "*in all walks of life*".[29]

Apart from the extent of discrimination practised in the housing sector, the Bill also fails to cover the entire spectrum of

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[26] Section 39(b), EQUAL OPPORTUNITY COMMISSION BILL, 2008:
"'*The Equal Opportunity Practices Code' is binding law in the same way as the 'Standing Orders' are binding on establishments under the Industrial Disputes Act, though the methods of its enforcement in case of violation will be as prescribed under the Act/Rules*".

[27] ¶4.6, Equal Opportunity Commission: What, Why and How(2008) *available at* http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/eoc_wwh.pdf .

[28] Section 2(g), EQUAL OPPORTUNITY COMMISSION BILL, 2008:
"'Deprived group' means a group of persons who find themselves disadvantaged or lacking in opportunities for reasons beyond their control or suffer from impaired ability to make good existing opportunities to access rights and entitlements available under law or schemes of the government".

[29] Section 23 (b)(i), EQUAL OPPORTUNITY COMMISSION BILL, 2008.

discrimination practised in the housing sector due to the grounding of prohibited grounds of discrimination within Article 15 and Article 16. It is submitted that the extent of discrimination in housing opportunities is not restricted to the grounds of sex, religion, caste and place of birth.[30] A sizeable number of groups are deprived of housing opportunities on various other factors such as food preferences, dress preferences, sexual orientation, age, marital status, gender identity, pregnancy etc.[31] Article 15 and Article 16 do not cover the wide range of analogous grounds of discrimination which deprive housing benefits to substantial social groups.

This begs the question as to the extent of exclusion that may be constitutionally prohibited in the personal realm of the individual. This is especially relevant in the Indian scenario, wherein communal living has been a part of the social fabric prior to communalisation of violence and of opportunity. In this regard the state interest in ensuring diversified access to housing attains priority because of two reasons. *First,* the discriminated group lose out on opportunity cost of utilising the housing and related benefits such as access to better educational facilities and employment opportunities due to factors beyond their control such as caste, sex etc. *Secondly,* the motivation of the sellers/landlords in practising such discrimination emanates from non-economic factors (as the buyers/tenants in such instances are willing to pay the market price), thereby undermining the argument of preservation of 'economic' freedom of the sellers/landowners to that extent. Instead, the freedom to sell/lease/rent over property rights in such cases focuses upon the issues of associational freedoms. For instance, a Jain housing society may be compelled to exclude non-vegetarians on account of their shared belief in vegetarianism. This

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30 Tarunabh Khaitan, *Transcending Reservations: A Paradigm Shift in the Debate on Equality*, 43(38) ECONOMIC AND POLITICAL WEEKLY 8, 9 (2008).

31 Tarunabh Khaitan, *Vegetarianism, Tolerance and Discrimination*, THE HINDU, May 26, 2008, *available at* http://www.thehindu.com/2008/05/26/stories/2005052653861000.htm.

may disproportionately impact the housing opportunity of a particular minority group. An extension based on *Naz* would classify such deprivation as indirect discrimination on account of the producing a disproportionate impact on a vulnerable group.[32] However, the need to exclude in this specific context is central to the core beliefs of Jainism in vegetarianism. Any prohibition on the exclusion on specific minorities would illegitimately infringe on the right to associational freedoms of the Jains. More importantly, the question arises if a Jain household is constitutionally bound to include specific groups at the cost of infringing upon its religious and cultural beliefs.

The religious, cultural and linguistic minorities protection clauses in Part III of the Constitution are also based upon the constitutional obligation for the protection of such core beliefs. Parallel reasoning may be applied to other forms of secular associations in order to decide if the exclusion is derivative of the "*freedom of conscience and expression*" of the association to the extent that the exclusion functions to protect its integrity.[33] However, certain "integrity-protecting" exclusions would be prohibited by the Indian Constitution, such as discrimination against the socially backward classes under Article 17.

Comparative Analysis with the Fair Housing Act

A comparative study of other anti-discrimination laws may prove to be instrumental in identifying alternate mediation methodologies available in other jurisdictions. The Fair Housing Act of the United States[34] provides a much wider field of enforcement to its anti-discrimination provisions. The anti-discrimination obligation

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32 *Supra* n. 16 at 430.

33 Stuart White, *Freedom of Association and the Right to Exclude,* 5(4) J. POL. PHIL. 373, 385 (1997).

34 Fair Housing Act, 42 U.S.C. Sections 3601-3619 of Title VIII, Civil Rights Act, 1968.

applies to all public and private enterprises. In addition, it is binding on individuals which make use of any government services. On the other hand, however, Section 803 (B)[35] exempts all single-family

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[35] [42 U.S.C. SECTION 3603] EFFECTIVE DATES OF CERTAIN PROHIBITIONS:
(B) Nothing in section 3604 of this title (other than subsection (c)) shall apply to -
(1) any single-family house sold or rented by an owner: *Provided*, That such private individual owner does not own more than three such single-family houses at any one time: *Provided further*, That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: *Provided further*, That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: *Provided further*, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented
(A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and
(B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604 (c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or
(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.
(C) Business of selling or renting dwellings defined
For the purposes of subsection (b) of this section, a person shall be deemed to be in the business of selling or renting dwellings if—
(1) he has, within the preceding twelve months, participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein, or
(2) he has, within the preceding twelve months, participated as agent, other than in the sale of his own personal residence in providing sales or rental facilities or

households from the obligation of non-discrimination, provided the single family households do not make use of any salesmen/brokers or advertisement services or any other external services while attempting to benefit from the extension of use of their property to other persons. The exemption is known as the 'Mrs. Murphy's exemption'. The exemption essentially allows all individual property owners, owning not more than four-unit buildings, to discriminate based on his or her First Amendment right to not associate. A holistic reading of the exemption clause would indicate that the legislature intended to protect the liberty of individuals whose usage of property was not commercial in nature. The added qualifications of not making use of any external services like broker-ship or advertisement while trying to interact with potential tenants has effectively narrowed down the benefit of this exemption to a narrow segment of private property owners. Yet, the exemption is significant in the fact that it draws a very tangible limit on state intervention which is based on the public and private nature of individual activities. Hence, Mrs. Murphy's exemption clause essentially prohibits horizontal application of non-discrimination norms over property usage which is private in nature. On the other hand, when the ambit of a private activity becomes enlarged to the extent that it acquires a public dimension, the protection of associational freedoms along with individual property rights gives way to non-discrimination.

The reasoning process drawn above resonates with Article 15 (2) which expressly prohibits discrimination in places of public nature. Judgments such as *Vishaka* v. *State of Rajasthan*[36], and *Society for Un-aided Private Schools of Rajasthan* v. *Union of India*[37] have also validated

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sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein, or

(3) he is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families.

36 AIR 1997 SC 3011.

37 (2012) 6 SCC 1.

state intervention over private actions which acquire a public dimension. In this regard, the judicial precedents in temple entry cases may be seen as analogous to the issue of constitutionally protected exclusion. Article 25(2)(b) does not prohibit implementation of social welfare reforms in Hindu religious institutions "*of a public character*". Herein, the regulation again seems to be predicated upon the degree of public dimension attached to the religious institution, which has been affirmed in different temple entry cases.[38]

Thus, the question arises if the Bill would allow for prohibition of discriminatory practices (both direct and indirect) in private property usage of the nature of a public act or function. It is submitted that Section 3 (vi) proposes a paradigm similar to Section 803 of the Fair Housing Act, which coupled with the location of the EOC Act within a judiciary-regulated constitutional orbit, would lead to the legitimate expectation for the enforcement of such non-discrimination norms based on the public nature of a private act.

Conclusion

In the west, there has been a surge of opinion that the legislature should be the leading protagonist in bringing about reforms in law, including re-interpretation of the Constitution to extend upon the existing rights of the citizens.[39] The equal opportunity commission would have been a manifestation of a legislative effort towards progressive interpretation of the Constitution in the Indian context. The idea, conceptualised on the basis of tangible evidences of direct and indirect discrimination towards deprived minority groups in various spheres of life such as housing, required a purposive

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[38] *See Sri Venkataraman Devaru* v. *State of Mysore*, AIR 1958 SC 255; *Rev. Stanislaus* v. *Madhya Pradesh*, AIR 1977 SC 908.

[39] Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990).

interpretation of Article 15 and Article 16 to allow for the horizontal application of prohibition to discriminate.

The expert group, however, has failed to rise to the challenge of performing the required re-interpretation of the Constitution. This is apparent in the absence of an express anti-discrimination law to assist the functioning of the commission along with the ambiguity in clearly delineating the entities obligated to practise non-discrimination. Such reluctance stems from the usage of constitutional standards as a convenient method of escaping for a legislature "*committed in principle to a constitutional cause yet uncomfortable with the details at the margin of application of these principles*".[40] Such tendencies lead to a circumvention of democratic participation in policy making through the elected representatives, wherein the extension of constitutional norms emanate through the elitist group of lawyers and judges. In addition, surrendering of its role, in extension of constitutional principles, by the legislature may also result in certain constitutional values, such as freedom of speech and associative expression, being undermined. Although an empirical study to establish the lack of free speech jurisprudence is beyond the scope of this paper, I am of the opinion that the conspicuous absence of any engagement with associational freedoms in the Menon Committee report is a result of the under-developed state of free speech and expression-based jurisprudence in the Indian judicial framework. In any case, the ethos of deliberative democracy is undermined if representative institutions concede their role in constitutional growth, for it may lead to decline in discourse on conflicting interests based upon different conceptions of constitutional freedoms and restrictions.

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[40] Lupu, *supra* n. 4, at 52.

The Quest for Constitutional Identity in India

Badrinarayanan Seetharamanan and
Yelamanchili Shiva Santosh Kumar[*]

Introduction

Constituting Identities

Colonialism gave birth to India as a nation, whose future citizens were primarily unified by the identity of their repressor. Indeed, by no means were the collective experiences of repression uniform across collectives. Reactions to the sentiment of oppression bred disparate identities that coalesced primarily around local manifestations of colonialism and as a consequence, "movements" against it were fragmented. However, with the proliferation of a concerted colonial project across the subcontinent, these movements were imbued with the recognition of a common other, as the generalizations of colonial masters began to brush aside the individuality of separate communities.

So too, movements began to inform each other, constantly evolving separately, only dimly aware that they would come together eventually. As they began to sublimate, the "movement", which now required breadth and the numbers, necessitated a more universal language that had the potential to capture the imagination of a still imaginary nation. We later explore the asymmetries in the manner that variously situated citizens associate with the constitution as a consequence of this grand compromise. Soon enough, the margins began to be erased over, with a ready tendency to fit into categories that were created, where "classifications and the classes they aspire to accommodate, conspire to emerge, hand in hand, each egging the other

[*] Research Fellow, Law, Governance and Development Initiative, Azim Premji University and IV Year, B.A. LL.B (Hons.), National Law School of India University, Bangalore.

on."[1] Neither colonialism, nor the nationalistic reactions to it, accepted the 'fuzziness' of pre-existing boundaries that lay beyond simple either/or divisions, rejecting the possibility of complex and intricately adopted selfhood.[2]

Not only do these new borders assert similarity within their bounds, but by contrasting identity with that of others, reinforce dissimilarities.[3] The question of such a broad-based identity had not come up until then, and even asking the question cast its content in doubt. The answers merely concretized it, forever placing it in tension with lived realities. British rule concluded, but the colonial legacy remained. The ones at the forefront of formal engagement with the rulers, the Congress party, found themselves accorded the sacred prerogative of translating the aspirations of a "people" into a formal, authoritative document that had the capacity of holding the nation together. Many questions remained though. Was it even possible to capture these aspirations in a document? Could a document breathe life into a nation-state? Or even more fundamentally, did there even exist a "people"?

The Constitution carried the possibility of creating new meaning and its drafting exercise was a leap of faith. Even as it began to acquire form, the rejection of the ethos of the struggle that preceded it was more strongly articulated. Illustratively, the erasure of the village – the idealized model of self-sustenance,[4] and civil disobedience[5]

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1 Ian Hacking, *Making Up People*, in RECONSTRUCTING INDIVIDUALISM: AUTONOMY, INDIVIDUALITY, AND THE SELF IN WESTERN THOUGHT, 228 (Thomas C. Heller et al eds., 1986).

2 Sudipta Kaviraj, *The Imaginary Institution of India*, *in* SUBALTERN STUDIES VII 1, 18-20 (Partha Chatterjee & G Pandey eds., 1993).

3 *See* Frank Bechhofer and David McCrone, *National Identity, Nationalism and Constitutional Change*, *in* NATIONAL IDENTITY, NATIONALISM AND CONSTITUTIONAL CHANGE, 1 (Frank Bechhofer & David McCrone eds., 2009).

4 As per Ambedkar, "What is the village but a sink of localism, a den of ignorance, narrow-mindedness and communalism? I am glad that the Draft Constitution

from the future of the nation state, left little for it to carry forward from the struggle that had unified it for so long. The framers aspired to instill constitutional fundamentalism in the document's ability to carry out that task. Like Habermas, they hoped for an identity that would be constructed out of public deliberation,[6] but left little to chance in drafting a Constitution that would be future proof. This paper quests after the promise of the Constitution.

The Constitution is a document of hope, and the manner in which citizens relate to it, and to each other through it, is integral to its success. Over the course of this paper, we explore the process of identity creation through the Constitution. In the first part, we test the bonds that are potentially created by the text and context of the drafting process. We attempt to locate the site of interpretative engagement that results in the cumulation of identity, on the premise that greater inclusivity and a sense of citizen ownership over the constitution improves this dialogue.

After exploring various models of engagement, and modes of identity creation, we settle on the Judiciary as this convergent space. We then interrogate the basic structure doctrine in the second portion, drawing a correlation with notions of constitutional identity. We conclude that the two are hardly coextensive, and that at best, the basic structure doctrine is a unique characterization of it by the Judiciary in

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has discarded the village and adopted the individual as its unit". *See* CONSTITUENT ASSEMBLY DEBATES, Vol. VII, 2 (Nov. 4 1948).

5 As per Ambedkar, "It means we must abandon the bloody methods of revolution. It means that we must abandon the method of civil disobedience, non-cooperation and satyagraha. When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods. But where constitutional methods are open, there can be no justification for these unconstitutional methods". *See* G.R.S RAO, MANAGING A VISION: DEMOCRACY, DEVELOPMENT AND GOVERNANCE 181 (2005).

6 J Habermas, *Religion in the Public Sphere* 14 EURO. J. PH 1, 1 (2006).

a definitional exercise that vests in them the power to determine the content of constitutional identity.

The Constitution as a Subject of Identity Creation

As markers of association, identities are not necessarily in conflict with each other, but do constantly inform, engage with and alter each other. Community identity, national identity and constitutional identity are separate collective categories involved in one such interplay, without prejudice to many such other categories that find themselves in that complex game.[7] Independently, each of them is vague, unspecific and internally inconsistent.[8] Indeed, identity as a *concept* is unlikely to be plagued by such a lack of specificity at a level where it is *felt*, but not articulated.

Indeterminate as it might remain, what is important to us is that identity is up for free appropriation. Identity is usually conceived under two circumstances, either when it needs to be defined for a particular purpose, say legislating upon it, or when it is under threat, i.e. when a claim to identity is challenged. In both situations, something assumed to be definite and stable, is replaced by an experience that induces doubt and uncertainty.[9]

Both forms of identity-creation, or re-creation, have played out in the Indian milieu. The colonial project of framing personal laws and its post-colonial continuity[10] exemplify the aforementioned first instance that other subsequent well-intentioned lawmakers, and an

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7 ANTHONY D. SMITH, NATIONAL IDENTITY 14 (1991).

8 *See* Rogers Brubaker and Frederick Cooper, *Beyond "Identity"*, 29 THEORY AND SOCIETY 1-47 (2000).

9 Kobena Mercer, *Welcome to the Jungle: Identity and Diversity in Postmodern Politics*, in IDENTITY: COMMUNITY, CULTURE, DIFFERENCE 43, 43-72 (Jonathan Rutherford ed., 1990).

10 *See* generally RINA VERMA WILLIAMS, POST COLONIAL POLITICS AND PERSONAL LAWS: COLONIAL LEGAL LEGACIES AND THE INDIAN STATE (2006).

often-misguided judiciary, are still contending with. By concretizing rules of inter-personal engagement, and strictly defining rules of community membership, and permitting limited room to navigate through customary laws, the process engendered a confused citizenry that questioned their commitments to practices they cherished, and once owned. Penal laws tell a similar story.[11]

The second type of identity confrontation has played out in the Indian tryst with secularism. The final draft of the Constitution only mollified in part, a section of an already elitist drafting assembly seeking provisions such as fetters against conversion,[12] symbolic inclusions in the preamble alluding to a Hindu legacy,[13] and even severe objections to minority protection provisions,[14] that would now be understood as being contrary to the more universal agenda of religious and community rights.

The country has since remained captive to this constitutional heritage which, in its most extreme form, has emerged as communalism. Intractable commitments to self-identification came to conflict with an apparently all-encompassing collective acceptance of the new constitutional norms. In either case, exclusion is inevitable – marginal in some instances and complete in others. Rosenfeld, drawing inspiration from Freud and Lacan, has postulated that these identities are negated, transformed and reintegrated into the contested discourse.[15]

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11 The Thuggee and Dacoity Supression Acts enacted between 1836 and 1848 and The Criminal Tribes Act, 1971 are examples.

12 CONSTITUENT ASSEMBLY DEBATES, Vol. V, 11 (Aug. 30, 1947).

13 CONSTITUENT ASSEMBLY DEBATES, VOL. XI, 6 (Nov. 19, 1949).

14 CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, 9 (May 26, 1949).

15 MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY 48, 51 (2010).

One such symptomatic manifestation in the judicial arena is the judgment of the Apex Court in *Aruna Roy*.[16] This social action litigation raised objections to curricular content in school textbooks, which included religious strictures, Sanskrit, Vedic Mathematics and Vedic astrology, claimed to be in violation of the right to education, right to development, right to information – all under Art. 21, which guarantees a right to life and personal liberty; and protections granted to minorities under Arts. 27 and 28.[17] The Court upheld the executive order, citing the Chavan Committee report, broader goals of preventing ills such as corruption, fanaticism, and even drug-abuse, encouraging "*tolerance and national cohesion*", the need to guard against westernization and preserve culture and traditions. On a first level, it is undeniable that such education can be imparted without reference to divisive religious texts. But more significantly, the Court alleging the unity of instructions across religions, even if true, runs contrary to the freedom of conscience of other religious communities, whose precepts deny recognition to other religions.[18] Further, Art. 28 was read in negative terms, as not imposing prohibitions on the study of religious *philosophy* or *culture*, contradistinguished from religious *instruction* or *worship*.[19]

The challenge of constitutional drafting then is to sublimate these tensions of belonging through commonly shared higher aspirations, or alternatively, by recognizing and respecting differences. The success of drafting usually, though not necessarily, requires a unifying constitutional identity, at the level of a shared political and cultural context in a nation-state. Constitutions have eternally

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16 *Ms. Aruna Roy and Others* v. *Union of India*, (2002) 7 SCC 368 ("Aruna Roy").

17 The case also raised other issues of non-consultation with the Central Advisory Board of Education, which were dismissed for not being mandatory.

18 *See A. S. Narayana Deekshitulu* v. *State of AP*, 1996 AIR 1765 for references to the Rig Veda, Brhadarayanakopanishad and the Mahabharat, which were deemed to be an integral part of an Indian way of living for time immemorial.

19 *Aruna Roy*, at ¶¶ 39-41.

grappled with the problem of identifying a minimum threshold of association. Such an identity may be derived from the experiences that preceded its drafting, or those that adequately represent a common identity, that exists beyond, and indeed, despite the constitution. In a memorable line that captures the sentiment, Laurence Tribe describes a constitution as being "*written in blood, rather than ink*".[20] An example of an identity of the latter form can be found in the Bhutanese Constitution, an agglomeration of liberal democratic ideals steeped in strong Buddhist imagery, meant to ease in a transition from monarchy.[21] Debates over the sufficiency of such bonds that have taken place in the European context on factual grounds are instructive of threshold requirements for such identity without claims of its capacity to impact norm creation.[22] Elsewhere, this contest has also been controversially framed in Universalist terms.[23]

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20 LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 29 (2008).

21 BHUT. CONST. pmbl:
Blessed by the Triple Gem, the protection of our guardian deities, the wisdom of our leaders, the everlasting fortunes of the Pelden Drukpa and the guidance of His Majesty the Druk Gyalpo, Jigme Khesar Namgyel Wangchuck; *Solemnly* pledging ourselves to strengthen the sovereignty of Bhutan, to secure the blessings of liberty, to ensure justice and tranquillity and to enhance the unity, happiness and well being of the people for all time; *Do hereby* ordain and adopt this Constitution for the Kingdom of Bhutan on the Fifteenth Day of the Fifth Month of the Male Earth Rat Year corresponding to the Eighteenth Day of July, Two Thousand and Eight.

22 *See* Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUR. L. J. 282, 282-296 (1995); *See* Jürgen Habermas, *Remarks on Dieter Grimm's "Does Europe Need a Constitution?"*, 1 EUR. L. J. 303, 303-307 (1995).

23 Michel Rosenfeld, *Modern Constitutionalism as Interplay between Identity and Diversity*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY 3, 3-10 (Michel Rosenfeld ed., 1994). Three fundamental ingredients are identified – limitations on the powers of government, rule of law and protection of fundamental rights and liberties; *See* Stanley N. Katz, *Constitutionalism in East Central Europe: Some Negative Lessons from the American Experience*, *in* VICKI C. JACKSON AND MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 284-286 (1999). It is interesting to note that the debate though is framed over the categories of classification rather than what they describe. *Comments on Michel*

Indeed, the conceptualization of a constitutional identity requires a break from the past, illustrating a break from a *different* past and the aspirations of a *new* future. For the sake of its acceptance, the Constitution delicately treads this balance to avoid jeopardizing popular self-identity in the name of innovation.[24] The depth of the constitutional and the commitment to a new mode of self-identification is directly related to the intensity of the movement that led to constitution making.[25] While the possibility of popular consensus over this collective self-identification is in the realm of utopian fantasy, it is nevertheless important to identify the identifiers, to better appreciate the identification.

The Indian Constitution was hardly a *people's* constitution, in the sense of public participation or deliberation. As Austin comments, "*the Assembly was the Congress and the Congress was India*".[26] The

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Rosenfeld's "The Identity of the Constitutional Subject, 33 CARDOZO L. REV. 101 (2012).

[24] Sometimes, these antinomies appear within the text or through practice. For example, the equality provision in the American Constitution would appear inconsistent in the absence of a ban on slavery. Such inconsistency is highlighted by the much impugned decisions of *Dredd Scott* v. *Sandford*, 60 U.S. 393 (1857) and later, *Korematsu* v. *United States*, 323 U.S. 214 (1944). In India, the roots of communalism have been traced to the use of Hindu symbolisms in the national movement. *See* CHRISTOPHE JAFFRELOT, THE HINDU NATIONALIST MOVEMENT AND INDIAN POLITICS: 1925 TO THE 1990S 11-45 (1996).

[25] Michel Rosenfeld, *The Problem of 'Identity' in Constitution-Making and Constitutional Reform* (Cardozo Legal Stud. Paper No. 143, 2005), available at http://ssrn.com/abstract=870437. Rosenfeld points to four models preceding constitution making – (i) Revolution-based: which allows a violent rejection of the pre-constitutional order eg. American Constitution; (ii) War-based: victory inspired drafting, which is usually dependent on the internalization of constitutional ideals eg. German Basic Law; (iii) Peaceful/Pacted: resulting from negotiations that follow regime change, which usually depict greater continuity eg. Bhutan. Under this category, the drafting process can degenerate into a never-ending, open field free for all participants with the power of influence to effect their changes eg. Nepal; (iv) Treaty-based: possibly the European Union.

[26] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 8-10 (1966).

unique position which the Congress occupied in the Indian independence movement ensured overwhelming majorities in the provincial assembly elections.[27] The urgency of the process adopted to constitute the constituent assembly combined with the absence of an alternative to the Congress, while not inhibiting incisive discourse within the assembly, would arguably have infused governmental policy into the development of constitutional content. Also, on account of the indirect elections, which decided the composition of the assembly, the constituent assembly's extremely erudite members stood in stark contrast to the masses. Deliberations were consequently devoid of "*any shade of public opinion.*"[28] Even discounting these factors, the failure to involve the citizens' *rising consciousness* by including consultative mechanisms at different stages, attenuates claims of being a *people's* constitution.

Further, the framework of the final Constitution was borrowed from the Government of India Act, 1935. In order to claim ownership, changes needed to be made to the rulers' constitution. However, the 1935 Act did form the *foundational document* of the constitution.[29] Multiple provisions of the constitution are identical reproductions from the 1935 Act and Dr. Ambedkar clearly admitted that there is "*nothing to be ashamed of in borrowing*" from the 1935 Act.[30] On the issue of such a defining influence on the Indian constitution, H.M. Seervai concludes that "*Little could the framers of that Act have dreamt that in the Constitution of a free India they would find the greatest monument to their drafting skill* ...".[31] Even if the influence of the Government of India Act served merely as a template for further constitutional development, in the sense that what was

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27 *Id* at p.9.

28 *Id*. at p.13-16.

29 GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 5 (1999).

30 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 164 (4thedn, Vol. I, 1991).

31 *Id*. at p. 171.

borrowed was simply textual, it is inevitable that the ontological baggage of this structural framework creeps into constitutional interpretation, reinforcing its colonial biases.[32]

While appraising the text, Tribe reminds us that in excessively fetishizing its text, one loses sight of the entirety of a Constitution. He argues that the "*dark matter*" of the Constitution, present not *around*, but *within* the text, constitutes an "*ocean of ideas, propositions, recovered memories, and imagined experiences*", that informs the appreciation of the text.[33] He rejects the notion that the indeterminacy of the content of this invisible constitution should come in the way of recognizing its existence, noting that similar barriers operate even while appreciating its visible portions.[34] Though he does not offer (or even claim to offer) clues that would aid any subsequent discovery of this meta-entity, his characterization broadens our horizon for potentially identifying, or in a limited sense, qualifying elements of constitutional identity.[35]

While the interplay between this constitutional identity and extra-constitutional identities is complex, the Indian experience reveals a formulation of constitutional identity that remains subservient to deeper, extra-constitutional considerations based on religion, language, caste or even nationhood, despite the contestation over the latter.[36] Undoubtedly, the identity derived from a constitution continuously

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32 SARBANI SEN, THE CONSTITUTION OF INDIA: POPULAR SOVEREIGNTY AND DEMOCRATIC TRANSFORMATIONS 31-33 (2007). For a critical review of Sen, *See* Rajeev Dhavan, *Sarbani Sen's Popular Sovereignty and Democratic Transformations*, INDIAN J. CONST. L. 204, (2008) (book review).

33 Tribe, *supra* n. 20, at 9.

34 Tribe, *supra* n. 20, at 7-8.

35 The most useful contribution is that he places others before him who made out a case for extra-constitutional interpretation in perspective. *See* for example, Thomas C. Grey, *Do We Have an Unwritten Constitution,* 27 STAN L. REV. 703 (1975).

36 *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law,* 108 YALE L.J. 1225, 1270-71 (1999).

evolves through the life of the text. Abstracting from Baxi's four 'Cs', one can identify the entities that contribute to this cumulative identity[37] – namely, the *constitution* or the 'official' written text; *constitutional law*, the site of authoritative constitutional discourse; *citizen interpretative practices*, though non-authoritative are responsible for judicial activism; *constitutionalism*, the ideology of constitutions that adduce background justifications for constitutional theory and practice.

Though the moment of drafting the text is hugely influential in formulating constitutional identity, this identity constantly evolves dialogically throughout the life of the constitution.[38] This paper would hardly be complete without reference to the champion of citizen involvement. Ackerman takes this proposition further, attempting to restore "*constitutional creativity*" predominantly in the hands of the citizens.[39] Beginning with the all too justified premise that dominant constitutional discourse is primarily the prerogative of the *professionals*, he argues that the American constitution has witnessed amendments beyond the scope of the formal amendment process inscribed in Art. 5 through its unique system of "*plebiscitarian presidency*", which confer substantive mandates onto elected

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37 Upendra Baxi, *Outline of a Theory of Practice of Indian Constitutionalism*, *in* POLITICS AND ETHICS OF THE INDIAN CONSTITUTION 100, 101 (Rajeev Bhargava ed., 2009).

38 Rosenfeld, *supra* note 25, at 8. *See* generally GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY 1-33 (2010).

39 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 1-12 (1998). It has had its supporters, who agree that Art. 5 of the U.S Constitution does not exhaust constitutional amendment – e.g., Mark Tushnet, *The Flag-Burning Episode: An Essay on the Constitution*, 61 U. COLO. L. REV. 39, 48-53 (1990); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CH. L. REV. 1043 (1988) as well as critics e.g., David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 35-51 (1990); Silas J. Wasserstrom & Louis Michael Seidman,*The Fourth Amendment as Constitutional Theory*, 77 GEO. L. J. 19, 54-56 (1988).

candidates.[40] The dialogue that potentially results from the transformative constitutional change translated as a specific directive, even statutory, is decisively concluded through a "*critical election*".[41] Following such "*constitutional moments*", a preservationist court begins to safeguard new constitutional values.[42]

Ackerman posits this debate between foundationalists, who insist that the rightness of such decision is beyond public deliberation, and monists, who equate legislative enactments with the will of the people. Ackerman certainly identifies periods of intense mobilization of public opinion, perhaps even rightly pointing out that these debates are deeper and relatively better informed than they are in other instances. However, it is not clear whether his analysis helps us in any way to accurately identify the scope of the transformation, or whether it even justifies its presumed constitution of a *we*, in "*We, the people*", limiting further our understanding of its impact on constitutional identity.[43]

For our purposes, it is sufficient to restrict ourselves to his descriptive analysis, rather than its avowed prescription for the restoration of *vibrant democracy*.[44] There are a few significant hurdles

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40 Ackerman, *supra* n. 39, at 68; Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

41 Ackerman, *supra* note 39, at 270-9. Ackerman also argues for a dualist model that distinguishes between constitutional change and regular statutory changes. He asserts that people adopt different attitudes under either circumstance, conscious of its significance of such moments – being active engaged participants in the first case and usually aloof in the latter.

42 Examples of such constitutional moments can include *Grisworld* v. *Connecticut*, 381 U.S. 479 (1965); *Brown* v. *Board of Edn*., 347 U.S. 483 (1954).

43 John E. Finn, *Transformation or Transmogrification? Ackerman, Hobbes (as in Calvin and Hobbes), and the Puzzle of Changing Constitutional Identity*, 10 CONST. POL. ECON. 355, 355-365 (1999).

44 *See* generally, Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments* 44 STAN. L. REV. 759 (1992).

to transplanting Ackerman's theory to the Indian experience. For one, the amending process requires a much higher threshold in USA, than in India.[45] Second, the disparity between the presidential[46] and parliamentary[47] system implies that the import of mandates in a similar fashion would be unlikely. Power, being more distributed in India and oftentimes even unidentifiable, would force a compromise that would not accurately represent the version of the mandate disseminated during the electoral process, due to the difficulties of a multi-party system and coalition politics.[48] Furthermore, such a system and politics render elections considerably less significant in terms of their tangible impact on government policy or deliberation.

Collectively, these questions beg a revisit of the principles of public deliberation and creation of authoritative rules. In a positivist account, neither citizen interpretations nor practices have any bearing in constituting the legal system,[49] contra "*popular constitutionalists*",[50] for whom constitutional interpretations of the people are sometimes in conflict with those offered by the courts.[51] To reconcile this transformation of expression into authority, they either need to make out a case for its distillation at the hands of state officials, or for the

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45 U.S. CONST. art.5; INDIAN CONST. art. 368.

46 *See* OTIS H. STEPHENS, JR., AND JOHN M. SCHEB II, AMERICAN CONSTITUTIONAL LAW, 163-181 (3rdedn., 2003).

47 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 2021-94 (4thedn., Vol. II, 1991).

48 *See* Mahendra P. Singh and Douglas V. Verney, *Challenges to India's Centralized Parliamentary Federalism*, 33 PUBLIUS, 1-20 (2003); *See* Mahesh P. Rangarajan, POLITY IN TRANSITION: INDIA AFTER THE 2004 GENERAL ELECTIONS, 40 ECON. & POL. WEEKLY 3598-3605 (2005).

49 *See* generally JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM (1980).

50 Rosalind Dixon, *Amending Constitutional Identity* 33 CARDOZO L. REV. 1847, 1847-1858 (2012). *See* Mathew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?* 10 Nw .UNIV. L. REV. 719, 719-723 (2006).

51 Tushnet, *Popular Constitutionalism As Political Law*, 81 CHI.-KENT L. REV. 991-1006 (2006)

proposition that citizens have a "*coequal or dominant role in deeming it as such*" - both of which are unviable, by virtue of being either too shallow or an overestimation.[52] The underlying premise of both accounts is the existence of "*certain canonical groups*" that are fundamentally responsible for generating 'law' within a system, be it in an *explanatory* or *normative* context.[53] Indeed, the quest to identify any passively deduced,[54] single recognitional group as determinatively creating a constitutional identity, or even legal norms, is doomed to fail.[55]

To resolve this particular dilemma in the Indian case, it is imperative that we identify the *site* of such expression, at least marginally fulfilling aspirations of popular dialogical interpretation where discourse is transformed into normativity. Ginsburg, Melton and Elkins' imperious empirical work on *The Endurance of National Constitutions*, offers some clues. Distinguishing fickle political, "*environmental factors*" from more easily measurable textual, "*design factors*", they identify a correlation between the specificity, inclusiveness and flexibility of constitutional provisions – all, conditions for the adaptability of a *tool*, and the longevity of a constitution[56] Understandably, the use of a tool lies in the hands of its wielder.

Indeed, the Indian constitution is not sustained on an inherent identity derived from it. The specificity threshold is met by its exhaustive drafting. As for the inclusiveness requirement, the Constitution creates interstices for a wide range of social actors to claim ownership over. However, this form of inclusiveness is narrowly

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52 Adler, *supra* n. 50, at 721.

53 Adler, *supra* n. 50, at 727-745.

54 Laurence Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 440 (1983).

55 Adler, *supra* n. 50, at 749.

56 TOM GINSBURG, THE ENDURANCE OF NATIONAL CONSTITUTIONS 2-11 (2009).

restricted to the specific provisions reflecting a citizen's association with it, without extending to the totality of the constitutional body. For instance, Arts. 14, 15(1), 15(2), 15(4), 16(1), 16(2), 16(4), 25(1), 27, 28 of the Indian Constitution are provisions indicative of 'collective rights', exercisable by minorities amongst others, while Arts. 29(1), 29(2), 30(1) and 30(2) are best indicative of special concessions, specific to minority groups. This asymmetry, Khosla argues, reflects that citizens are not equal and has "*opened up new spaces in our politics, novel politics in constitutional engineering and exhibited a respect for indeterminacy*".[57] The extent to which a minority's exercise of collective rights is flavored by the content of specific rights further adds to the overall indeterminacy. As a result, extra-constitutional identities prevail over binding commitments to the text.

Having been amended nearly a hundred times in its history, the adaptability of the Indian Constitution is reflected through a relatively straightforward amendment process, requiring varying standards of assent from elected representatives depending on the kind of provision sought to be amended. The first ratified Constitution indicated that the Courts were to be subservient to the wishes of elected representatives who were capable of reversing unfavourable decisions of the judiciary by simple majorities. Further, by rejecting the proposal to introduce substantive due process under the life and liberty provision,[58] the eventuality of greater judicial interference in the decisions of the Parliament was decisively avoided.[59] It is another matter that the doctrine crept back into constitutional deliberation

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57 MADHAV KHOSLA, THE INDIAN CONSTITUTION 160-165 (2012).

58 CONSTITUENT ASSEMBLY DEBATES, Vol. IX, 35 (Sep. 15, 1949); CONSTITUENT ASSEMBLY DEBATES, Vol. VII, 20 (Dec. 6, 1947).

59 Manoj Mate, *The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT'L L.J. 175, 179-180 (2010). He also attributes the superiority of the Parliament over the Judiciary to a tradition of Austinian positivism.

riding on the Supreme Court's broad-stroked formulation of the basic structure doctrine.

A considerable amount of scholarship has focused on tempering judicial overreach in certain constitutional matters, presuming that elected representatives are the only competent body to reach such a determination.[60] The positivist narrative explains that, *in fact*, the judiciary remains supreme, with their primary role as authoritatively settling questions on constitutional norms.[61] We suspect that the "*foundationalist*" account would argue that correctness of any determination is beyond any participants in the constitutional project.

Discounting sustained civil society movements that might have otherwise had a cerebral, but *informal* impact, citizen influence on the Parliament through formal channels is solely expressed through periodic elections. However, from its inception, access to the higher judiciary has been far more straightforward and more so in matters of constitutional incursions. This "*juridical democracy*", which emerged after the emergency blunders, served to augment the institutional acceptability and popularity of the Indian apex court.[62] In addition to the arguable impact of the judiciary's expansion of standing on providing access to justice for the dispossessed, its formative influence on providing a platform to address "*potentially explosive social and*

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60 For instance, *see* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27STAN. L REV. 585, 588-597 (1975); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

61 *See* Christopher Kutz, *The Judicial Community*, 11 PHIL. ISSUES 442, 458-462 (2001). *See* JOSEPHRAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM (1980).

62 Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD., 107-108 (1985).

political movements" is undeniable.[63] This *epistolary jurisdiction* of the higher judiciary unrecognizably altered the procedural requirements for filing applications under Article 32 and Article 226 before the Supreme Court and the High Courts respectively.[64]

Such applications are filed against the *state* and the limitless possibilities of direct citizen engagement with the state are facilitated, except before an unelected, non-representative adjudicatory body. Further, this tryst is restricted to narrow matters of constitutional *law*, the habitat of professional discourse that does not necessarily account for citizen aspirations sought to be actualized in a transformative sense.

The formation of constitutional identity certainly is an accumulation of forms of associating with the constitution beyond *just* in its legal sense. In any case, as evidenced by countless rejections of petitions on grounds of being matters of "policy", that are acknowledged as the exclusive preserve of the government of the day,[65] or merely being "frivolous",[66] these cases do not reflect the breadth of potential citizen engagement, even within constitutional law. Empirical data attests to the claim that the disadvantaged category of citizens who formed the original focus for exercising expansive jurisdiction is changing.[67] Moreover, as this prerogative is exercised

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63 *See* Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT'L L. J. 57, 70-72 (1994).

64 *S.P. Gupta* v. *Union of India*, [1982] 2 S.C.R 365; *See* G.L. Peiris, *Public Interest Dimension in the Indian Subcontinent: Current Dimensions*, 40 INT'L & COMP. L. Q. 66, 67-70 (1991).

65 Ashok H. Desai and S. Murlidhar, *Public Interest Litigation: Potential and Problems*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 159, 176-179 (B.N. Kirpal*et. al.* eds., 2000).

66 Some of the notable instances in which the Supreme Court refused to proceed to the admissions stage include the mining in Niyamgiri Hills and the dismissal of the petition against building of the Commonwealth Games infrastructure on the riverbed.

67 Varun Gauri, *Public Interest Litigation in India* 7-13 (Policy Research Working Paper No. 5109, 2009). Also, the shift in focus detrimentally affects the

only when there is some intrusion on the right of an individual or a class of individuals, the resultant conversation is hardly inclusive in the scope of interlocutors. In any case, despite being stunted by these institutional limitations, the higher judiciary has curiously grown into the most active site for "dialogue" in constitutional matters.

In the name of socialism and a defense of popular sovereignty, the first three decades witnessed a tussle between the executive and the judiciary, contesting the right to private property and limits of judicial review, respectively. This contest birthed the first appropriations over defining the *identity* of the constitution.

The Basic Structure Doctrine as an Exercise in Identity Creation

The Nehruvian model of socialism, meant to infuse social and economic equality, manifested itself through aggressive agrarian land redistribution measures. Aggrieved landowners sought judicial intervention against these measures, which were executed without due process or compensation for acquisitions, alleging infractions into the fundamental 'right to acquire, hold and dispose of property'. Repeatedly, the Supreme Court upheld their claims.[68] With the intent of nullifying these judgments, the Parliament inserted the Ninth Schedule into the Constitution in 1951. The Schedule originally contained the land reform legislations that were placed above challenges on the grounds of such measures violating fundamental rights.[69] Judicial mediation on the grounds of insufficient procedural safeguards continued to mollify petitioners.[70]

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disadvantaged groups. *See* Usha Ramanathan, *Demolition Drive*, 40 ECON. & POL. WEEKLY 2908 (2005).

68 *See State of Bihar* v. *Kameshwar Singh*, (1952) S.C.R. 889.

69 *Maharashtra* v. *Man Singh*, (1978) 2 S.C.R. 856.

70 *See* S.P. Sathe, *Judicial Activism: The Indian Experience* 6 WASH. U. J. L. &POL'Y 029 (2001).

These cases had begun to engender broader concerns regarding the limits of the amending power of the Parliament, and boiled over in *Golak Nath*,[71] drawing the lines for a protracted battle between judicial and parliamentary supremacy. By a razor thin majority of 6-5, the Court decided that constitutional amendments could not render fundamental rights unenforceable, attempting to balance the integrity of the constitution and the Parliamentary prerogative to legislate upon entrenched feudalistic models. For the purpose of practicability, the Court also introduced the *doctrine of prospective over-ruling*, under which only future claims on the same grounds would be upheld, without disturbing the land reforms already enacted by the Parliament and various state legislatures.

In doing so, the opinion of the Chief Justice carved out an exalted space for fundamental rights – *primordial rights* occupying a "*transcendental position beyond the reach of Parliament*",[72] thereby evoking the grammar of natural law. Though it went unarticulated in the dissent, the appeal to natural law would be problematic for a few reasons. First, the judgment presupposes a direct correlation between the content of the constitution and the strictures of natural law. Indeed, it imposes on the constitution claims that are not made within its text and impedes efforts at socio-economic equality that would otherwise remain possible. As a matter of use in constitutional interpretation, natural law creates a parallel system of authority, unrestricted by rules of *stare decisis*, probably more fundamental to the judicial system than natural law. Jacobsohn ruefully refers to Justice Black's aphorism, calling natural rights an "*incongruous excrescence upon the Constitution*".[73]

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71 *I.C. Golaknath* v. *State of Punjab*, 1967 SCR (2) 762. (hereinafter, "Golaknath").

72 *Golaknath*, at ¶ 20.

73 *Adamson* v. *California*, 332 U.S. 46, 75 (1947). GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY 53 (2010).

In response, the Parliament amended the amendment provision by inserting Art. 368 (5), bestowing upon itself the authority to amend *any* part of the Constitution. In arguably the most important case in the history of the Supreme Court, *Kesavananda Bharati*, another deeply divided bench ruled (7-6) that certain features of the constitution were integral to its existence and could not be abrogated by the legislature. The power of the judiciary to question such legislative action too was deemed to constitute a feature of this 'basic structure' of the Constitution.

The court reversed its judgment in *Golak Nath*, but asserted its own authority to quash amendments that transgressed this 'basic structure', assuming definitional authority over the identity of the Constitution. The attachment between fundamental rights and natural law was severed, with the Court observing, "*Its* [natural law] *gods are locked in internecine conflict*".[74] The most significant impetus for the move came from Nani Palkhivala's reference to Dietrich Conrad, a German scholar of Indian politics, who had contemporaneously warned of the dangers of an easily amendable constitution, drawing parallels with a Nazi regime that defaced the Weimar Constitution in its quest for power.[75]

The process of identifying the elements of constitutional identity is an exercise designed to maintain and defend an "*inner sameness and continuity*".[76] Such an exercise inherently limits the fungibility of the identification, rejecting sudden, disruptive changes in pattern or character. It will be interesting to observe whether the Court in the future will revisit the validity of past markers of identity. Else, this process creates a self-contained, self-fulfilling prophecy, possibly removed from social reality.

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74 *Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461, at 2006.

75 Dietrich Conrad, *Limitation of Amendment Procedures and the Constituent Power*, INDIAN Y. INT'L AFF. 15 (1970).

76 ERIK H. ERIKSON, DIMENSIONS OF A NEW IDENTITY 204 (1974).

The Court's framing of 'basic structure' as a holistic, open-textured concept,[77] beyond specific enumeration, could have been directed at avoiding the possibility of uni-dimensionally locking-in the destiny of this constitutional regime. Dworkin argues against a formulation of integrity in law that demands consistency in principle across all historical stages, and opines that it "*does not require that judges try to understand the law they enforce as continuous in principle with the abandoned law of a previous century or even a previous generation.*"[78] To him, interpretation is situated in the present and looks backward only as far as necessitated by contemporary circumstances.[79] His explanation requires to be modified in the context of a document, whose content is continuously being created, or as presumed to be while interpretative authority is being claimed, "unraveled".

The full impact of the Court's formulation of basic structure has primarily been felt through its application in subsequent cases, most unsettlingly in the *Election Case*.[80] In 1975, a single judge of the Allahabad high court judge charged Indira Gandhi of electoral fraud in her constituency in the 1971 elections. Almost spontaneously, the 39thAmendment was passed to immunize the Prime Minister from judicial inquiry. In this case, the court once again adopted the basic structure doctrine to strike down the amendment. The timing of the judgment, which was delivered in the early days of the Emergency declared by Gandhi, elevated the doctrine to a mythical status, and catapulted it into popular consciousness by projecting the judiciary as the only successful opposition against the excesses of the executive.[81]

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77 Beyond the "*core of settled meaning*" - H.L.A. HART, THE CONCEPT OF LAW 124-25 (1961).

78 RONALD DWORKIN, LAW'S EMPIRE 227 (1986).

79 *Id*.

80 *Indira Gandhi* v. *Raj Narain*, AIR 1975 SC 2299,

81 The emergency era court has a different history. *A. D. M. Jabalpur* v. *Shukla*, AIR 1976 SC 1377, the most impugned judgment from the emergency days, is

It is important to clarify that the doctrine is attracted depending not on how far-reaching the change sought to be made is, but when the basic structure is threatened. The doctrine has been identified by open-textured terms such as democracy, independence of judiciary, constitutional supremacy, secularism, separation of powers, etc. Krishnaswamy contends that the interpretation of these broad terms is tempered by the contextual understanding of the text, and their application in precedents.[82]

The co-option of the answers to questions fundamental to the nature of constitutional identity, especially when framed so broadly, concentrate the collective imagination of a polity in the hands of the judiciary, also keeping it relevant in any further inquiry.[83] And, clearly it has. Attempts to negative the impact of the decision in *Kesavananda Bharati* were rejected in quick time. The first of these attempts oddly came through Chief Justice A. N. Ray without any party, or even the government filing a review petition. In what is regarded as his finest hour of advocacy, Nani Palkhivala averted the overruling of the judgment, and the thirteen member bench was dissolved within two days of oral arguments. Unperturbed, the Parliament immediately passed the 42nd Amendment, 1976, which was also nullified by the 44th Amendment, passed upon the defeat of the Congress Party. Over time, there has been a greater acceptance of the doctrine, as illustrated by the terms of reference for the constitution of the National Commission to Review the Working of the Constitution, 2002, which stated that the

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characterized as the "*lowest point that could ever be touched by any court with a conscience*". *See* O. CHINAPPA REDDY, THE COURT AND THE CONSTITUTION OF INDIA - SUMMITS AND SHALLOWS (2010).

82 SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA xi-xxxiii (2009).

83 Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, 75 FORDHAM L. REV. 721-753 (2006).

commission would "*recommend changes ... without interfering with its* [the Constitution's] *basic structure or features.*"[84]

However, this apparent finality of judicial interpretation of constitutional identity is wholly subject to its execution by the Parliament. Perhaps, a point of inflexion could potentially emerge when the body of concepts under the broad umbrella of basic structure collapse within themselves, unable to deal with inconsistencies, either internal to the content of the doctrine, or in the manner in which it confronts very real, self-created, non-authoritative notions of constitutional identity.

Conclusion

The evolution of the basic structure doctrine maps out the first attempt to create a sense of collective existence in Indian polity, carved out from a Constitution that failed to capture it within its text. However, the process has raised many concerns. Some of these were identified as appropriation of constitutional identity by a non-representative institution, treading a delicate balance in the separation of powers between various branches of government. The latter's attendant failings aside, the most significant of these concerns is that the site of its creation are the Courts. Moreover, the resultant citizen-state engagement was found to be limited in both scope and content, with matters complicated by the sense of finality to their decisions in resolving questions of constitutional law.

Ran Hirschl aptly termed the judicialization of key governance questions, "juristocracy", or rule by the judiciary, whose history of self-empowerment in the Indian context also offers important insights on the frailties of identity creation and definition. These included the necessity of employing open-textured ideas to articulate a political

[84] National Commission to Review the Working of the Constitution, report available at http://lawmin.nic.in/ncrwc/ncrwcreport.htm.

theory around and within the constitution. This conception of a shared constitutional heritage represents aspirations that transcend, and could possibly run against the grain of values framed in simple majoritarian terms. Indeed, the counter-majoritarian inclinations of the Judiciary could possibly exacerbate the disconnect between felt identity, even aspirational, and their identification.

Over the years, the basic structure doctrine has been employed beyond limiting amendments to the constitution. One could hypothesize that the continued articulation of basic structure has developed a constellation of ideas that inescapably begin to have a more pervasive impact on adjudication. In the chronology of its evolution, basic structure was first rejected as a qualifier for parliamentary action other than constitutional amendments. In the next stage, it begins to be referenced more elaborately in the obiter dicta of the judgment on other matters as well. In its present form, the doctrine has begun to be applied even to other forms of state action.[85] An important caveat that needs to find mention here is that these three stages are operating in parallel, with the doctrine continuously broadening in form and import.

So far there has been nothing in this piece to suggest the exportability of the doctrine, which developed under unique circumstances in India. The cross-jurisdictional engagement in the South Asian context offers an interesting account. In a three-member Cabinet Committee set up to finalize the 1990 draft of the Nepali Constitution, the Ministers limited the scope of amendments to the Constitution under Art. 116 insofar as they did not 'prejudice the spirit of the Preamble'. This is certainly representative of an attempt to

[85] Krishnaswamy, *supra* n. 82, at xxix-xxxiii.

delineate a Nepali constitutional identity whose vessel was the Preamble of the popularly adopted Constitution.[86]

In Sri Lanka, basic structure was invoked, and rejected, in a challenge to the Provincial Councils Bill in the 13th Amendment Case.[87] The Court held that the Sri Lankan Constitution would survive without loss of identity and that, "*The basic structure or framework of the Constitution will continue intact in its integrity*", in respect of the unitary structure of the Sri Lankan State retained by an ethno-religious majority.[88] Thus, without accepting the import of secular/federal principles, which feature in the Indian basic structure, the Court employed the model to negatively define for itself a conception of basic structure.

In contrast, the Bangladeshi Supreme Court voided the 8th Amendment to the Constitution in *Anwar Hossain Chowdhury*,[89] holding that the amending power was subject to the immutability of the basic structure of the Constitution. The logic that the amendment provisions, being a "derivative constituent power", could not destroy its basic structure resonates with *Kesavananda Bharati*. Like its Indian counterpart, the Court could not reach a consensus on the content of basic structure. However, very interestingly, there was a consensus across counsels and the bench, including the dissenting judges, on the existence of certain fundamental inviolable standards that operate as an inherent limitation on constitutional amendments.[90]

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86 Mara Malagodi, *The Rejection of the Minority Approach in the 1990 on Institution Making Experience: A Reflection on the Influence of Foreign Institutional Model*s. CONSTITUTIONALISM AND DIVERSITY IN NEPAL SEMINAR (2007), available at www.uni-bielefeld.de/midea/pdf/Mara.pdf.

87 *In Re The Thirteenth Amendment to the Constitution and the Provincial Councils Bill*, 2 Sri L. R. 312 (1987).

88 *Id.* at 329.

89 *Anwar Hossain Chowdhury* v. *Bangladesh*,18 CLC (AD) (1989).

90 Afzal, J. notes that in the name of amendment, "*the Constitution cannot be destroyed."Id.*, at ¶600.

In conclusion, our hypothesis is that constitutional identity, much like other identities is potentially vast and unknowable, but definitional projects such as the basic structure are reminiscent of a settlement on artificial islands reclaimed from the ocean that is constitutional identity – a vantage point that is a site of continuous construction, from where every foray to the ocean marks a leap of faith, and opportunity.

A Short Introduction that Goes Way Beyond

Ananth Padmanabhan[*]

Rarely does one stumble upon writing on Indian law, especially books, which seriously and critically examine judicial perspectives and put forth an independent view. The commonplace character of our 'scholarship' is evident from the sad reality that only case digests, passing off as commentaries, do well in the market. Lawyers are looking for something that aids them in finding the law, not understanding it, and students are happy with classroom lectures in textbook format. In this unhappy scenario comes along a short book of less than 200 pages which is enervating and stimulating for the mind. Madhav Khosla's 'Short Introduction to the Indian Constitution', published by the Oxford University Press, is a lot more than it professes to be, and one only wishes it were longer.

This book, through its four chapters, takes us through the content of most, if not all, provisions in our Constitution. More importantly, it teaches us how this wonderful document has attempted to accommodate divergent interests through its asymmetric character, and reveals how the self-serving abuse of this character has taken place at the hands of those working this document. The book also takes a hard look at many myths associated with the working of the Indian Supreme Court and its interpretation of important constitutional provisions including fundamental rights and directive principles.

While introducing the text, Madhav captures the aspirational goal of the Constituent Assembly in the opening sentences, and eloquently describes their endeavour as '*an extraordinary experiment in human history*'. He also demarcates, with clarity, the boundaries of his endeavour – to explain the architecture of the Constitution while gently touching upon some of its themes. Aware of the constraints

[*] Advocate, Madras High Court.

brought in by the limitation on words, he spells out that this book will provoke more and persuade less. Reading further, I realise that this is quite an understatement. Madhav, in every chapter of the book, has put forth novel arguments on several controversial constitutional issues, thus proving why he, in the words of Sunil Khilnani, is "*an important new voice in our intellectual life*". These arguments, as explained by Madhav himself, relate to the appropriate manner of interpreting the constitutional text, rather than normative debates on what the constitutional provision or scheme ought to be. Such debates, and Madhav's view of them in the background of current political developments, shall hopefully become the subject matter of a separate academic work in the future.

The first chapter deals with an examination of the constitutional scheme pertaining to separation of powers. While taking the reader through the different wings or branches of governance, Madhav has addressed important issues relating to the working of the respective branch. Thus, the discussion on Rajya Sabha, the Council of States, is enriched by a critique of the Supreme Court's inability in the *Kuldip Nayar*[1] decision, to articulate criteria that would qualify as sufficient for a member to adequately represent a State. Similarly, Madhav expresses serious doubt about the constitutionality of the oppressive provisions in the Tenth Schedule, i.e., the anti-defection regime, and argues that the Supreme Court verdict in *Kihoto Hollohan*[2] did little to preserve the independence of legislators. The *reductio ad absurdum* that the Supreme Court decision in *P.V. Narasimha Rao*[3] has come to infamously stand for also finds special mention in this chapter.

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1 *Kuldip Nayar* v. *Union of India*, (2006) 7 SCC 1.
2 *Kihoto Hollohon* v. *Zachilhu*, AIR 1993 SC 412.
3 *P V Narasimha Rao* v. *State (CBI/SPE),* (1998) 4 SCC 626.

The ingenious manner in which the Supreme Court levelled the balance of power between the Executive and itself in respect of appointments to the higher judiciary also merits attention in the book. Unwittingly, Madhav concludes that primacy finally shifted, through on ingenious interpretation of Article 124, to the hands of the judiciary. Hence, presently '*healthy convention*' ensures appointment of the candidate even where the Executive requests reconsideration, so long as the collegium reiterates its recommendation. A play out of this convention was unfortunately witnessed quite recently when the Union requested the Supreme Court collegium to reconsider three of the names proposed for elevation to the Court. The chapter also contains a brief discussion on independent constitutional bodies such as the Election Commission and the Comptroller and Auditor General, but misses out on a mention of tribunals and the scheme under Articles 324A and 324B of the Constitution. Considering that the tribunal model of adjudication has gained considerable popularity and earned equal amount of flak in recent times, it would be worthy of inclusion in subsequent editions.

The second chapter addresses the Indian model of federalism, and the unique constitutional scheme of distribution of powers between the Union and the States that has come about largely due to the way in which our Republic was formed. The need for a strong Centre was felt during the drafting phase, and this explains the tilt in favour of the Union in our federal structure. Madhav however goes on to show, through a comprehensive review of the constitutional scheme, that the States enjoy supremacy within the sphere allocated to them. In support of this point, Madhav cites the example of 'police reform' – a boiling concern –and argues that reforms on this front have been stalled due to the matter being a State subject in the VII Schedule.

The discussion on legislative competence explores serious limitation on the law-making power of Parliament and the State Legislatures. It also cautions the judiciary to go beyond these limitations, or the ones imposed by virtue of Part III, while adjudicating on the constitutional validity of any statute. Using the example of the Armed Forces (Special Powers) Act, upheld by the Supreme Court in the *Naga People's Movement of Human Rights*[4] decision, Madhav illustrates the thin line separating the issue of who can legislate from the one on whether the legislation can be enacted in the first place. He concludes, notably, that the constitutional concerns with any legislation do not end with fundamental rights compatibility and legislative competence. Strands of this reasoning, though couched in terms of violation of Articles 14 and 21, are found in the recent Supreme Court decision in *Nandini Sundar*[5], where the "Salwa Judum" brand of policing was held to be out of line with constitutional values.

The discussion on 'asymmetric federalism' is however what really places this chapter, and the book, on a different pedestal of scholarship. A common conceptual thread stretching across, and seeking to explain, provisions as diverse in content as Articles 370 (which provides for the so-called 'special status' for Jammu and Kashmir), 371-F and 371-D and the Sixth Schedule, has not so far been developed in any of the earlier, and more detailed, works on our Constitution. Madhav uses the term 'asymmetric federalism' as being a form of federalism where some of the constituent units in the federation have more autonomy or privileges than the others, and applies this doctrine to explain the presence of the above provisions. Article 370, introduced as a transitory provision, has assumed a life of its own and in Madhav's words, "*binds the State (Kashmir) to the Indian Union.*" Similarly, Article 371-F, by providing for reservations for certain sections of the population of Sikkim in the State's Legislative

4 *Naga People's Movement of Human Rights* v. *Union of India*, (1998) 2 SCC 109.
5 *Nandini Sundar & Ors.* v. *State of Chattisgarh*, (2011) 7 SCC 547.

Assembly, seeks to accommodate special interests, while the Sixth Schedule supplies a framework of 'regional asymmetry' for addressing special interests within the States of Assam, Mizoram, Meghalaya and Tripura. Madhav rightly points out that the Supreme Court has been aware of this need to accommodate, as striven for through the above model of asymmetric federalism, and intervened only in rare occasions such as *P. Sambamurthy's*[6] case, when Article 371-D(5) contravened the separation of powers doctrine. Though the Constituent Assembly may not have had this model of asymmetric federalism in mind at the time of drafting the document, it goes a long way towards explaining the manner in which these 'special' provisions have been operationalized. This doctrine is also important in understanding the clarion call for separate statehood in different parts of the country, and for differential treatment by existing States, and the futility of it all as the privileges of asymmetric federalism seem to hardly translate into better attainment of constitutional goals.

Madhav is in fine form in the third chapter where he advances several interesting arguments on the interpretation of Part III of the Constitution, which enshrines fundamental rights. He starts the discussion with an issue that has assumed greater significance post the publication of this work: the horizontal application of fundamental rights. This issue, which was at the forefront of the constitutional challenge to the Right to Education Act, 2009, in the *Society for Unaided Private Schools of Rajasthan*[7]case, delves into the possibility of casting a legal obligation on private actors to honour the fundamental rights of citizens. Contrasting the language used in certain provisions such as Articles 15(2), 17, 23 and 24 with the rest of Part III, Madhav argues that the Constitution partially adopts a horizontal approach towards rights. He cautions against the extension of this approach to the other rights that are clearly addressed to the State, as unfortunately

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6 *P. Sambamurthy* v. *State of Andhra Pradesh*, (1987) 1 SCC 362.

7 *Society for Unaided Private Schools of Rajasthan* v. *Union of India*, (2012) 6 SCC 1.

done in the *Vishaka*[8] decision. However, he is equally critical of the decision in *Pradeep Kumar Biswas*[9], which defines "State" under Article 12 in terms of where the power is sourced from rather than the kind of power which the body in question wields.

The asymmetric character of our Constitution is used as an analytical device by Madhav in the discussion on fundamental rights, especially the right to equality. He reads Article 14 conjointly with Articles 15 and 16 to contend that our Constitution, far from mandating a 'one-size-fits-all' form of equality, tinkers and plays around with this concept using the idea of positive discrimination. There is no better indication of this than the caste-based reservations prevalent in India, and the fact that these measures have been upheld not as an exception but as a facet of equality. The Supreme Court's views on reservations, whether it be the 50% cap and creamy layer restrictions as laid down in *Indira Sawhney*[10], or the extremely low standard of scrutiny employed to assess the constitutional validity of Article 15(5) in *A.K. Thakur*,[11] reveal the tension and the difficulty in interpreting this asymmetric model of equality to balance competing interests. Madhav goes to the extent of submitting that recent amendments such as Article 16(4A) and 16(4B) have "*junked judicial safeguards which have been laid down to preserve the logic of reservations.*" This prescient statement assumes relevance in the context of the recent Constitution (One Hundred and Seventeenth Amendment) Bill, 2012, which seeks to further dilute the minimal safeguards laid down in the *M. Nagaraj*[12] decision while upholding the above amendments. The asymmetric model is, clearly, being misused to garner votes and political support in the name of caste, rather than to achieve real equality through positive discrimination.

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8 *Vishakha* v. *State of Rajasthan*, (1997) 6 SCC 241.
9 *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology*, (2002) 5 SCC 111.
10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217.
11 *Ashoka Kumar Thakur* v. *Union of India,* (2008) 6 SCC 1.
12 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212.

Madhav devotes the highest attention to Article 21, and rightly so, considering that this salient constitutional provision has spurred considerable debate due to the shifting stance by the Supreme Court as regards its interpretation. He treads the path of careful scrutiny of the decision in *Maneka Gandhi*[13] and advances the view that this seemingly monumental pronouncement did not really complete the journey from procedural to substantive due process. This narrative fits well with the final relief granted in *Maneka*, which was to pave the way for a post-decisional hearing opportunity to the Petitioner. Madhav's conclusion that *Maneka* only pushed the case for a better and fairer procedure is more reasonable than interpreting the decision as endorsing substantive due process. Similarly, his scepticism of the 'unenumerated rights' theory is amply justified through a study of the outcome in *Olga Tellis*.[14] His thesis that the Court has used Article 21 in a conditional manner to guarantee certain rights when the additional promise was already made by the State is largely correct though the Court's role in the guarantee of compulsory education as a fundamental right under Article 21 is a notable exception. The linkage sought to be drawn between freedom of religion and personal laws is a bit unclear, and it is felt that the discussion on pluralism, which contributed very little to the understanding of Article 25 while eating up precious space, could be kept out of subsequent editions.

The final chapter of the book deals with constitutional amendments and the basic structure doctrine. Though not as analytical as the earlier chapters, it is certainly as engaging and informative as the rest. Madhav has clearly taken the effort to trace the genesis of the basic structure doctrine and put forth a few strong points on what this doctrine really entails. Madhav concludes that this doctrine does not represent a struggle for power between the Judiciary and the Legislature as much as an effort to distinguish between a constitutional

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13 *Maneka Gandhi* v. *Union of India,* (1978) 1 SCC 248.

14 *Olga Tellis* v. *Bombay Municipal Corporation*, (1985) 3 SCC 545.

amendment and revolutionary action. While answering the oft-asked question as to why this patently potent doctrine has not been instrumental in striking down various controversial amendments, Madhav reverts to the theme of asymmetry. He argues that the present state of asymmetry in the Constitution, largely brought about due to earlier amendments, makes the real character of this document blurred and ambiguous. This internal asymmetry, according to him, makes it difficult for the Court to assess the true scope and character of the Constitution's basic structure. This is probably the reason why Parliament is emboldened to introduce further amendments derogating from Article 14, especially in the context of reservations, as it is impossible today to really predict the essence of the equality protection in our Constitution.

To sum up, Madhav's work is a lucidly written account of the different provisions in our Constitution, the major debates surrounding their interpretation, and the path forward in understanding emerging constitutional controversies. Apart from its views on Indian constitutional law and theory, this book also holds promise for Indian scholarship in general due to the precise and neatly structured narrative. A special word of commendation is also due to the publisher for having come out with a book on Indian law that captures several important issues over the span of 165 well-edited pages, with no spelling errors or grammatical misconstruction.

Articles And Essays

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