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BOARD OF ADVISORS

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EDITOR'S NOTE

As the Editor-in-Chief, it gives me immense pleasure to present Issue I of Volume VI of the Comparative Constitutional Law and Administrative Law Journal ("**CALJ**").

IN THE ISSUE

In ***The Contestation Between Right to Be Forgotten and Freedom of Expression: Constitutional Silences and Missed Opportunities***, *Dr. Shruti Bedi*, in light of the discussion surrounding the right to be forgotten, highlights the importance of striking a balance between two fundamental rights traditionally pitted against each other—the right to privacy and the right to freedom of speech and expression, in India. Through the course of the article, the author analyses the evolution of the right to be forgotten and steps adopted by jurisdictions such as the European Union, Brazil and the United States to reconcile the persisting tensions between the two fundamental rights. The author argues that the two rights are capable of co-existence without conflict, with the help of a cautious filing in of constitutional silences by the Indian judiciary.

In ***Judicial Review of "Internal Parliamentary Proceedings": The Dialogic and Non-Dialogic Approaches***, *M. Jashim Ali Chowdhury* undertakes a comparative study of the internal proceedings jurisprudence of the judiciaries of the United Kingdom, India and Bangladesh. The author analyses the influence of the models of judicial review and parliament-judiciary relations over the internal proceedings jurisprudence of the three jurisdictions. The author argues that the Indian and Bangladeshi judiciaries' understandings of the internal proceedings doctrine are conditioned by their self-aggrandised posture of guardianship over the constitution—causing them to occasionally be in confrontation with the legislative and political branches. Highlighting the cons of such an approach, the author argues that the United Kingdom's dialogic model of judicial review provides for a rather congenial basis for principled judicial consideration of the internal proceedings doctrine.

In ***Law Clerks and Access to Judges: A Comparative Reflection on the Recruitment Process of Law Clerks in India***, *Anurag Bhaskar*, highlights the need for a transparent, accessible and inclusive recruitment

process in the institution of clerkship. The author undertakes a study of the law clerk recruitment processes prevalent across various jurisdictions—Australia, Canada, South Africa, the United Kingdom and the United States, to critically analyse the current recruitment process of law clerks in India. Taking lessons from the best practices across the globe, the author proposes a new recruitment policy for law clerks in India.

In ***Implied Limitation on the Power of Amendment: A Comparative Study of its Invocation in India, Colombia and Benin***, *Siddharth Sijoria* undertakes a comparative study of the evolution of the doctrine of implied limitation on constitutional amendment power in the jurisdictions of India, Colombia and Benin. Through the course of the article, the author highlights the constitutional basis for the doctrine and counters the criticism that deems the invocation of the doctrine a facet of judicial overreach. The author argues that the doctrine acts as a check on the misuse of power and is an essential tool to tackle instances of abusive constitutionalism and shield democracies against autocratic tendencies that may otherwise be displayed by powerful incumbents.

In ***The Inextricable Linkage Between Caste and Patriarchy: Inequality in Granting Caste Certificates to SC/ST Children***, *Srijan Somal and Kratika Indurkhya,* examining the influence of patriarchy on policies surrounding the caste system in India, highlight the lack of non-discriminatory policies on inheritance of caste status for children born out of inter-caste marriages in several states. The authors analyse the tests applied by courts for the determination of caste status of such children in light of the right to equality, and argue that such tests have been largely inapt, inconsistent and go against the ethos of the Constitution. The authors recommend changes to the present policies, to make the existing framework inclusive and functional.

In ***Readjustment of the Commons: Evaluating Claims of Southern Resistance***, *Shreenath A. Khemka and Aniket Pandey* critically analyse the resistance displayed by southern states to readjustment of the seats in the Indian Parliament as per population in light of the differential rise in population across southern and northern states. The authors argue that such claims made by the southern states are non-justiciable, citing the

incongruity of the claims with the bicameral archetype of Parliament and absence of numerical exactitude.

Finally, in ***Book Review: Why Religious Freedom Matters For Democracy: Comparative Reflections From Britain and France for a Democratic 'Vivre Ensemble' by Myriam Hunter-Henin****, Aditya Rawat*, critically analyses Hunter-Henin's "*Democratic Model*" aimed at alleviating tensions between religion and State. The author provides for a unique take on the book, by applying the *Democratic Model* to the Indian constitutional law discourse.

ACKNOWLEDGEMENT

The editorial board of CALJ ("**Board**") has had to continue functioning off-campus, owing to the onset of the second wave of COVID-19 in India. This experience posed a unique set of challenges, that the board would have not been able to sail through without the support of our Hon'ble Vice Chancellor, Prof. (Dr.) Poonam Pradhan Saxena. The guidance and support provided by our Registrar, Mrs. Neha Giri, our Director, Prof. (Dr.) I.P. Massey and faculty advisor Ms. Vini Singh were also unparalleled.

The Board owes its gratitude to the IT Department of our University, for their consistent efforts which have ensured that the journal is equipped with the best of resources at all times. The Board also extends its gratitude to the Students Section of the University and Mr. Piyush Kumar Dave. Their valuable efforts have ensured the smooth functioning of our centre, the Centre for Comparative Constitutional Law and Administrative Law ("**CCAL**").

I thank everybody in the editorial team for the immense effort they have put in to enable the timely publication of this issue. Members of the Board—Ayush Mehta, Prakhar Raghuvanshi, Piyush Sharma, Eeshan Krishnatria, Raajash Kulmi, Rashi Jeph, Aditya Maheshwari, Falguni Sharma, Garima Chauhan, Karunakar, Kirti Harit, Maitreyi Singh, Akshay Tiwari, Ayush Mangal, Atharva Chandra, Himanshi Yadav, Palak Jhalani, Rachana R. Rammohan, Revati Sohoni and Sharia Shoaib, have all been integral to this endeavour. I thank them for their consistent initiative, enthusiasm and dedication.

I would also like to take this opportunity to thank the authors for having taken out time to contribute to this issue and enriching the discourse and literature on their respective themes. I hereby extend my heartfelt gratitude to them for their patience and cooperation throughout the editorial process, that ensured timely publication of this issue.

Working on this issue with the Board has been an incredible experience. Over the last four months, alongside ensuring we are on track with our publication schedule for this issue, we, as CCAL hosted two guest lectures with eminent speakers—Prof. (Dr.) Bittu Kaveri Rajaraman on the topic "*LGBTQIA+ Rights and Constitutional Values*" and Prof. (Dr.) Shubhankar Dam on the topic "*Commissions of Untruth: The Politics of India's Ad-Hoc Judicial Inquiries*" that saw enthusiastic participation from students across various law schools in India. CCAL has also endeavoured to meaningfully contribute to the constitutional law discourse, with the weekly publication of blog posts on contemporary constitutional law and administrative law topics on our official website, under the name of "*Pith & Substance: The CCAL Blog*". We have also redesigned our website to ensure the best user experience for our readers.

We, as a Board, hope that this issue proves to be a valuable resource for our readers and helps in fostering informed discourse on the subjects of constitutional law and administrative law. We reiterate that it is the feedback of our readers, which is held in the highest regard. Therefore, should you have any queries or suggestions for us, write to us at **editorcalq@gmail[dot]com**.

Sandhya Swaminathan
Editor-in-Chief

THE CONTESTATION BETWEEN RIGHT TO BE FORGOTTEN AND FREEDOM OF EXPRESSION: CONSTITUTIONAL SILENCES AND MISSED OPPORTUNITIES

DR. SHRUTI BEDI[1]

The Indian Constitution has many silences and unfilled gaps, despite its voluptuousness. Amongst these silences is the lack of any clear guideline in matters of conflict between two different fundamental rights under Part III of the Constitution. Balancing privacy related and freedom of expression related interests has always been difficult and the need for judiciary's dexterity in this matter has acquired more prominence after the issue of the right to be forgotten (RTBF) was catapulted internationally by the decision of the Court of Justice of the European Union. Since the RTBF discussion is a part of the broader discussion on balancing different rights, the piece examines the conflict between privacy and freedom of expression, by delving into the existing tension as debated under the Indian law with some lessons from other countries. It addresses various questions raised in the process and argues that RTBF can coexist with freedom of expression.

INTRODUCTION

The Indian Constitution is known for its remarkable workmanship but not for its brevity.[2] This lengthy Constitution has many silences and unfilled

* Cite it as: Bedi, *The Contestation Between Right to Be Forgotten and Freedom of Expression: Constitutional Silences and Missed Opportunities*, 6(1) COMP. CONST. L. & ADMIN. L.J. 1 (2021).

[1] Dr. Shruti Bedi is a Professor of Law at University Institute of Legal Studies (UILS), Panjab University (PU), Chandigarh, India. She is also the Co-ordinator at the Dept. of Law, USOL, PU and the Director at the Centre for Constitution & Public Policy, UILS, PU. She has authored two books: *Terrorism: Our World and Our Laws* (2009) and *Indian Counter Terrorism Law* (2016); and co-edited four books: *Judicial Review: Process, Powers and Problems* (Cambridge University Press, 2020); *Taking Bail Seriously: State of Bail Jurisprudence in India* (Lexis Nexis, 2020); *Law and Media* (2019) and *Electoral System: Democracy, Laws and Issues* (2019).

** I have benefitted from the discussion and comments during the webinar on Challenges to Protection of Fundamental Rights, organised by Centre for Constitution & Public Policy, UILS, PU in June 2020, where I initially presented the concept of the right to be forgotten. I also thank the Editorial Board, CALJ for their helpful comments on previous drafts.

[2] INDIA CONST. The Indian Constitution is the longest written constitution of a sovereign country with 449 articles, 25 parts and 12 schedules.

gaps. Undoubtedly, its provisions are saturated with meaning, but even then, they do not provide for every prospective situation. It is said that sometimes it is the silences of a constitution that speak more tellingly than the provisions.[3] These silences allow the constitution to adapt itself to the desires and requirements of the people of this nation.

Amongst these silences is the lack of any clear guideline in matters of conflict between two different fundamental rights under Part III of the Constitution. Article 19(1)(a) guarantees freedom of speech and expression to its citizens which includes the right to express oneself through the online medium. In today's digital world, the world wide web is known for its ability to not forget any information. This in turn raises one of the gravest concerns regarding the right to privacy—the right to be forgotten ("**RTBF**") from the internet. RTBF has recently emerged as a recognised right under various jurisdictions prompted by the European Union jurisprudence.[4] The Indian courts have also received petitions from its citizens for their RTBF.[5] However, allowing people to remove links to information pertaining to them from the search engines is also said to

[3] The Supreme Court in the case of Anuradha Bhasin v. Union of India, (2020) SCC OnLine SC 25, dealt with the matter of freedom of expression through the online medium. In ¶ 163(B), Justice N.V. Ramana held that the freedom of speech and expression and the freedom to practice any profession or carry on any trade, business or occupation over the medium of internet enjoys constitutional protection under Article 19(1)(a) and 19(1)(g). *See also* Shruti Bedi & Sebastian Lafrance, *The Justice in Judicial Activism: Jurisprudence of Rights and Freedoms in India and Canada*, *in* THE SUPREME COURT AND THE CONSTITUTION: AN INDIAN DISCOURSE 63–64 (Salman Khurshid et al. eds., Wolters Kluwer India Pvt. Ltd. 2020).

[4] *See* Case C-131/12, Google Spain SL, Google Inc v. Agencia Española de Protección de Datos, Mario Costeja González, [2014] Q.B. 1022 [hereinafter *Google Spain Case*]. The author further discusses the various jurisdictions that have accepted RTBF during the course of the article.

[5] Dharamraj Dave v. State of Gujarat, (2017) SCC OnLine Guj 2493; Sri Vasunathan v. The Registrar General, (2017) SCC OnLine Kar 424; Subodh Gupta v. Herdsceneand, (2019) SCC OnLine Del 11209; X v. Y, (2021) SCC OnLine Del 4193.

violate freedom of speech and expression.[6] Consequently, this contestation between RTBF and freedom of expression needs to be resolved.

The Indian Supreme Court has never really been proactive in resolving such conflicts between two fundamental rights.[7] Balancing privacy related and freedom of expression related interests has always been difficult. The need for judiciary's dexterity has gained even more prominence after the issue of RTBF was catapulted internationally by the decision of the Court of Justice of the European Union ("**CJEU**").[8] This article explores the scope of RTBF under different jurisdictions and analyses its implications for Indian jurisprudence. Despite the unprecedented nature of the *Google Spain SL*, *Google Inc v. Agencia Española de Protección de Datos*, *Mario Costeja González*,[9] CJEU failed to provide any substantial guidance on the practical implementation of the right. Since the RTBF discussion is a part of the broader discussion on balancing different rights, this piece examines the conflict between privacy and freedom of expression, by delving into the existing tension as debated under the Indian law with some lessons from other countries. It addresses various questions raised in the process and argues that RTBF can coexist with freedom of expression.

The first part of the article discusses the aspect of constitutional silences present in the Indian Constitution in the context of privacy, particularly data privacy. The second part traces the developing jurisprudence in various jurisdictions including India on RTBF. The third part explores the conflict between freedom of expression on the one hand and privacy and RTBF on the other. The piece dissects the Indian decisions as missed opportunities to fill in the constitutional silences on this contestation and offers suggestions to balance the two rights.

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[6] Freedom of information includes the right of the public to be informed, which is assured through online engines like Google sites. *See Anuradha Bhasin*, (2020) SCC OnLine SC 25. *See also* WOLFGANG BENEDEK & MATTHIAS C. KETTEMANN, FREEDOM OF EXPRESSION AND THE INTERNET, at 27–28 (Council of Europe 2013).

[7] Raghav Kohli, *The Sound of Constitutional Silences: Interpretive Holism and Free Speech under Article 19 of the Constitution,* XX STATUTE L. REV. 1, 2 (2020).

[8] *Google Spain Case*, [2014] Q.B. 1022.

[9] *Id.*

CONSTITUTIONAL SILENCES IN THE CONTEXT OF RIGHT TO PRIVACY

The onus to decipher and construe the silences of the Indian Constitution falls upon our sagacious judiciary, the final interpreter. In the seventy-one years of the Indian Constitution, many judgments have been delivered which carry the hallmark of being game changers. The nine-judge unanimous decision of the Apex Court on the right to privacy has the potential to change the course of Indian constitutional jurisprudence.[10] The centre had argued in the *privacy case*[11] that the right to privacy was not only expressly missing from the list of fundamental rights but also that the framers had opted to consciously discard it. Chelameshwar J. refuted this argument by stressing the significance of silences in the Constitution.[12] He remarked:

> "*A close scrutiny of the debates reveals that the Assembly only considered whether there should be an express provision guaranteeing the right to privacy in the limited context of 'searches' and 'secrecy of correspondence'. Dimensions of the right to privacy are much larger and were not fully examined.*"[13]

The silences in a constitution are not simply empty spaces. They contain strategic content with import vital to the existence of a constitution. Constitutional interpretation, according to Laurence Tribe, is impacted by "*door-closing silences*" and "*door-opening silences*".[14] A fascinating example of door-opening silences is the development of privacy jurisprudence under American Constitutional Law. The Constitution of America does not expressly mention "*right to privacy*", however, the courts have interpreted the right under various amendments to the Constitution and have since

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[10] Faizan Mustafa, *The Silences of the Constitution*, THE NEW INDIAN EXPRESS (Sept. 6, 2017), https://www.newindianexpress.com/opinions/2017/sep/06/the-silences-of-the-constitution-1653111-1.html.

[11] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 [hereinafter *Privacy case*].

[12] *Id.* ¶ 344–346.

[13] *Id.* ¶ 350.

[14] Laurence H. Tribe, *Soundings and Silences*, 115 MICH. L. REV. 26, 34–46 (2016); F. S. Nariman, *The Silences in our Constitutional Law*, 2 SCC (JOUR) 15 (2006).

extended its scope.[15] The courts view such silences in the constitution as "*invitations to fill in gaps*".[16] The examples of such judicial activism are instances of silences allowing doors to open. Goldberg, J. in the *Griswold case*[17] held in his concurring opinion,

> "*The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which is protected from abridgement by the Government though not specifically mentioned in the Constitution.*"[18]

The provisions of a constitution, especially the fundamental rights, have no determinate content. The content is filled in through judicial interpretation over a period of time. Constitutional interpretation has a special character to it. M. Hidayatullah, J. observed, "*More freedom exists in the interpretation of the Constitution than in the interpretation of ordinary laws. … in the domain of constitutional law, there is, again and again, novelty of situation and approach.*"[19]

In the Indian context, the definition of "*State*" under Article 12 has been interpreted expansively over a period of time.[20] The meaning and scope of equality under Article 14 has been expanded to exclude any arbitrary act.[21] Under Article 21, the right to life and personal liberty has been given a wide connotation to include new fundamental rights.[22] One of the greatest

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[15] *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Katz v. United States, 389 U.S. 347 (1967); Roe v. Wade, 410 U.S. 113 (1973); Obergefell v. Hodges, 576 U.S. 644 (2015).
[16] V. Sudhish Pai, *Construing the Sounds of the Constitution's Speech: Meanings beyond Text*, 2(1) CMR U. J. CON. L. AFF. 9, 17 (2020).
[17] *Griswold*, 381 U.S. 479 (1965).
[18] *Id.* ¶ 35.
[19] Ashok Tanwar v. State of H.P., (2005) 2 SCC 104.
[20] Ajay Hasia v. Khalid Mujib, (1981) 1 SCC 722; Chander Mohan Khanna v. NCERT, AIR 1992 SC 76; Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111; Rajasthan State Electricity Board v. Mohan Lal, AIR 1967 SC 1857.
[21] *See* E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3.
[22] The expansive interpretation given to art. 21 has been the initiative of the Indian Supreme Court in cases like, Maneka Gandhi v. Union of India, AIR 1978 SC 597; Francis Coralie v. Union Territory of Delhi, AIR 1981 SC 746; Bandhua Mukti Morcha v. Union

moments of judicial interpretation filling in constitutional silences under the Indian Constitution is the *Kesavananda Bharati*[23] decision which enunciated the doctrine of basic structure. The Apex Court read implied limitations into the amending power, wherein the Parliament cannot amend or abrogate the basic structure of the Constitution. Chelameshwar J. in the *Privacy* judgment spoke of the *Kesavananda* decision as to the "*most outstanding and brilliant exposition of the "dark matter" … of our Constitution.*"[24] Speaking of the constitutional silences, he stated, "*The implications arising from the scheme of the Constitution are "Constitution's dark matter" and are as important as the express stipulations in its text.*"[25]

"*Construing the sounds of the Constitution's speech and giving meaning to the silences of the Constitution*", according to Sudhish Pai, "*is an act of judicial wisdom and statesmanship*" which requires both activism and restraint.[26] Chelameshwar J. states that the Apex Court has progressively been adopting the "*living constitutionalist approach*" as he believes that it "*takes into account a variety of factors as aids to interpret the text*" and the consequent "*lack of rigidity allows for an enduring constitution.*"[27]

DATA PROTECTION UNDER THE PRIVACY ECOSYSTEM

Privacy as a concept encompasses many different areas of law including data protection. The meaning and scope of the right to privacy embodies a different narrative for different countries.[28] Narratives concerning digital privacy and data protection have come to acquire immense importance on

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of India, AIR 1984 SC 802; Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180; Sunil Batra v. Delhi Administration, (1980) 3 SCC 488; D.K. Basu v. State of West Bengal, (1997) 1 SCC 416; Vishaka v. State of Rajasthan, (1997) 6 SCC 241; Navtej Singh Johar v. Union of India, (2018) 1 SCC 791; *Privacy Case*, (2017) 10 SCC 1; Common Cause v. Union of India, (2018) 9 SCC 382; Shakti Vahini v. Union of India, (2018) 7 SCC 192.

[23] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

[24] *Privacy Case*, (2017) 10 SCC 1, ¶ 345.

[25] *Id.*

[26] Pai, *supra* note 16, at 29.

[27] *Privacy case*, (2017) 10 SCC 1, ¶ 344.

[28] Express Web Desk, *Right to privacy: How it is protected in other countries*, THE INDIAN EXPRESS (Aug. 24, 2017), https://indianexpress.com/article/india/right-to-privacy-how-it-is-protected-in-other-countries/.

account of changing technological and social contexts. The currently evolving "*privacy ecosystem*" is an expression of a "*combination of citizens' rights and cultural preferences; corporate policies (both formally stated and informally practiced); state, national, regional, and international regulations and laws…*"[29]

The internet brings with it numerous threats and challenges that impact every person in the community. Legal systems across the world are trying to respond to these "*new virtual realities*".[30] The world has gone online during the pandemic and consequently, the current scenario is adding fuel to the growing ambiguities. Countries across the world are hastening to enact data protection laws as they understand how modern technology can erode our privacy. The European Union General Data Protection Regulation ("**GDPR**") was a breakthrough in data privacy and is considered the gold standard among data protection regulations.[31] Currently, as of January 2021, there are one hundred and thirty three jurisdictions that have enacted data privacy laws.[32] The United Kingdom ("**UK**") is presently regulated by the Data Protection Act 2018 which incorporates the European Union ("**EU**") GDPR. However, after the exit of the UK from the EU on March, 2019, the UK Government has transposed the General Data Protection Regulation (Regulation (EU) 2016/679) into UK national law, thereby creating the UK GDPR.[33]

The United States of America ("**U.S.**") has no single data privacy legislation but follows a sectoral approach, relying on sector-specific and state laws, for instance, the California Consumer Privacy Act.[34] As far as India is concerned there is no specific legislation on privacy and data protection in existence currently. There are several different laws like the

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[29] Jennifer Holt & Steven Malčić, *The Privacy Ecosystem: Regulating Digital Identity in the United States and European Union*, 5 J. INFO. POL'Y 155, 158 (2015).
[30] José Manuel Martínez & Juan Manuel Mecinas, *Old Wine in a New Bottle? Right of Publicity and Right to be Forgotten in the Internet Era*, 8 J. INFO. POL'Y 374, 375 (2018).
[31] *GDPR: A ray of hope in dark times*, PIWIK (Jun. 11, 2021), https://piwik.pro/privacy-laws-around-globe/.
[32] *Catch up on Privacy around the World on Data Privacy Day 2021!*, MORRISON FOERSTER (Jan. 28, 2021), https://www.mofo.com/resources/insights/210127-data-privacy-day.html.
[33] *Data Protection Laws of the World*, DLA PIPER (Jan. 27, 2021), https://www.dlapiperdata protection.com/index.html?t=law&c=GB&c2=.
[34] *A Practical Guide to Data Privacy Laws by Country [2021]*, SIGHT SOFTWARE (Mar. 5, 2021), https://i-sight.com/resources/a-practical-guide-to-data-privacy-laws-by-country/U.K.

Information Technology Act, 2000 and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules (Privacy Rules 2011) which contain specific provisions to protect personal data and other data privacy requirements. The one comprehensive piece of legislation for data privacy is the Personal Data Protection Bill, 2019 which is yet to be passed in Parliament.[35]

RIGHT TO BE FORGOTTEN: THERE IS JUST NO ESCAPING IT!

An individual's claim to have certain data erased so as to make it inaccessible to the public is known as the RTBF.[36] This right stems from the autonomy of an individual who acquires the right over his personal information on a certain time scale.[37] The ideation of RTBF emerged primarily in Europe more than 20 years ago, "*as a right to rectify, erase or block data*" when it is "*incomplete or inaccurate*", as expressed by Article 12 of the Directive 95/46/EC of the European Parliament and of the Council.[38] RTBF is an important element of the new EU GDPR which bestows the right on consumers to request for deletion or removal of personal data held

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[35] Akanksha Prakash, *What is the purpose of Data Protection Law in India?*, BUSINESS TODAY (July 11, 2021), https://www.businesstoday.in/opinion/columns/story/what-is-the-purpose-of-data-protection-law-in-india-300925-2021-07-09. The Joint Committee of Parliament (JCP) which is deliberating on the Personal Data Protection Bill, 2019, has been given its fifth extension to submit its report. It is expected to submit the report in the first week of the Winter Session, which usually commences around the last week of November. *See JCP gets time to present its report on personal data protection bill*, MINT (July 23, 2021), https://www.livemint.com/news/india/jpc-to-seek-time-to-present-report-on-personal-data-protection-bill-11627017273374.html.

[36] *Data Protection Under GDPR*, YOUR EUROPE (Mar. 26, 2021), https://europa.eu/youreurope/business/dealing-with-customers/data-protection/data-protection-gdpr/index_en.htm.

[37] Afifa Sherin, *Right to be Forgotten: An Emerging Trend in Constitutional Law*, INDIAN REV. ADVANCED LEGAL RES. BLOG (Apr. 19, 2021), https://www.iralr.in/post/right-to-be-forgotten-a-emerging-trend-in-constitutional-law.

[38] Camila Taliberti & Paulo Brancher, *The Right to Not Forget Freedom of Speech*, AZEVEDO SETTE (Aug. 2, 2017), http://www.azevedosette.com.br/news/en/the-right-to-not-forget-freedom-of-speech/4582.

by the company or controller.[39] The GDPR Rules also provide that search engines like Google have to delete references to personal data that may be thrown up publicly in the search results.[40] Retaining privacy on the internet under the notion of RTBF is gaining ground in different nations.[41] RTBF, known as the *Right to Erasure* in the U.S., is now recognised under a recently enacted legislation in California.[42]

The rule of data erasure is that whoever is using the data has to volunteer permission from the owner of the data.[43] Consequently, the data has to be erased on withdrawal of consent or when the data controller has no legal right to process the data.[44] This right originated under the French Jurisprudence as the *Right to Oblivion* where social integration was made easy for offenders who had served their sentence.[45] The European Union Data Protection Directive 95/46/EC, 1995 initially introduced internet protection under Article 12.[46] The European Commission in 2012 under the draft European Data Protection Regulation superseded the directive and included protection of RTBF under Article 17.[47]

A. THE EUROPEAN PERSPECTIVE

The right to be forgotten gained prominence after the decision of the CJEU in *Google Spain SL, Google Inc v. Agencia Española de Protección de Datos,*

[39] Commission Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Council Directive 95/46/EC, 2016 O.J. (L 119) 17 [hereinafter *GDPR*].

[40] *Id.* art. 17 of the GDPR mandates that on an application by a concerned person, the company/controller has to remove the data without undue delay.

[41] Jeff Peters, *Right to be Forgotten*, VARONIS BLOG (Jun. 17, 2020), https://www.varonis.com/blog/right-to-be-forgotten/.

[42] California recently passed RTBF in the California Consumer Privacy Act. North Carolina is working on RTBF laws, and there are early efforts to bring the issue before the US Congress.

[43] Afifa, *supra* note 37.

[44] *Id.*

[45] *Id.*

[46] Alessandro Mantelero, *The EU Proposal for General Data Protection Regulation and the roots of the 'right to be forgotten'*, 29(3) COMP. L. & SEC. REV. 233 (2013).

[47] *Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*, COM (2012) 11 final (Jan. 25, 2012).

Mario Costeja González[48] in May 2014. A Spanish citizen, Mr. Costeja used the Spanish data protection legislation as the basis for initiating proceedings against Google asking it to delete from its search engine all information pertaining to his bankruptcy from ten years earlier, available to the public.[49] Google controverted this, stating that "*i) it was not subject to Spanish law, ii) it was not a "controller" of the processing, and iii) that making it comply would have a chilling effect on fundamental rights*."[50] The inclusion of information on the list of results of a search engine plays a significant role in the dissemination of information. Consequently, the deletion of information not only impacts the freedom of expression but also the right to information.

The Court held Google subject to Spanish law and that it was a controller of its search engine results.[51] The Court also critically enumerated the data protection responsibilities of the search engine. The Court categorically stated that there was no chilling effect on fundamental rights and that Google must meet "*the requirements of Directive 95/96*" as its activity is "*liable to affect significantly, and additionally compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data*."[52]

Furthermore, it held that since the search results on the person make "*access to that information appreciably easier*" and "*may play a decisive role in the dissemination of that information, it is liable to constitute a more significant interference with the data subject's fundamental right to privacy than the publication on the web*

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[48] *Google Spain case*, [2014] Q.B. 1022. *See also* Ashish S. Soni, *Leave me Alone! Europe's "Right to be Forgotten"*, 41(2) LITIGATION 15-17 (2015); David Lindsay, *The 'Right to be Forgotten' by Search Engines under Data Privacy Law: A Legal Analysis of the Costeja Ruling*, 6(2) J. MEDIA L. 159–179 (2014).

[49] *See* David Lindsay, *The 'Right to be Forgotten' by Search Engines under Data Privacy Law: A Legal Analysis of the Costeja Ruling*, 6(2) J. MEDIA L. 159–179 (2014).

[50] David Erdos, *Mind the Gap – The CJEU Google Spain Judgment Profoundly Challenges the Current Realities of Freedom of Expression and Information Online*, UK CONST. L. ASS'N BLOG (May 15, 2014), https://ukconstitutionallaw.org/2014/05/15/david-erdos-mind-the-gap-the-cjeu-google-spain-judgment-profoundly-challenges-the-current-realities-of-freedom-of-expression-and-information-online/.

[51] *Google Spain Case*, [2014] Q.B. 1022, ¶ 33.

[52] *Id.* ¶ 38.

page."[53] Surprisingly, despite the in-depth analysis, the Court did not speak of freedom of expression and there was no attempt to balance the right against the provisions of data protection. Both Article 10 of the European Convention on Human Rights and Article 11 of the EU Fundamental Rights Charter clearly enumerate the right to freedom of expression. The fallout of the case is that henceforth search engines will be considered as data controllers with the obligation to "*de-index information that is inappropriate, excessive, not relevant, or no longer relevant, when a data subject to whom such data refer requests it.*"[54]

B. THE BRAZILIAN PERSPECTIVE

Interestingly, this *Google Spain* decision has impacted every country dealing with the dilemma of RTBF, and today we think of RTBF in terms of the CJEU decision. However, this approach which is a fallout of the specific boundaries of the EU legal framework is one amongst many. Consequently, it may not necessarily be the only perspective or even the best in the given situation. Brazil, for example, does not adopt the same stance and the Brazilian conception of RTBF is entirely different. Brazil has long recognised RTBF as a right not to be remembered, available to individuals *vis-à-vis* regular media institutions.[55] In the *Jurandir v. Globo*[56] decision, where a man was wrongly sentenced to jail time, the Brazilian Supreme Court of Justice ("**STJ**") found that the right to information and freedom of press is limited by protections available to an individual.[57] The STJ developed RTBF based on Article 5.X of the Brazilian Constitution[58]

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[53] *Id.* ¶ 87.

[54] Luca Belli, *The Right to be Forgotten is not Compatible with the Brazilian Constitution. Or is it?*, FUTURE OF PRIVACY FORUM BLOG (Mar. 23, 2021), https://fpf.org/blog/the-right-to-be-forgotten-is-not-compatible-with-the-brazilian-constitution-or-is-it/.

[55] In Brazilian jurisprudence the RTBF has been conceived as a general right to effectively limit the publication of certain information. The man included in the Globo reportage had been discharged many years before, hence he had a right to be "let alone," and not to be remembered for something he had not even committed.

[56] RJ, Crim. No. 2012/0144910-7, Relator: Jorgi Mussi, 10.10.2013, Diario Da Justicia [DJ], 04.06.2021, (Braz.) [hereinafter *Aida Curi Case*].

[57] *Case Analysis*, GLOBAL FREEDOM OF EXPRESSION COLUMBIA UNIVERSITY (May 28, 2013), https://globalfreedomofexpression.columbia.edu/cases/jurandir-v-globo/.

[58] CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 5 (Braz.). All persons are equal before the law, without any distinction whatsoever. Brazilians and foreigners residing in

which incorporates two aspects of privacy, the fundamental right to intimacy and preservation of image.

Despite the use of the same words of RTBF, the STJ and CJEU have different conceptions of the right. Although both limit access to a specific type of personal information, there exist basic differences between the two. STJ's interpretation of RTBF is based on the protection of privacy, honour, and image[59] whereas CJEU bases it upon the fundamental right to data protection which is recognised as a separate fundamental right in the EU. Consequently, the Brazilian goal is to regulate the deletion of discrediting facts so as to protect the private life of an individual. It is not to regulate the processing of personal data by the controller. Most significantly, there was no legal framework on data protection in existence at that time.[60]

In February 2021, the Brazilian Federal Supreme Court ("**STF**") in the *Aida Curi case*[61] held that:

> "*The idea of a right to be forgotten is incompatible with the Constitution, thus understood as the power to prevent, due to the passage of time, the disclosure of facts or data that are true and lawfully obtained and published in analogue or digital media…[A]ny excesses or abuses in the exercise of freedom of expression and information must be analysed on a case-by-case basis, based on constitutional parameters—especially those relating to the protection of honour, image, privacy*

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the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:
X – the privacy, private life, honour and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured.

[59] This interpretation is based on art. 5.X of the Brazilian Constitution as followed by the STJ on the issue of RTBF.

[60] At the time of the decision there was no right to data protection in Brazil. It is in the process of now being recognised since 2020. *See* Belli, *supra* note 54.

[61] *Aida Curi Case*, *supra* note 56. This was a lawsuit involving the TV show "*Linha Directa Justica*" broadcasted by Rede Globo in 2004, which covered the tragic death of a young woman called Aída Curi. The plaintiffs (the victim's brothers) had claimed compensation for moral damages, arguing that they have relived the pain from the past, and for material damage to the image, due to the commercial exploitation of Aida's death, without the authorization of the living relatives. The plaintiffs had argued that the program's transmission violated the right to be forgotten.

and personality in general—and the explicit and specific legal provisions existing in the criminal and civil spheres."[62]

The STF based the decision of incompatibility with the Federal Constitution on the peculiarity of the Brazilian version of the RTBF.[63] According to the Court, allowing RTBF to prohibit the publication of lawfully obtained true facts is incompatible with the Constitution.[64] However, it still leaves the ground open for examination on a case-to-case basis, reflecting constitutional and other legal provisions.

C. THE U.S. PERSPECTIVE

RTBF in the U.S. is primarily perceived as a threat to free speech. The "*right to know*" is at the core of the right to freedom of speech and expression. The right to freedom of speech and expression can only be properly exercised when a person has clear access to information.[65] Consequently, if search engines are forced to remove links to legitimate content that is already in the public domain, it could lead to online censorship.[66] Free speech is one of the most coveted rights in the US and anything which has the possibility of being used as a tool of censorship is frowned upon.[67] The practical application of RTBF would amount to censorship and runs contrary to U.S. First Amendment rights.[68] Lawmakers are increasingly

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[62] Belli, *supra* note 54.

[63] *Aida Curi Case*, *supra* note 56.

[64] *Brazil: Federal Supreme Court Decides Right to Be Forgotten Is Not Supported by Constitution*, LIBRARY OF CONGRESS (Mar. 15, 2021), https://www.loc.gov/item/global-legal-monitor/2021-03-15/brazil-federal-supreme-court-decides-right-to-be-forgotten-is-not-supported-by-constitution/.

[65] Devika Aggarwal, *Right to be Forgotten: A Threat to Freedom of Speech and Expression?* (May 15, 2015), https://spicyip.com/2015/05/right-to-be-forgotten-a-threat-to-freedom-of-speech-expression.html.

[66] Edward Lee, *The Right to be Forgotten v. Free Speech*, 12(1) I/S: A J. L. & POL'Y INFO. SOC. 85, 91 (2015).

[67] Ryan Brooks, *Right to be Forgotten: EU Laws and US Concerns*, NETWRIX BLOG (Dec. 12, 2019), https://blog.netwrix.com/2019/12/12/the-right-to-be-forgotten-eu-laws-and-us-concerns/. *See also* Leticia Bode & Meg Leta Jones, *Ready to forget: American attitudes toward the right to be forgotten*, 33(2) THE INFO. SOC. 76–85 (2017).

[68] *See generally* Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 458 (1980). The limits of law in protecting privacy stem from the law's commitment to interests that sometimes require losses of privacy, such as freedom of expression, interests in research, and the needs of law enforcement.

finding that public opinion does not favour RTBF.[69] Additionally, even though free speech is given priority over everything being fundamental to the American Constitution, RTBF throws a bigger challenge to free enterprise. RTBF threatens the business models which rely on using and holding vast extents of personal data.[70]

D. THE INDIAN JURISPRUDENCE

Due to the absence of RTBF being grounded in any statute, the right has evolved sporadically in India. The lack of any specific provision on RTBF in India's first legal content on the protection of privacy [The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011] means that the judicial attention has been *ad hoc*.[71] The judiciary has occasionally upheld requests for the removal of online content but has been unable to develop any clear criteria for it.

The first case, *Dharamraj Dave v. State of Gujarat*[72] on the issue of RTBF arose before the Gujarat High Court wherein the Court did not accede to the plea of content removal. A petition had been filed for a permanent restraint on the free public exhibition of a judgment in a matter relating to the petitioner.[73] The petitioner had been accused of a number of offences including culpable homicide amounting to murder but had been eventually acquitted of the charges by the court.[74] He, therefore, contended that despite the fact that the judgment was classified as "*unreportable*", it was being published by an online repository of judgments and the same was

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[69] Samuel W. Royston, *The Right to be Forgotten: Comparing U.S. and European Approaches*, 48(2) ST. MARY'S L.J. 253, 273 (2016).
[70] Paul Bernal, *Between a European Rock and an American Hard Place?*, UK CONST. L. ASS'N BLOG (Feb. 27, 2012), https://ukconstitutionallaw.org/2012/02/27/paul-bernal-between-a-european-rock-and-an-american-hard-place/.
[71] Karthik Rai, *Aarogya Setu and the Right to be Forgotten*, INDIAN CONST. L. & PHIL. BLOG (May 7, 2020), https://indconlawphil.wordpress.com/2020/05/07/coronavirus-and-the-constitution-xxiv-aarogya-setu-and-the-right-to-be-forgotten-guest-post/.
[72] (2017) SCC OnLine Guj 2019.
[73] *Id.* ¶ 3.
[74] *Id.*

also available on Google search.[75] The High Court dismissed the petition on the grounds, (i) the petitioner had failed to produce the relevant provisions of law or to show any violation of the constitutional right to life and liberty, and (ii) publication on a website does not amount to "*reporting*", as reporting is only covered by law reports.[76]

The first ground mentioned by the Court is relevant to the present discussion as it refers to the lack of any legislation on data protection. Consequently, the only recourse in such a situation is to rely on Article 21 of the Indian Constitution, the repository of unenumerated rights. RTBF stems from the broader right to privacy under Article 21. However, another problem that arises in such cases is that fundamental rights are available only against "*State*"[77] and their application to private parties remains under a cloud.

The second case was before the Karnataka High Court, *Sri Vasunathan v. The Registrar General*.[78] The Court ruled in favour of the petitioner in this case in a limited sense. The petitioner had requested the removal of his daughter's name from a judgment involving claims of marriage and forgery and this was accepted by the court.[79] Interestingly, the Court allowed the redaction of the name while making a vague mention of parallel initiatives by "*western countries*" which had upheld the right when "*sensitive*" cases concerning the "*modesty*" or "*reputation*" of people, especially women, were involved.[80] Even though the Court made a reference to the existing jurisprudence in other countries, it did not base it on the fundamental right to privacy, but on the concept of modesty and reputation of women.[81] Consequently, the result was an incoherent law, without the development of any clear jurisprudence on the subject.

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[75] *Id.* ¶ 4.
[76] *Id.* ¶ 7.
[77] INDIA CONST. art. 13, cl. 2. The State is prohibited from enacting any law violative of the fundamental rights. The fundamental rights can only be claimed against the State.
[78] 2017 SCC OnLine Kar 424.
[79] *Id.* ¶¶ 6, 8.
[80] *Id.* ¶ 9.
[81] Amber Sinha, *Right to be Forgotten: A Tale of Two Judgments*, THE CENTRE FOR INTERNET & SOC'Y (Apr. 7, 2017), https://cis-india.org/internet-governance/blog/right-to-be-forgotten-a-tale-of-two-judgments.

Thereafter, the Supreme Court recognised the right to privacy in the *Privacy case* where S.K. Kaul J. placed RTBF under Article 21. He was clearly of the view that individuals have a right to add and remove data from online sources. He stated, "*The right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the internet.*"[82] If a person wanted to remove his personal data from the virtual space, he should be able to, if the said information served no "*legitimate interest*", was "*incorrect*", or was not "*necessary*" or "*relevant*".[83] However, he conceded that the exercise of the right was subject to countervailing rights like free speech:

> "*Such a right cannot be exercised where the information/data is necessary, for exercising the right of freedom of expression and information, for compliance with legal obligations, for the performance of a task carried out in public interest, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims.*"[84]

Thereafter, the Delhi High Court in 2019 in *Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd.*[85] recognised RTBF as "*inherent*" in the right to privacy.[86] The matter pertained to the publication of two articles containing harassment allegations against the plaintiff during the #MeToo campaign.[87] The Court ordered the removal of the internet articles that would sully the plaintiff's reputation "*forever*".[88] In another case before the Delhi High Court, *Subodh Gupta v. Herdsceneand*[89] the plea was filed for delinking the search results regarding sexual harassment charges against the plaintiff on Instagram. Though the Court acceded to the request, it again missed the opportunity to balance rights and fill in the constitutional silences. Recently, the Delhi High Court reiterated the *Zulfiqar* decision in

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[82] *Privacy Case*, (2017) 10 SCC 1, ¶ 629.
[83] *Id.* ¶ 636.
[84] *Id.*
[85] (2019) SCC OnLine Del 8494.
[86] *Id.* ¶ 9.
[87] *Id.* ¶ 1.
[88] *Id.* ¶¶ 7–8.
[89] (2019) SCC OnLine Del 11209.

X v. Y and resultantly passed another opportunity to advance the Indian jurisprudence surrounding RTBF.[90] Though the courts in India have given recognition to RTBF as a part of privacy, the waters remain uncharted. The requests for content removal have been acceded to on a case-by-case basis without delving into pertinent questions, under what situations is RTBF available to an individual and whether it comes into conflict with any other right. Scholars allege that RTBF could result in violation of freedom of expression.[91]

Srikrishna Committee

Due to the absence of comprehensive legislation on data privacy, a committee presided by Justice B.N. Srikrishna was constituted to recommend a data protection regime in India. The report of the Committee titled "*A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians*"[92] clarified that a "*unilateral withdrawal of consent*" by the data principal could trigger the right to be forgotten. Relying on the opinion of the House of Commons, Justice Committee,[93] the Srikrishna Committee stated that the right to be forgotten "*provides a data principal the right against the disclosure of her data when the processing of her personal data has become unlawful or unwanted*."[94]

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[90] X v. Y, (2021) SCC OnLine Del 4193. While recognising RTBF and the plaintiff's entitlement "to protection from invasion of her privacy by strangers and anonymous callers" (¶ 22) the Court again chose to pass only a simple order of "*removal/pull down*" of the videos (¶ 32), based on the facts of the case.

[91] NEIL RICHARDS, INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE 91–92 (Oxford University Press 2015); The American freedom of speech, as reflected in the First Amendment, means that the Costeja judgment would not pass muster under U.S. law. The Costeja records were reported correctly by the newspaper; and constitutionally, the press has an almost absolute right to publish accurate, lawful information.

[92] A FREE AND FAIR DIGITAL ECONOMY: PROTECTING PRIVACY, EMPOWERING INDIANS COMMITTEE OF EXPERTS UNDER THE CHAIRMANSHIP OF JUSTICE B.N. SRIKRISHNA (2018) [hereinafter *Srikrishna Committee*]. *See also* Omkar Upadhyay, *Enumerating the Unenumerated: Recognising the 'Right to be Forgotten' in Indian Jurisprudence*, 9(2) NLIU L. REV. 462, 475–476 (2020).

[93] JUSTICE COMMITTEE, THE COMMITTEE'S OPINION ON THE EUROPEAN UNION DATA PROTECTION FRAMEWORK PROPOSALS, REPORT, 2012–13, HC Vol. 1, at 26 (UK).

[94] Srikrishna Committee, *supra* note 92, ¶ 76.

In cases of "*conflict of assessment as to whether the purpose of the disclosure has been served or whether it is no longer necessary*", the Committee was of the view that "*a balancing test that the interest in discontinuing the disclosure outweighs the interest in continuing with it, must be carried out*."[95] For giving due recognition to RTBF, the Committee advocated the balancing of the right to privacy with freedom of speech. It also advocated the consideration of practical issues like:

> "*In case of a direct or subsequent public disclosure of personal data, the spread of information may become very difficult to prevent; second, the restriction of disclosure immediately affects the right to free speech and expression. The purpose for a publication may often involve matters of public interest and whether the publication is 'necessary' may depend on the extent of such public interest.*"[96]

The Personal Data Protection Bill, 2019

The Personal Data Protection Bill, 2019, ("**PDP Bill**") which is yet to be passed by the Parliament incorporates the "*right to be forgotten*". Clause 20 of the Bill allows for any person to "*restrict or prevent the continuing disclosure of his personal data by a data fiduciary*" if the disclosure of data "*no longer serves the purpose*" for which it was collected, or if the original consent provided by the data principal has been withdrawn, or if the disclosure has been made contrary to the provisions of the PDP Bill or any other law in force.[97] The ambit and scope of RTBF under the PDP Bill will largely depend on the interpretation given by the adjudicators who get to allow or dismiss the requests for deletion of information.

The interpretation of the phrase "*no longer serves the purpose*" leaves room for ambiguity as Prashant Reddy states:

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[95] *Id.*

[96] *Id.*

[97] The Personal Data Protection Bill, No. 373, 17th Lok Sabha, 2019 (India). *See also* Sanskruti Yagnik, *Right to be Forgotten: A Case of Protecting Human Dignity and Informational Self Determination*, THE LEAFLET (Jun. 9, 2021), https://www.theleaflet.in/right-to-be-forgotten-a-case-of-protecting-human-dignity-and-informational-self-determination/#:~:text=Puttaswamy%20(Retd.)-,v.,the%20home%20and%20sexual%20orientation.

> "*How should an adjudicator decide whether information related to a person's criminal past is relevant 10 years or 20 years after the information was first published on the internet and indexed by search engines?*"[98]

Another question that arises is, whether the information will be de-indexed or deleted by the search engine company. The Bill does not clarify whether RTBF is limited to simple de-indexing of the concerned link from the search engine, or will it be fulfilled when the information is completely deleted from the source. In Europe, the courts ordered the search engines to de-index the relevant information and that too only for the European users.[99] This meant that the search result would be deleted from the index created by Google, but the original news story would remain untouched. Unfortunately, the PDP Bill does not attempt to clarify the Indian position on this aspect and leaves an unnecessary extent of discretion in the hands of the adjudicators. This could lead to misuse of power and unnecessary conflicts with search engines.

CONTESTATION BETWEEN RTBF AND FREEDOM OF EXPRESSION

To get the data erased, a request has to be made directly to the data controller. Google[100] and Facebook[101] have specific forms for this and on receipt of the application for erasure of data, the request is considered based on legal precedents. Any exceptions to RTBF pertain to public interest, freedom of speech and freedom of information. The controversy

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[98] Prashant Reddy T., *Personal Data Protection Bill: A 'Right to be Forgotten' – Giving Government the Power to Censor*, BLOOMBERG QUINT (Feb. 11, 2020), https://www.bloombergquint.com/opinion/personal-data-protection-bill-a-right-to-be-forgotten-giving-government-the-power-to-censor.

[99] Case C-507/17, Google LLC v. Commission nationale de l'informatique et des libertés, [2019] 9 WLUK 276. Herein, the CEJU held that RTBF and any corresponding delisting or de-indexing requests do not apply globally; *See also* Greg Sterling, *In a victory for speech, EU's top court sides with Google in right to be forgotten case,* SEARCH ENGINE LAND (Sept. 24, 2019), https://searchengineland.com/in-a-victory-for-speech-eus-top-court-sides-with-google-in-right-to-be-forgotten-case-322528.

[100] *EU Privacy Removal: Google Personal Information Removal Request Form*, GOOGLE, https://www.google.com/webmasters/tools/legal-removal-request?complaint_type=rtbf&visit_id=637202230061146146-20083139&rd=1.

[101] *Facebook Data Deletion Request Callback*, FACEBOOK, https://developers.facebook.com/docs/development/create-an-app/app-dashboard/data-deletion-callback/.

surrounding RTBF arises due to the conflict between an individual's right to privacy and the general right to freedom of speech and freedom of information.

De-indexing or delisting requests require the balancing of two rights, RTBF and freedom of expression. However, these rights are interpreted differently in different jurisdictions. While the EU allows restrictions on speech, like hate speech,[102] the U.S. law doesn't[103] and therefore there is no clear formula for encompassing RTBF as a corollary to the right to privacy. Brazil views RTBF as incompatible with the provisions of its constitution. In the *Google Spain case,* the CJEU attempted to balance the public's right to information with an individual's right to privacy through RTBF,[104] but failed to lay down any distinct jurisprudence. In resolving the conflict, the question is which right should be given more importance with respect to the other and who should be authorised to conduct the balancing act.

An analysis of the points of conflict between RTBF and freedom of expression, therefore, becomes necessary. Conflict can arise when public access to information has to be balanced with individual privacy rights.[105] In the *Google Spain case*, the Court accepted that no right takes precedence over the other and RTBF cannot exist without balancing other interests like freedom of expression.[106] The Court acknowledged that this could happen when the publication of the information is "*carried out solely for journalistic purposes*."[107] However, the Court held that in light of the "*fundamental rights under Articles 7 and 8 of the Charter*", the data subject could request the removal of information from inclusion in the list of results

[102] EU Human Rights Guidelines on Freedom of Expression Online and Offline, Council of the European Union (May 12, 2014). [hereinafter *EU Human Rights Guidelines*]. The right to freedom of expression includes freedom to seek and receive information.
[103] Freedom of speech and expression in the United States is stringently protected from government restrictions by the First Amendment to the United States Constitution. Also known as free speech, it entails free and public expression of opinions without censorship, interference and restraint by the government.
[104] Lee, *supra* note 66, at 92.
[105] *Google Spain Case*, [2014] Q.B. 1022.
[106] *Id.* ¶ 81.
[107] *Id.* ¶ 85.

overriding the "*interest of the general public in finding that information upon a search relating to the data subject's name.*"[108] Recognising the countervailing position, the Court further stated that if it appeared from "*the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having access to the information in question*", then RTBF would take a back-seat.[109] This alludes to a situation of well-known public figures like politicians who must accept more interference with their privacy as compared to other citizens.

Therefore, the CJEU's decision leads to the conclusion that "*the relevant compelling interest - public or private - depends on the facts of the given case*"[110] and that a "*fair balance*" must be struck between the "*legitimate interests of the internet users*" and the data subject's privacy and data protection rights.[111] In the present judgment, the court relied primarily on the Data Protection Directive and did not take into consideration the existing extensive case law on balancing privacy and freedom of expression of the European Court of Human Rights.[112]

After the *Google Spain* judgment, Google balances the "*privacy rights of the individual with the public's interest to know and the right to distribute information*."[113] It looks at "*whether the results include outdated information*" about the person and "*whether there's a public interest in the information*", for example, requests for removal of "*information about financial scams, professional malpractice, criminal convictions, or public conduct of government officials*" may be declined.[114]

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[108] *Id.* ¶ 97.
[109] *Id.* ¶ 97.
[110] Shaniqua Singleton, *Balancing a Right to be Forgotten with a Right to Freedom of Expression in the Wake of Google Spain v. AEPD*, 44(165) GA. J. INT'L & COMP. L. 165, 179–180 (2015).
[111] *Google Spain case*, [2014] Q.B. 1022, ¶ 81.
[112] The judgments delivered by the European Court of Human Rights balance freedom of expression and privacy. *See* Axel Springer AG v. Germany, App. No. 39954/08 (Feb. 7, 2012), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-109034%22]}. Alt hough the E.C.H.R. recognises that freedom of expression is essential from the existence of democracy, it reaffirms that freedom of expression can be limited in view of the rights of others, such as privacy.
[113] *EU Privacy Removal: Google Personal Information Removal Request Form*, GOOGLE, https://www.google.com/webmasters/tools/legal-removal-request?complaint_type=rtbf&visit_id=637202230061146146-20083139&rd=1.
[114] *Id.*

INDIA: CAN THE RIGHTS BE BALANCED?

The EU envisages the data controllers to apply the "*balancing test*" while considering requests for RTBF.[115] Right to privacy is an established fundamental right in the context of the European Union, whereas India has recently recognised it as a fundamental right. The sustainability of the right to privacy is higher in Europe as it has a highly developed privacy jurisprudence as compared to India. The development of this right in India has till now been limited to enforcement against state surveillance. Consequently, without a robust privacy jurisprudence and a specific data protection law, RTBF cannot be validated. Contrarily, free speech jurisprudence in India has developed to a higher extent resulting in a greater likelihood of it prevailing over RTBF.[116]

The CJEU advocated the application of the balancing test,[117] however, the doctrine of balancing rights has been a thorn in the side of many constitutional courts. Under the Indian constitutional text, there is no express mechanism present for balancing of rights. In light of this "*constitutional silence*" in the context of freedom of speech and expression, it needs to be seen whether there are any circumstances where another fundamental right like Article 21 may operate as a valid limitation on Article 19(1)(a). Article 19(2) incorporates eight express limitations.[118] However, it nowhere states that freedom of speech is specifically subject to any other fundamental right (like the right to privacy under Article 21) under Part III of the Indian Constitution.

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[115] *Google Spain Case*, [2014] Q.B. 1022, ¶ 81.

[116] Ramit Mehta & Tejash Bhandari, *Right to be Forgotten: A Critical and Comparative Analysis*, THE DAILY GUARDIAN (Dec. 17, 2020), https://thedailyguardian.com/right-to-be-forgotten-a-critical-and-comparative-analysis/.

[117] *Google Spain Case*, [2014] Q.B. 1022, ¶ 81.

[118] INDIA CONST. art. 19, cl. 2; Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Constitutional values rarely come into conflict with each other. But the absence of a balancing mechanism for resolving contestation between two rights is a classic case of "*constitutional silence*". To balance the competing rights of equal supremacy is not an easy task for the judiciary, hence, the development of a proper mechanism is a necessity.[119] The solution to recalibrate two fundamental rights may lie in the general principles propounded by the five-judge bench decision of the Supreme Court in *Sahara India Corpn v. SEBI*.[120] The Court advocated a three-step test prior to the deployment of the balancing measure. *Firstly*, the operation of one fundamental right is a "*real and substantial risk*" to the effective operation of another; *secondly*, a balancing measure is necessary *i.e.*, no "*reasonable*" or less intrusive alternative can negate the said risk (necessity test); and *thirdly*, the benefits of such balancing measures outweigh the damage caused to the operation of the right/freedom, which is sought to be limited (proportionality test).[121]

After compliance with the triple test, the *Sahara* decision advocated the employment of "*neutralizing devices or techniques evolved by the courts*" so as to "*effectuate a balance between conflicting public interests.*"[122] There is no clear formula for which a "*neutralizing device*" is to be used for resolving the conflict between two fundamental rights, but generally, these devices must i) operate within the parameters of necessity and proportionality; ii) pass the test of reasonableness under Article 14, 19(2) and 21 (*Maneka Gandhi*); and iii) have the capacity to "*neutralize*" the friction and discord between two Part III rights.[123]

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[119] Anubhav Khamroi, *Constitutional Silences, Balancing of Rights, and the Concept of a "Neutralising Device"*, INDIAN CONST. L. & PHIL. BLOG (Nov. 9, 2019), https://indconlawphil.wordpress.com/2019/11/09/guest-post-constitutional-silences-balancing-of-rights-and-the-concept-of-a-neutralising-device/.

[120] (2012) 10 SCC 603, ¶ 42 [hereinafter *Sahara Case*].

[121] *Id.* ¶¶ 42–43; Khamroi, *supra* note 119.

[122] *Id.* ¶ 43.

[123] *Id.* ¶¶ 43, 46. In the *Sahara Case*, (2012) 10 SCC 603, there was a conflict between the freedom of press guaranteed under Article 19(1)(a) and right to a fair trial under Article 21 and the Supreme Court devised the use of postponement orders, as a "*neutralizing device*", against any publication or broadcast that may put the proper administration of justice or fairness of the trial at "*real and substantial risk*".

The Madras High Court in *Kanimozhi Karunanidhi v. Thiru P. Varadarajan*[124] had the opportunity to balance the conflict between free speech under Article 19(1)(a) and the right to privacy under Article 21. The applicant in the case was "*seeking an order of an injunction on the contention that the respondents cannot be allowed to continuously publish articles, which contain either a direct or indirect reference to her, and her immediate family members* ..."[125] On the other hand, the Respondents contended that the right to freedom of expression included the "*right to publish any material, which according to it, is in public interest*."[126] Herein, the Court ordered a limited injunction that only prohibited publication of information pertaining to her "*private life*" without her consent.[127] The injunction, however, was not to extend to any information as "*to the functions of the applicant as a Member of the Parliament or as a Leader of the Political Party*."[128]

The courts have had a few occasions to balance Article 19(1)(a) and Article 21.[129] The fact that RTBF is a recently emerging right under the limited right to privacy and it is not yet recognised under any specific legislation in India, makes it necessary for the courts to have clear-cut guidelines to balance the right with free speech. The constitutional silences need to be filled. The Justice Sri Krishna Committee also recommended the application of the balancing test; however, the PDP Bill is silent on the issue.[130]

RTBF, as recognised under the right to privacy under Article 21 of the Indian Constitution is usually claimed against private entities. However, fundamental rights under the Indian Constitution are only enforceable

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[124] 2018 SCC OnLine Mad 1637.
[125] *Id.* ¶ 29.
[126] *Id.*
[127] *Id.* ¶ 51
[128] *Id.* ¶ 52.
[129] Kaushal Kishore v. State of Uttar Pradesh, (2018) 11 SCC 562; Thalappalam Service Cooperative Bank Ltd v. State of Kerala, (2013) 16 SCC 82; Central Public Information Officer v. Subhash Chandra Agarwal, (2020) 5 SCC 481.
[130] Jithendra Palepu, *The Personal Data Protection Bill 2019: Do you have a Right to be Forgotten from the Internet?*, THE LEAFLET (Sept. 18, 2020), https://www.theleaflet.in/the-personal-data-protection-bill-2018-do-you-have-the-right-to-be-forgotten-from-the-internet/.

vertically, against the State.[131] The question that arises is whether RTBF can be enforced horizontally, against private individuals or entities. Direct horizontality, according to Gautam Bhatia, is only reflected by Articles 15(2), 17 and 23 of the Constitution, wherein the violation of a fundamental right by another private entity is protected by the State.[132] Looking at the European jurisprudence on this aspect, people cannot bring a claim against other private individuals before the European Court of Human Rights.[133] However, people can allege that the State is not protecting their rights against other individuals. Consequently, the rights in the European Convention of Human Rights have a horizontal effect.[134] As compared to this, the Indian courts merely enforce constitutional provisions against private parties indirectly by imposing an obligation on the State to perform duties that "*prevent or prohibit a private act*."[135]

COEXISTENCE OF RTBF AND FREEDOM OF EXPRESSION: FILLING IN THE CONSTITUTIONAL SILENCES

The *Google Spain* judgment illustrated how under European law, freedom of expression can be limited by privacy and data protection rights. RTBF needs to be statutorily established under the Indian Jurisprudence and it must include private entities as well as State, as proposed in the PDP Bill. Due to the lack of clear guidelines under the Indian jurisprudence as well as those laid by CJEU in the *Google Spain case*, the questions of how to

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131 INDIA CONST. art. 13, cl. 2. Fundamental Rights can only be claimed against the State.

132 Gautam Bhatia, *Horizontality under the Indian Constitution: A Schema*, INDIAN CONST. L. & PHIL. BLOG (May 24, 2015), https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/.

133 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol Nos. 11 and 14 art. 34 (Nov. 4, 1950) E.T.S. 5; The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

134 S. Kulk & F. Zuiderveen Borgesius, *Privacy, Freedom of Expression and the Right to be forgotten in Europe, in* THE CAMBRIDGE HANDBOOK OF CONSUMER PRIVACY 309 (E. Selinger et al. eds. Cambridge University Press 2018).

135 Dhananjay Dhonchak, *Right to be Forgotten: Privacy vs. Freedom*, THE INDIAN EXPRESS (Aug. 4, 2021), https://indianexpress.com/article/opinion/right-to-be-forgotten-privacy-vs-freedom-ashutosh-kaushik-7438554/.

balance the two rights and who will balance the rights remain unanswered. Some suggestions to resolve these questions are offered.

A. LIST INSTANCES OF DEROGATION FROM RTBF

The courts should delineate as to when the authorities may derogate from RTBF. Since neither the *Google Spain case*, nor the Indian cases were able to adequately list out the parameters of the application of RTBF, listing the kinds of information that cannot be de-indexed/deleted, will make it easier to determine the right.[136] Article 9 of the European Data Protection Directive allows member states to derogate from the Directive's provisions when information is processed for artistic, literary, and journalistic purposes.[137] This enables the States to limit a person's right to privacy whenever it is necessary to protect freedom of expression. Similarly, in the Indian context, the impending data protection law could state when the content removal requests would not be allowed in cases where the information exists for certain specified purposes.

B. PROVIDE CLEAR STANDARDS FOR ALLOWING RTBF REQUESTS

To harmonise RTBF with freedom of expression, clearer standards must be provided as to the instances when companies would be obligated to honour the requests for removal of information. In the *Google Spain case,* the Court had held that the information is no longer necessary when it appears to be "*inadequate, irrelevant or no longer relevant or excessive*."[138] However, the search engines have been left to determine the allowing of removal requests and this brings in subjectivity. If uniform standards of invoking RTBF are laid down, it would eliminate discretion and arbitrariness.

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136 Singleton, *supra* note 110, at 188.

137 Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data, 2005 O.J. (L 281) [hereinafter *Data Protection Directive*].

138 *Google Spain Case*, [2014] Q.B. 1022, ¶ 93.

In fact, the courts could follow the approach adopted by Google in determining such requests. Google has removed links where the information involves nude photographs uploaded against the will of the applicant, HIV diagnoses, and outdated political views.[139] On the other hand, Google has refused to entertain removal requests pertaining to sex offender convictions, violent crime reportage, etc.[140]

CONCLUSION

The CJEU in the *Google Spain case* and the Indian judiciary have provided little guidance on the practical implementation of RTBF, nor have they tried to resolve the contestation between RTBF and freedom of expression. Filling in the constitutional silences has always been an arduous task for any constitutional court and the Indian judiciary is no exception. An attempt has been made in this piece to chart the existing RTBF jurisprudence in different countries. The alternatives that countries and search engines have in reconciling the tension between RTBF and freedom of expression have been analysed. Though an effort has been made to provide answers to the unresolved questions, a peaceful co-existence between RTBF and free speech still eludes us.

The standard for the scope of application of RTBF in India as well as the means to balance it with freedom of expression remains unresolved and the questions remain unanswered. The answers to these questions will determine the ability of search engine companies, courts, and the general public to function effectively.[141] Though the article provides some answers to these questions by adopting the stance that RTBF can coexist with freedom of expression and by presenting suggestions on resolving the contestation between the rights, there is still a long way to go. The right is new, and its development will take its own course even if the data protection law is passed in India. The debate surrounding RTBF is the beginning of the jurisprudence on the balancing of the right to privacy and freedom of expression in the digital world.

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[139] Andy Martin, *Right to be Forgotten: Drawing the Line*, THE ECONOMIST (Oct. 3, 2014), https://www.economist.com/international/2014/10/03/drawing-the-line.
[140] *Id.*
[141] Singleton, *supra* note 110, at 193.

JUDICIAL REVIEW OF "*INTERNAL PARLIAMENTARY PROCEEDINGS*": THE DIALOGIC AND NON-DIALOGIC APPROACHES

M JASHIM ALI CHOWDHURY[1]

This article compares the internal proceedings jurisprudence of the highest courts of the United Kingdom (UK), India, and Bangladesh. Though the Supreme Courts of Bangladesh and India have shown general deference to the debates in parliament, they have shown willingness to lift the veil of those "internal proceedings" that might have constitutional questions involved. It appears that the UK, India, and Bangladesh's respective models of judicial review and parliament-judiciary relationship influence their internal proceedings jurisprudence. While the Indian and Bangladeshi Supreme Courts' understandings of the internal proceedings doctrine are conditioned by their self-aggrandised posture of guardianship over the Constitution, the British judiciary's approach is largely dialogic and conciliatory. Indian and Bangladeshi Supreme Courts' adversarial approach frequently places them in direct confrontation with the legislative and political branches. While the Indian Supreme Court does not shy away from such confrontation, Bangladesh Supreme Court usually tries to avoid it and, in the process, ends up taking fluctuating and self-contradictory positions in different cases. The author argues that the UK's dialogic model of judicial review provides for a rather congenial basis for principled judicial consideration of the internal proceedings doctrine.

INTRODUCTION

Parliamentary privileges and immunities are essential ingredients of the functional autonomy of the parliament. They guarantee the freedom of deliberation of members of parliament ("**MPs**") within the House and reinforce the power of parliament to regulate its internal proceedings. The origin of the privileges and immunities is related to the British House of

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Commons' historic struggle against the Crown and its courts.[2] They later found a place in the written constitutions of many common law countries.[3] While some countries have codified them through statute laws,[4] others have maintained the conventional nature of the concept.[5] However, the privileges are perceived and enforced in constitutional supremacies in ways characteristically different from those of the United Kingdom ("**UK**"). Unlike the UK's sovereign Parliament, parliaments in constitutional supremacies are limited by constitutional provisions and principles, *e.g.,* separation of powers and checks and balances.[6] The judiciary's relation *vis-à-vis* the legislature and other coordinate branches of the government is guided by constitutional scrutiny and inter-branch comity. On the one hand, judicial review ensures that parliaments remain within their constitutional boundaries.[7] On the other hand, parliamentary privileges and immunities in general, particularly the internal proceedings doctrine, work to avoid unnecessary judicial intrusion into the legislative business.[8]

This article attempts to compare the internal proceedings jurisprudence of the UK, Indian and Bangladeshi judiciaries. Though the Apex Courts of Bangladesh and India have generally respected the sanctity of parliamentary deliberation on the floor of the House, they appear prepared to examine "*internal proceedings*" that may have constitutional implications.

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[2] RICHARD GORDON & MALCOLM JACK, PARLIAMENTARY PRIVILEGE: EVOLUTION OR CODIFICATION? 13–22 (The Constitution Society 2013).

[3] U.S. CONST. art. VI cl. 1; AUSTL. CONST. § 49, § 51; INDIA CONST. arts. 105, 194; BANGL. CONST. art. 78.

[4] *Parliamentary Privileges Act 1987* (Cth) (Austl.); Legislature Act 1908 (N.Z.); Imperial Laws Application Act 1988 (N.Z.).

[5] For example, the Parliament of Canada Act, 1985 and the Constitution Act, 1867 have left the privileges and immunities undefined by providing that those should be as those of the UK House of Commons. Prior to the Forty Fourth Amendment of 1978, arts. 105(3) and 194(3) of the Indian Constitution had similar provisions.

[6] Jutta Limbach, *The Concept of the Supremacy of the Constitution,* 64 MOD. L. REV. 1 (2001).

[7] Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power,* 39 HASTINGS CONST. L. Q. 457 (2011).

[8] *See* Anne Twomey, *Can Parliamentary Privilege be Used to Shut-Down Parliamentary Accountability?* Austl. Pub. L. (Jan. 22, 2020), https://auspublaw.org/2020/01/can-parliamentary-privilege-be-used-to-shut-down-parliamentary-accountability.

The second, third and fourth parts of the article analyse the internal proceedings jurisprudence of the UK, India, and Bangladesh separately. The fifth part then compares and contrasts the models of judicial review and parliament-judiciary relation that influence the internal proceedings jurisprudence of the three jurisdictions. This part argues that the Indian and Bangladeshi Supreme Courts' understandings of the internal proceedings doctrine are conditioned by their self-aggrandised posture of guardianship over the constitution. In the process, the courts occasionally find themselves in confrontation with the legislative and political branches. It will also be argued that the Bangladesh Supreme Court's occasional efforts to avoid such confrontation have resulted in hesitant and inconsistent judicial pronouncements. By the end of the fifth part, it will be asserted that the UK's dialogic approach to judicial review provides a rather congenial platform for principled judicial consideration of the internal proceedings doctrine. The sixth part concludes the article by arguing that the prevailing culture of institutional distrust and non-relation between the judiciary and legislatures in Bangladesh and India makes the dialogic approach an important goal worth pursuing.

THE PRIVILEGE OF INTERNAL PROCEEDINGS IN THE UK

The British Parliament's privileges and immunities emerged as part of the House of Commons' struggle against the Crown and its courts, including the House of Lords.[9] Unlike its commonwealth offspring like India and Bangladesh, the UK Parliament's privileges and immunities are supported by its trademark doctrine of parliamentary sovereignty.[10] While some of these privileges are codified in statutes, the basic principles of the privileges and immunities continue to exist in the common law. Article 9 of the UK Bill of Rights, 1689 contained an express guarantee that the speeches, debates and proceedings in Parliament would not be impeached or questioned in any court or place out of Parliament. It meant that the

[9] NICHOLAS GARFORTH & PETER LEYLAND, ACCOUNTABILITY IN THE CONTEMPORARY CONSTITUTION, 270–278 (Oxford University Press 2013); Chuks Okpaluba, *Can a court review the internal affairs and processes of the legislature? Contemporary developments in South Africa*, 48(2) COMP. INT'L L.J. S. AFR. 183, 186–9 (2015).

[10] S. Lakin, *Parliamentary privilege, Parliamentary sovereignty, and Constitutional Principle,* U.K. CONST. L. BLOG (Feb. 11, 2013), https://ukconstitutionallaw.org/2013/02/11/stuart-lakin-parliamentary-privilege-parliamentary-sovereignty-and-constitutional-principle.

members of Parliament would not be sued for defamation or crime for anything they say or do in Parliament. They will enjoy freedom from arbitrary arrest and detentions that might hamper their participation in the parliamentary process. Propriety of the parliamentary process and the Speaker's rulings concerning the process or order within the House will not be questioned by the courts. Nor will the courts look into parliamentary debates while interpreting the laws. There are, however, debates in the UK about the scope of the privileges and immunities and the ways the judiciary should approach those.[11] British courts, however, have an alternative route of intrusion into the Parliament's internal proceedings. It is the Court's power to determine the scope of its jurisdiction, *i.e.,* the power to decide whether something qualifies as the Parliament's internal proceeding or not.[12]

DETERMINATION OF THE SCOPE OF PRIVILEGE CLAIMS

While it is for the Parliament to protect privileges of its members, the courts may be required to decide the scopes of those privileges. Once a court finds that something falls within the Parliament's internal realm, its jurisdiction ends there, and the matter rests exclusively with the Parliament. Landmark British cases on the point are *Stockdale v. Hansard*[13] and *Bradlaugh v. Gossett*[14]. Lord Coleridge CJ and Stephen J while summarising the law in *Bradlaugh v. Gossett*, held that the Parliament has "*exclusive power of interpreting*" the boundaries of its internal proceedings.[15] The courts may intervene when a right-related question needs to be answered independently of the House.[16] For example, the right of a general citizen to sue any person who might have sat and voted in the House unlawfully must be interpreted by

[11] A. Twomey, *Article 9 of the Bill of Rights 1688 and Its Application to Prorogation*, U.K. CONST. L. BLOG (Oct. 4, 2019), https://ukconstitutionallaw.org/2019/10/04/anne-twomey-article-9-of-the-bill-of-rights-1688-and-its-application-to-prorogation/.
[12] D. C. Jain, *Judicial Review of Parliamentary Privileges: Functional Relationship of Courts and Legislatures in India,* 9(2) J. INDIAN L. INST. 205 (1967).
[13] *Stockdale v. Hansard* [1839] 9 Ad & El 1 96.
[14] Bradlaugh v. Gossett [1884] 12 QBD 271.
[15] *Id.* at 280 (Per Lord Coleridge CJ. & Stephen J.).
[16] *Id.* at 283.

the Court independently of the House.[17] The courts might also be called to adjudicate cases where the Parliament expels or suspends any of its members, summons anyone from the public to appear before its committees, or punishes anyone for its contempt.[18] In such cases, the courts need to see whether the matter is still internal to the Parliament.[19]

The British courts usually follow a "*core and essential function*" test in relation to internal proceedings claims. Courts consider something as the Parliament's internal proceeding when they find that such thing is "*appropriate and necessary for the operation of the legislature*."[20] The UK Supreme Court has reiterated this long-standing rule in the cases of *R v. Chaytor*[21] and *Cherry-Miller II*[22]. In *Chaytor,* the question was whether irregularities in claiming parliamentary expenses by the MPs could be subject to criminal prosecution. In 2009, prosecutions were brought against some MPs and Lords by an independent prosecuting authority - the Crown Prosecution Service.[23] The defendant parliamentarians argued that the expenses claim they made in relation to their parliamentary services were privileged and internal to the Parliament and thus out of the Court's jurisdiction.[24] The question for consideration was whether the criminal proceedings would harm the "*core or essential business of Parliament*" and whether it would "*inhibit*

[17] Such a provision is found in art. 69 of the Constitution of Bangladesh that provides, "*If a person sits or votes as a member of Parliament before he makes or subscribes the oath or affirmation in accordance with this Constitution, or when he knows that he is not qualified or is disqualified for membership thereof, he shall be liable in respect of each day on which he so sits or votes to a penalty of one thousand taka to be recovered as a debt due to the Republic*".

[18] The U.S. Supreme Court's famous Powell v. McCormack, 395 U.S. 486, 506 (1969) case for example considered whether the U.S. House of Representative had the authority to exclude Representative Adam Clayton Powell from the House. The UK House of Lords have considered legality challenges to the Newfoundland legislature's punitive action against one of its members in Kielly v. Carson (13 E.R. 225, May 23, 1842). *See* Enid Campbell, *Expulsion of Members of Parliament*, 21(1) U. Toronto L.J. 15 (1971).

[19] The Right Hon. The Lord Burnett of Maldon, *Parliamentary Privilege – Liberty and Due Limitation*, 24(2) JUD. REV. 107 (2019).

[20] Russell Keith, *Judicial Intervention in Parliamentary Proceedings: The Implications of Egan v Willis,* 28(3) FED. L. REV. 549, 570 (2000).

[21] R v. Chaytor [2010] UKSC 52, ¶¶ 14–16.

[22] R (Miller) v. The Prime Minister and Cherry v. Advocate General for Scotland [2019] UKSC 41.

[23] R v. Chaytor [2010] UKSC 52, ¶¶ 5–7.

[24] *Id.* ¶¶ 12–13.

debate or freedom of speech" within the Parliament.[25] Lord Philips rejected the MPs' argument and observed that "*the only thing that [the criminal prosecution] would inhibit would be the making of dishonest claims.*"[26] Similarly, in *Cherry-Miller II* (2019),[27] the UK Supreme Court did not give in to the UK government's "*blunt argument of no-go area*"[28] of internal proceedings.[29] In this case, a dubious prorogation of Parliament in the wake of the Brexit crisis was challenged. The Court proceeded to weigh the matters on merit and found that a prorogation issued by the Crown under the Prime Minister's advice and "*imposed upon the parliament from outside*" could not constitute an internal proceeding of Parliament.[30] *Chaytor* and *Cherry-Miller II* confirm the proposition that parliamentary privileges do not substantively bar the Court from judging the breadth of any privilege claim.[31] Rather, it is a procedural bar that comes into effect only after the Court determines the scope of the privilege claimed.[32] Once a matter is found falling within the scope of internal parliamentary proceedings, the courts would stop there, and the Parliament would reserve its exclusive authority over the matter.[33]

The UK courts' "*core and essential functional necessity test*" is recognised in many other commonwealth jurisdictions, including Australia,[34] Canada,[35] Dominica,[36] and New Zealand.[37] In written constitutions, of course, there

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[25] *Id.* ¶ 8.
[26] *Id.* ¶ 48.
[27] *Miller*, [2019] UKSC 41.
[28] Lord Mance DP, Justiciability, address at the 40th Annual FA Mann Lecture (Nov. 27, 2017) at 22, https://www.supremecourt.uk/docs/speech-171127.pdf.
[29] R v. Chaytor [2010] UKSC 52, ¶ 63.
[30] *Id.* ¶¶ 66–68.
[31] THOMAS ERSKINE MAY, TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT (25th Edition Online), Part II Chapter 16 ¶ 16.1 https://erskinemay.parliament.uk/section/5036/the-opposing-views/.
[32] Prebble v. Television New Zealand Ltd [1995] 1 AC 321(N.Z.).
[33] Bradlaugh v. Gossett [1884] 12 QBD 271 (U.K.).
[34] Egan v. Willis [1998] HCA 71 (Austl.).
[35] New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly) (1993)1 S.C.R. 319 (Can.).
[36] Sabaroche v. Speaker of House of Assembly [1999] 3LRC 584 (Dominica Ct. App.) (Dominica).
[37] *Prebble*, [1995] 1 AC 321 (N.Z.).

are divergent views on ensuring a delicate balance between the functional autonomy of the parliament and the judicial power to guard constitutional supremacy. While some courts (*e.g.*, Canada) take a relatively conservative approach to the problem, others (*e.g.*, Dominica and Australia) take a rather radical view of judicial review.[38]

THE PRIVILEGE OF INTERNAL PROCEEDINGS IN INDIA

From 1919 to 1947, legislatures in the Indian subcontinent lacked the privileges and immunities available to the House of Commons. The period is marked by native legislators' "*determined struggle*"[39] for securing privileges comparable to the House of Commons. While the efforts yielded very little during the colonial regime, its influence on the post-1947 constitution-making was decisive. Original Articles 105(3) and 194(3) of the Indian Constitution provided that powers, privileges, and immunities of the Indian legislature would be equal to those of the British House of Commons. The Forty-Fourth Amendment Act of 1978 later removed the reference to the House of Commons and empowered the Parliament to codify the immunities and privileges. The Indian Parliament, however, has not done that yet. In the absence of codification, basic contours of the privileges stand comparable to those of the UK Parliament.[40]

Courts in constitutional supremacy differ from the British courts regarding judicial review of statutes law and constitutional amendment. The judicial claim of "*guardianship of the constitution*" and the constitutional limits on legislative powers restrict the Parliament in ways not perceivable in the UK.[41] The Indian Supreme Court has noted this difference in cases like

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[38] Nicholas Christopher Dunn, Parliamentary Privileges v. Constitutional Supremacy: Berenger v. Jeewoolal [1999] 2 MR 172 (2001) (Unpublished LL.B. (Hons) Dissertation, Victoria University of Wellington) (on file with Victoria University of Wellington Library).
[39] Hans Raj, *Evolution of Parliamentary Privileges in India*, 41(2) IND. J. POL. SCI. 295 (1980).
[40] Akhtar Ali Khan, *Power, Privileges and Immunities of Parliament: Need For Codification*, 41(2) IND. J. POL. SCI. 309, 313 (1980). *See also* The State Of Kerala v. K. Ajith, (2021) SCC OnLine SC 510. In this case, the Indian Supreme Court bench comprising D. Y. Chandrachud and M. R. Shah JJ. also noted the Supreme Court's obligation to look into the English cases in the absence of codification.
[41] Rudra Chandran L, *Parliamentary Privilege: An Analysis & Extent of 'Privilege'*, 4(2) INT'L J. L. MAN. HUM. 1464, 1469–70 (2021).

Special Reference No. 1 of 1964,[42] *Raja Ram Pal v. Speaker, Lok Sabha,*[43] and *Kalpana Mehta v. Union of India*.[44] In *Raja Ram Pal*, it upheld a restrictive reading of the internal proceedings doctrine and held that prohibition against judicial intrusion in the parliamentary process is limited to the "*procedural irregularities within the four walls of parliament*". The Court's power to judge the constitutionality of internal legislative business is not affected by the doctrine:

> "*On a plain reading, Article 122(1) [Indian Constitution] prohibits "the validity of any proceedings in Parliament" from being "called in question" in a court merely on the ground of "irregularity of procedure". In other words, the procedural irregularities cannot be used by the Court to undo or vitiate what happens within the four walls of the legislature. But then, "procedural irregularity" stands in stark contrast to "substantive illegality" which cannot be found included in the former.*"[45] (emphasis supplied)

In some cases, the Court tested whether any parliamentary action could violate anyone's constitutional right or any provision or abstract principle of the Constitution. In the process, it occasionally refused to defer to the Speaker's "*final*" rulings on internal businesses of Parliament. In *K. S. Puttaswamy v. Union of India*,[46] the 4:1 majority in a five-member bench held that the Speaker's certification of the Aadhar Bill of 2016 as a "*money bill*" was constitutionally right. However, all the judges of the bench agreed that the Speaker's power to certify money bills under Article 122 of the Indian Constitution would not be "*final*" as long as it conflicts with any other provision of the Constitution. Though another five-member bench of the Court later doubted the correctness of this majority opinion,[47] the Court's power to review the Speaker's "*final decisions*" on constitutional grounds has not been questioned.[48] The Court confirmed the reviewability of the

[42] Special Reference No. 1 of 1964, AIR 1965 SC 745.
[43] Raja Ram Pal v. Speaker, Lok Sabha, (2007) 3 SCC 184.
[44] Kalpana Mehta v. Union of India, (2018) 7 SCC 1.
[45] *Raja Ram Pal*, (2007) 3 SCC 184, ¶ 360.
[46] K. S. Puttaswamy v. Union of India, (2019) 1 SCC 1.
[47] Roger Mathew v. South India Bank Ltd, (2020) 6 SCC 1.
[48] *Id.*

Speaker's "*final decisions*" in later cases like *Kihoto Hollohan v. Zachillhu,*[49] *Mohd Saeed Siddiqui v. State of Uttar Pradesh*[50] and *Yogendra Kumar Jaiswal v. State of Bihar*[51]. The Court attempted rights-based review of parliamentary privileges in several other cases involving freedom of press,[52] peoples' right to life and personal liberty,[53] judicial officers' right to be independent in the exercise of the judicial function[54], lawyers' right to pursue their legal profession,[55] and so on.

DETERMINATION OF THE SCOPE OF PRIVILEGE CLAIMS

Like the UK courts, Indian courts have affirmed that they are entitled to decide the jurisdictional question by determining the scope of any privilege claimed by the Parliament. In *Raja Ram Pal*, the Court considered whether Article 105(3) privileges of Parliament were wide enough to empower the Parliament to expel (termination of membership) some MPs from the House.[56] In this case, ten MPs were video-recorded taking bribes for raising parliamentary questions or local issues (Cash for Question Scandal). A parliamentary resolution later expelled them. The bench of R. V. Raveendran J. quoted the *Special Reference 1 of 1964* with approval:

> "*[T]here can be no doubt that the sovereignty which can be claimed by the Parliament in England cannot be claimed by any Legislature in India in the absolute literal sense. We feel no difficulty in holding that the decision about the construction of Article 194(3) [privileges of the state legislature] must ultimately rest exclusively with the Judicature of this country.*"[57]

The Court concluded that the "*other powers, privileges and immunities*" of the House mentioned in Article 105(3) of the Constitution does not cover the power of expulsion of the members.[58] On separate occasions, the Supreme

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[49] Kihoto Hollohan v. Zachillhu, AIR 1993 SC 412.
[50] Mohd Saeed Siddiqui v. State of Uttar Pradesh, (2014) 11 SCC 415.
[51] Yogendra Kumar Jaiswal v. State of Bihar, (2013) SCC 183.
[52] Pandit M. S. M. Sharma v. S. K. Sinha, AIR 1954 SC 636.
[53] Special Reference No. 1 of 1964, AIR 1965 SC 745.
[54] *Id.*
[55] Rudra Chandran, *supra* note 41, at 1472–76.
[56] Raja Ram Pal v. Speaker, Lok Sabha, (2007) 3 SCC 184, ¶ 8.
[57] *Id.* ¶ 13 (Per R. V. Raveendran J).
[58] *Id.* ¶ 31.

Court dealt with questions about speech and voting by MPs in the House. Articles 105(2) and 194(2) guarantee the freedom of speech and voting for members of Union and State legislatures. In *Tej Kiran Jain v. N. Sanjiva Reddy*,[59] the Court interpreted those articles as absolute and held that the MPs were immune from civil or criminal liability for "*anything said*" or "*any vote cast*" in the House.[60]

While the *Tej Kiran Jain,* represents absolute judicial deference to internal parliamentary proceedings, the decision in *P. V. Narasimha Rao v. State*[61] tried to condition the deference a bit. *Narasimha Rao* was concerned about a criminal conspiracy charge against some MPs who were allegedly bribed for not voting against the government in a no-confidence motion.[62] The Court refused to intervene in the matter, considering the bribery to be an act "*in respect of*" or having direct nexus with the act of voting in the House.[63] The protection under Article 105(2) of the Constitution relates to a vote actually cast in the House, the Court opined.[64] Relying on this *direct nexus test*, the Court held that an MP who might have taken the bribe but did not actually vote would risk their immunity.[65]

Narasimha Rao's "*direct nexus test*" was further qualified by the Jharkhand High Court in *Sita Soren v. Union of India*.[66] The Court there held that someone taking a bribe for voting in a particular way but actually voting in another way would lose their immunity.[67] In this case, the legislator allegedly accepted a bribe for one candidate to the *Rajya Sabha*, but eventually voted for another candidate.[68] The Jharkhand High Court judgment was soon challenged before the Supreme Court in a special leave

[59] Tej Kiran Jain v. N. Sanjiva Reddy, 1971 SCR (1) 612.
[60] *Id.* 615E (Per M Hidayatullah CJ).
[61] P. V. Narasimha Rao v. State, (1998) 4 SCC 626.
[62] *Id.* ¶ 2.
[63] *Id.* ¶ 101 (Per Ray J.), ¶¶ 133–134 (Per Bharucha and Rajendra Babu JJ).
[64] *Id.* ¶ 135 (Per Bharucha and Rajendra Babu JJ.).
[65] *Id.*
[66] Sita Soren v. Union of India, (2014) 3 AIR Jhar R 443.
[67] *Id.* ¶¶ 10, 13.
[68] *Id.* ¶ 12.

petition.[69] While referring the matter to a larger bench, the Supreme Court conveyed enough of an indication that the majority view of *Narasimha Rao* might be reconsidered:

> "*Having considered the matter, we are of the view that having regard to the wide ramification of the question that has arisen, the doubts raised and the issue being a matter of substantial public importance, we should be requesting for a reference of the matter to a larger Bench, as may be considered appropriate, to hear and decide the issue arising*."[70](emphasis supplied)

While waiting for the large bench decision in *Sita Soren*, to some there might be temptation to declare *Narasimha Rao* a bad law. However, this, if done, could bolster an expansive view of judicial guardianship of the Constitution and aggressive advocacy of judicial policing in areas of social and political morality. Additionally, as Gautam Bhatia argues, outright overruling of *Narasimha Rao* could threaten the legislative branch's functional independence and unduly empower the executive branch to apply its police power on the members of the legislative branch.[71] As will be argued in the fifth part of this article, fondness for judicial governance of political morality may undermine the peoples' ability to hold their representatives politically accountable for their conduct. Perhaps it is the same fondness of judicial governance that prompts some to argue for judicial review of legislation on the grounds of adequacy-inadequacy or quality of debate within the Parliament. Advocates of this approach argue that executive dominance in the legislative process very often results in suppression of scrutiny, and parties exploit the Parliament to pass laws without adequate deliberation.[72]

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[69] Sita Soren v. Union of India, Criminal Appeal No(s) 451/2019 (Arising out of Special Leave Petition (Criminal) No. 2758/2014).

[70] *Id.* ¶ 5 (Per Ranjan Gagoi, Abdul Nazeer JJ.).

[71] Karan Kamath, *Reconsidering P. V. Narasimha Rao v. State – Bribery, parliamentary votes, and parliamentary immunity,* INDIAN CONST. L. PHIL. BLOG (July 1, 2020), https://indconlawphil.wordpress.com/2020/07/01/guest-post-reconsidering-p-v-narasimha-rao-v-state-bribery-parliamentary-votes-and-parliamentary-immunity/.

[72] Vikram A. Narayan & Jahnavi Sindhu, *A Case For Judicial Review of Legislative Process in India,* 53(4) VRÜ 358, 388-410 (2020). Relying on David Landau's argument of "*democratic dysfunction*", justify an expanded judicial role, so as to enable the judiciary to identify and remedy abuses of power that would remain unseen and unchecked under the traditional

INTERNAL PROCEEDINGS DOCTRINE IN BANGLADESH

Judicial consideration of the Parliament's internal proceedings is barred by Article 78(1) of the Constitution of Bangladesh. It plainly reads, "*The validity of the proceedings in Parliament shall not be questioned in any court*". However, like its Indian counterpart, the Bangladeshi Supreme Court does not shy away from judging internal parliamentary businesses if it thinks a constitutional question is involved. Like the Indian Supreme Court, the position is based on an assertive claim of guardianship over the Constitution.

However, unlike the Indian Court, the Bangladesh Supreme Court has shown a lack of confidence and consistency in the process. The Court has tested the boundary of Parliament's "*internal proceedings*" in a series of cases relating to parliament boycotts, resignations, floor crossing, and Speaker's rulings. In some of those cases, despite finding constitutional justification for intervention, the Court has avoided direct confrontation with the Speaker and the Parliament, and in the process, substantially weakened its jurisprudential stance.

The opposition party MPs in Bangladesh's fifth Parliament (1991-1996) were pressing their demand to introduce an election-time caretaker government in Bangladesh.[73] The ruling party however, was not interested.[74] At one stage of the demand, the MPs started boycotting the parliament sessions continuously.[75] The boycott was challenged in *Anwar*

notion of separation of powers. *See* David Landau, *A Dynamic Theory of Judicial Role*, 55(5) B. C. L. REV. 1501 (2014). For a similar argument in relation to South Africa *see* Liora Lazarus & Natasha Simonsen, *Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference, in* PARLIAMENT AND HUMAN RIGHTS: REDRESSING THE DEMOCRATIC DEFICIT 385 (Murray Hunt et al. eds., Hart Publishing, 2015).

[73] Golam Hossain, *Bangladesh in 1994: Democracy at Risk,* 35(2) ASIAN SURV. 171 (1995).

[74] Md. Morshedul Islam, *1996's Non-party Caretaker Government Movement And The Role Of Opposition In Bangladesh: A Politico-Legal Analysis*, 3(6) GLOBAL J. POL. SCI. ADMIN. 20 (2016).

[75] Md. Nazrul Islam, *Non-Party Caretaker Government in Bangladesh (1991–2001): Dilemma for Democracy?,* 3(8) DEVELOPING COUNTRY STUD. 116, 120 (2013).

Hossain Khan v. Speaker, Jatya Sangsad.[76] The High Court Division Bench held that abstention from the session of Parliament without leave of the Parliament could not be an internal matter for Parliament.[77] This being a question of "*constitutional obligation to represent the people*", the Court ordered the opposition MPs to return to Parliament immediately, failing which the appropriate authority would recover their salaries, emoluments, and allowances for those absenting days under "*due process of law*".[78] However, the Division Bench did not elaborate how the Court could enforce the MPs' "*constitutional obligation to represent people*" by attending Parliament and how the absence or presence of MPs in the House could not be a matter internal to the Parliament. The Division Bench also did not elaborate on what "*due process*" could be followed to recover the truant MPs' salaries. The Court's decision was appealed, and it would take another thirteen years to be decided.[79] Before that, the boycotting MPs approached their ninety consecutive sitting days of absence without leave.[80] As per Article 67(1)(b) of the Bangladesh Constitution, MPs would lose their seat if they remain absent from Parliament without the Speaker's leave for ninety consecutive sitting days. The President of Bangladesh then sent a special reference to the Appellate Division of the Supreme Court.[81] The Reference asked the Court whether the MPs' parliament boycott would mean an absence without leave.[82] Some legal experts urged the Court not to answer the Reference. They argued that the vacation of parliamentary seats is an internal matter of Parliament.[83] The Appellate Division rejected the argument saying the questions referred were related to the interpretation of a few words of Article 67(1)(b) of the Constitution—the meaning of "*absent without leave*".[84] The interpretation of the Constitution is the Court's

[76] Anwar Hossain Khan v. Speaker of Bangladesh Sangsad Bhaban, 47 DLR (HCD) (1995) 42.
[77] *Id.* ¶ 20.
[78] *Id.* ¶ 41.
[79] Moudud Ahmed v. Anwar Hossain Khan, 60 DLR (2008) (AD) 108.
[80] Nizam Ahmed, *Parliamentary Opposition In Bangladesh: A Study of its Role in the Fifth Parliament,* 3(2) PARTY POL. 147, 151 (1997).
[81] Special Reference No. 1 of 1995, 47 DLR (1995) (AD) 111 (App. Div. Bangl. Sup. Ct.).
[82] *Id.* ¶ 2.
[83] *Id.* ¶ 85.
[84] *Id.* ¶ 84.

responsibility, and it had nothing to do with the internal proceedings of the Parliament.[85] Justice Latifur Rahman put the view in clearer terms:[86]

> "*The internal and proper business of the proceedings of the Parliament is beyond the purview of the Constitutional Court, but while acting in the name of internal proceedings, if any violation of the constitutional provision takes place, then this court is certainly competent to interfere*."

Taken together, the High Court Division's view in *Anwar Hossain Khan* and the Appellate Division's view in *Special Reference No 1 of 1995* seem to suggest that the Court is willing to do a restrictive reading of the internal process doctrine in cases involving constitutional questions. However, thirteen years later, the Appellate Division refused to settle the issue authoritatively. The Appellate Division disposed of the appeal against *Anwar Hossain Khan v. Speaker* in *Moudud Ahmed v. Anwar Hossain Khan*.[87] This time the Appellate Division refrained from commenting on the "*internal proceedings*" issue.

The Appellate Division overturned the High Court Division's order to the MPs to return to the Parliament. It observed that the appearance/non-appearance and participation/non-participation was completely a personal choice and depended on a particular member's volition. Even if an MP were compelled to attend the sitting of the Parliament, they might not be compelled to participate in the proceedings therein. As the Court's order would serve no purpose, the High Court Division ought not to have made such an order at all, the Appellate Division opined.[88] Seen from a constitutional supremacy perspective, the *Moudud Ahmed* case seems to wash to the Court's hands-off in cases where MPs' personal choice and volition would determine the outcome. As the author has elsewhere argued, this tendency of the Supreme Court is hardly based on any

[85] *Id.* ¶ 33.
[86] *Id.*
[87] Moudud Ahmed v. Anwar Hossain Khan, 60 DLR (2008) (AD) 108.
[88] *Id.* ¶ 70.

consistent appreciation of the constitutional doctrines involved.[89] It was rather decided on the basis of a fear that MPs would not have followed the Court's order. This tendency of tailor-making suitable arguments to fit the necessity of a case in hand is apparently detrimental to the jurisprudential strength of the Court.

DETERMINATION OF THE SCOPE OF PRIVILEGE CLAIMS

Like the UK and Indian courts, the Supreme Court of Bangladesh has asserted its right to interpret and decide the scope of any privileges claimed by the Parliament. In this area as well, the Court's position is inconsistent and driven by the difficulties of the situation at hand. In cases of defamation or contempt petition against the MPs for their parliamentary speeches, the Court has shown absolute deference to debates in Parliament. It, however, has sent inconsistent messages of deference and intervention in cases regarding the material benefits and privileges the MPs claim. Several contempt of court petitions against MPs from both of the leading political parties Awami League ("**AL**") and Bangladesh Nationalist Party ("**BNP**") for violation of the *sub judice* rule was rejected by the Court under the internal process doctrine.[90] The Court's opinion was that the Constitution confers immunity regarding "*anything said in Parliament*".[91] The word "*anything*" is of the widest import and equivalent to "*everything*".[92] The Court also held that violation of the *sub judice* rule on the floor of the Parliament could not be remedied in the Court.[93]

In cases of material amenities and facilities of the MPs, the Court has endorsed the "*core and essential function test*" of the British courts. In the cases of *Dr. Ahmed Hussain v. Bangladesh*[94] and *BLAST v. Government of Bangladesh*,[95] the Court held that immunities and privileges are based on the necessity of free and unhampered exercise of legislative business, not for personal

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[89] M Jashim Ali Chowdhury, *Bangladesh's inconsistency with the prospective invalidation, in* CONSTITUTIONAL REMEDIES IN ASIA, 33–46 (Po Jen Yap ed., Routledge 2019).
[90] Ataur Rahman Khan v. Md. Nasim, 52 DLR (HCD) (2000) 16; Cyril Sikdar v. Nazmul Huda, 46 DLR 555.
[91] *Id.* ¶ 35.
[92] *Id.* ¶ 23.
[93] *Cyril Sikdar*, 46 DLR 555, ¶ 17.
[94] Dr. Ahmed Husain v. Bangladesh, 51 DLR (AD) (1999) 75.
[95] BLAST v. Government of Bangladesh, 60 DLR (2008) 176.

benefits or bounties MPs. *Dr Ahmed Hussain*[96] was a case challenging a law enhancing the remunerations, etc., of the MPs. A particularly controversial provision of the law was allowing the MPs to import duty-free cars from abroad. The petitioner argued that an MP being already entitled to rail, air, steamer, or launch journey at the highest class and receiving travel allowances, duty-free car import facility could not be a privilege essential to discharge their office[97]. It was rather a bounty conferred by the MPs upon themselves.[98] It was argued by the State that the remunerations, benefits, and facilities allowed to the MPs by law must be appropriated to enhance the functional independence of the legislature.[99] In this case, the Court refrained from judging the functional necessity of the privilege questioned but indicated that this facility might seem odd to the people at large and may not be related to a real functional necessity of the parliament.[100] The Court, however, refused to declare the law unconstitutional as long as the Constitution permitted the Parliament to determine its privileges by law: "*What looks indecent to others may, in fact, be constitutionally permissible*", the Court opined.[101]

The *BLAST case*[102] decided around a decade later found a rather assertive court. In 2000, Bangladesh Legal Aid and Services Trust ("**BLAST**") prayed for the enforcement of Article 27 (to equality before law) by ordering the Bangladesh Telegraph and Telephone Board ("**BTTB**") to collect arrears of telephone bills from the Members of the fifth and seventh Parliaments.[103] The Court directed the BTTB to take appropriate measures to realise the outstanding phone bills of defaulting MPs within a period of six months and observed as follows:

[96] *Dr. Ahmed Husain*, 51 DLR (AD) (1999) 75.
[97] *Id.* ¶ 7.
[98] *Id.*
[99] *Id.* ¶ 6.
[100] *Id.* ¶ 8.
[101] *Id.*
[102] BLAST v. Government of Bangladesh, 60 DLR (2008) 176.
[103] *Id.* ¶ 2.

> "*The privileges of the functionaries of the state are not allowed because they occupy such an exalted and high position but only so that they can perform their functions better in the interest of the people*".[104]

Suppose the Parliament's material benefits and privilege-related cases are any indications. In that case, the Court's hesitation and lack of confidence become even more evident in cases where the Speaker's rulings or actions were challenged. At one stage of the political struggle for non-party caretaker government in the mid-1990s, 147 MPs belonging to the opposition parties resigned from Parliament *en masse*.[105] It happened after the High Court Division ordered them to join the Parliament (*Anwar Hossain Khan v. Speaker*) but before the appeal (*Moudud Ahmed v. Anwar Hossain Khan*) was decided by the Appellate Division. The 147 opposition party MPs sent their resignation letters to the Speaker through their respective parliamentary party leaders.[106] A political deadlock followed the *en masse* resignation. The Speaker kept the resignation letters lying on his table for more than two months, and he did not issue any official notification of the event.[107] Article 66(4) of the Bangladesh Constitution and Rule 178 of the Parliament's Rules of Procedure require the Speaker to inform the Election Commission about any such incident in Parliament. Suppose there is any doubt as to whether a seat has become vacant or not. In that case, the Members of Parliament (Determination of Dispute) Act, 1980 entrusts the Election Commission with the duty of answering the question. Since the Speaker was not acting, people could not know whether the *en masse* resigning MPs were still the MPs or whether their seats became vacant. In case of vacation, the Election Commission is required by Article 123(4) of the Bangladesh Constitution to arrange a by-election within ninety days of the vacancy. With everything pending in the Speaker's table, two writ petitions were moved to the High Court Division. The validity of *en masse* resignation was challenged in *Rafique Hossain v. Speaker*. The Speakers' inaction was challenged, on the other hand, in *Alauddin Khalid v.*

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[104] *Id.* ¶ 48.
[105] Golam Hossain, *Bangladesh in 1995: Politics of Intransigence,* 36(2) *Asian Surv.* 196 (1996).
[106] NIZAM AHMED, THE PARLIAMENT OF BANGLADESH, 196 (Routledge 2017).
[107] *Id.* at 207.

Speaker. The Court heard and decided both the cases together, and the case is reported as *Rafique Hossain and Alauddin Khalid v. Speaker*.[108]

The resigning MPs and their parties argued that the resignation was a matter related to the internal proceedings of Parliament and, as such, as per Article 78(2) of the Constitution, was outside judicial review.[109] The Court held that the "*act of submission of resignation*" did not form part of the proceedings of Parliament until and unless the Speaker officially brought it to the notice of Parliament following the Rule 178(3) of the Parliament's Rules of Procedure.[110] Regarding Mr. Rafique Hossain's argument about the alleged invalidity of *en masse* resignation, the Court opined that there is no distinction between "*resignation*" and "*en masse resignation*".[111]

Mr. Alauddin Khalid argued that the inaction of the then Speaker Sheikh Razzak Ali was *mala fide* and he was, thereby, intentionally withholding from his constitutional duty.[112] However, the Attorney General's office argued that under Article 67(2) of the Constitution of Bangladesh, the Speaker has got some roles to play in the process.[113] He had to see whether the resignation has been submitted duly, whether the member resigning had assigned any reason for their resignation, whether the resignation letter contains any extraneous matters,[114] and whether the resignation letters were in line with the related constitutional provision or not.[115] The Court seemed unconvinced by the Attorney General's argument. It argued that the Speaker's only role, if there be any, was to be sure whether the signatures of the resigning MPs were genuine or not.[116] Apart from this, no provision

[108] Rafique Hossain v. Speaker Bangladesh Parliament, 47 DLR 361 (1995).
[109] *Id.* ¶ 7.
[110] *Id.* ¶ 67 (Per Kazi Ebadul Haque J.).
[111] *Id.* ¶¶ 7, 20.
[112] *Id.* ¶ 5.
[113] *Id.* ¶ 38.
[114] *Id.* ¶ 19.
[115] *Id.* ¶ 13.
[116] *Id.* ¶ 72.

of the Constitution empowered the Speaker to accept or reject any MPs' resignations on any other technical grounds.[117]

Around five years later, the Supreme Court was asked once again to judge the Speaker's authority in parliamentary business. *Khandker Delwar Hossain v. The Speaker*[118] was a case relating to floor crossing by two opposition party MPs in the seventh Parliament (1996-2001). The facts of the case, as summarised in the judgment, are as follows.[119] Mr Hasibur Rhaman Shwapon and Dr Md Alauddin were elected as members of Parliament with BNP nomination in the 1996 election. Being allured and induced by the ruling AL, they changed their allegiance and took oath as Deputy Minister and State Ministers of the consensus government of Sheikh Hasina. Their seat in the House was accordingly changed from the opposition bench to the Treasury Bench. BNP Chief Whip wrote to the Speaker informing of their defection and the party's disapproval of this. The letter requested the Speaker to refer the matter to the Election Commission. The Speaker, however, remained silent for around two months. After that, the Speaker issued a Ruling and argued that the concerned MPs had not resigned from their parties, nor did they vote or abstain from voting against their party's decision. Absent these conditions; there was no constitutional dispute for the Speaker to refer to the Election Commission. Similar to the *Rafique Hossain and Alauddin Khalid v. Speaker* case, the Court held that the Speaker did not have any role except for forwarding the matter to the Election Commission.[120] The Appellate Division later confirmed this position in *Secretary, Parliament Secretariat v. Khandker Delwar Hossain*.[121]

THE DIALOGIC AND NON-DIALOGIC APPROACHES

In written and unwritten constitutions alike, the principle of judicial non-intrusion in parliamentary affairs is inspired by the separation of powers. Judicial abstention from legislative affairs presumably generates a

[117] *Id.* ¶ 64 (Per Kazi Ebadul Haque J.).
[118] Khandker Delwar Hossain v. The Speaker, 51 DLR 1 (1999).
[119] *Id.* ¶¶ 2–4.
[120] *Id.* ¶ 57.
[121] Secretary, Parliament Secretariat, Dhaka v. Khandker Delwar Hossain, 19 BLD (AD) 276 (1999).

corresponding expectation of legislative non-interference in the judicial process. Therefore, judicial consideration of the parliamentary process and its materials requires a heightened interactive and trust-building approach.[122] Absent an interactive and dialogic tendency in judicial review, the internal proceedings jurisprudence of both the Supreme Courts of India and Bangladesh are dominated by a self-aggrandised posture of guardianship over the Constitution. This very often yields strong judicial decisions and occasional combative responses from the Parliament. To contextualise the argument, we may consider the *Keshav Singh cases (Keshav Singh v. Speaker, Legislative Assembly*[123] and the *Special Reference No 1 of 1964*[124]*)* from India and the *parliament boycott* (*Anwar Hossain Khan*), *en masse resignation (Rafique (Md) Hossain and Md Alauddin Khalid), floor-crossing* (*Khandker Delwar Hossain*), and the *Speaker's Ruling* (*A. K. M. Shafiuddin v. Speaker*[125]) cases from Bangladesh.

India's 1964 events surrounding Mr Keshav Singh mark the level of confrontation that might ensue from a non-dialogic approach to judicial review. The Uttar Pradesh Legislative Assembly jailed a citizen, Mr Keshav Singh, for seven days in charge of its contempt.[126] Two judges of the Allahabad High Court entertained his *habeas corpus* petition and ordered his release from jail.[127] The Legislative Assembly took the matter from there and issued contempt of parliament charges against the judges.[128] The Legislative Assembly was convinced that the judiciary lacked the power to sit over a legislative judgment regarding its contempt.[129] The Assembly ordered the judges to be produced before it.[130] The two judges then brought a petition against the Speaker for violation of Article 211 of the Indian Constitution (prohibition on discussion of the judges' conduct).[131]

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122 Russell Keith, *supra* note 20.
123 Keshav Singh v. Speaker, Legislative Assembly, AIR 1965 All 349.
124 Special Reference No. 1 of 1964, AIR 1965 SC 745.
125 A. K. M. Shafiuddin v. Bangladesh, (2012) 41 CLC (HCD).
126 *Keshav Singh*, AIR 1965 All 349, ¶ 3.
127 *Id.* ¶ 2.
128 *Id.* ¶ 6.
129 *Id.*
130 *Id.*
131 *Id.* ¶ 7.

A Bench of all the judges (except the two petitioner judges) of Allahabad High Court heard the petition and decided in favour of the judges.[132] The Legislative Assembly, in its turn, withdrew the arrest warrant against the judges but still passed a resolution calling the judges to appear before the Assembly for "*clarification of facts*".[133]

The President ultimately referred the matter to the Supreme Court of India. The Indian Supreme Court in *Special Reference No 1 of 1964* took the view that Indian legislatures' privileges and immunities—and also, the internal proceedings protection—are limited by the Constitution and the judiciary, as the guardian of the Constitution, would be in full authority to interpret the boundary of such privileges and immunities.[134] Though the position of the Indian Supreme Court in *Special Reference No 1 of 1964* is hailed by some as the "*vindication of constitutional supremacy*,"[135] Chintan Chandrachud argues that the Supreme Court took the case as "*a contest for custodianship of the Constitution*"[136] rather than considering whether both the coequal branch of the republic lacked jurisdiction to decide against each other. Chandrachud writes:

> "*It was possible, for example, for the Supreme Court to decide that it was beyond the authority of the high court to consider Keshav Singh's petition, but also that it was beyond the authority of the assembly to commit the judges for contempt for deciding that question.*"[137]

This sole guardianship approach apparently constitutes the hallmark of Indian judicial review. There has been an argument that India's strong form of judicial review system emboldened by its basic structure jurisprudence has enabled the "*unelected judges availing so many powers and refusing to heed the*

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[132] *Id.* ¶¶ 8, 10.
[133] *Id.* ¶¶ 11–12.
[134] *Id.* ¶ 39 (Per Gajendragadkar, C. J.)
[135] Mirza Hameedullah Beg, '*A Case of Constitutional Conflict Between The State Legislative Assembly and the High Court': Supremacy of the Constitution Vindicated*, 1 ALLAHABAD HIGH COURT CENTENARY CELEBRATION 1866-1966, http://www.allahabadhighcourt.in/event/CaseConstitutionalConflictMHBeg.pdf.
[136] CHINTAN CHANDRACHUD, THE CASES THAT INDIA FORGOT, 9 (Juggernaut 2019).
[137] *Id.*

intentions of the elected representatives."[138] The Indian Supreme Court has shown a general distrust of politicians and tried to resist parliamentary involvement in any issue they consider "*internal*" to the judiciary. Under this approach, any argument for inter-institutional check and balance is highly likely to be seen as an assault on judicial independence.[139] The Court's 2015 judgment in the *Ninety-Ninth Amendment case*[140] shows that the Court might be willing to bend the constitutional supremacy and basic structure doctrines suitably to guard its perceived supremacy over other branches.[141] Arguably, the possibility of adjudication by such a hostile Supreme Court might be a reason that discouraged the Indian Parliament from codifying its privileges in a statutory format. Given the contexts, such an unwritten common law approach to the parliamentary privileges within India's written constitutional system is "*paradoxical*"[142] but not unexpected.

Compared to India, Bangladesh's position, as discussed in the fourth part, on the internal proceedings doctrine is one of incoherence, indecisiveness and fortuitous deflections. As previously mentioned in detail, in the *Parliament boycott case (Anwar Hossain Khan v. Speaker),*[143] the High Court Division "*ordered*" the MPs to stop their boycott and return to Parliament. The MPs responded by resigning from Parliament *en masse*. Around thirteen years later, the Appellate Division disposed of the appeal and held that the High Court Division's "*order*" was useless and unenforceable.[144] Next, in the *en masse* resignation case *(Rafique Hossain and Md Alauddin v. Speaker)*,[145] the High Court Division supported the MPs' right to resign *en masse* but refused to entertain a petition seeking the Speaker to notify such resignation officially. Despite the Court's opinion that the Speaker had no

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138 Walekar Dasharath, *Changing Equation Between Indian Parliament and Judiciary*, 71(1) IND. J. POL. SCI. 163 (2010).
139 *See* Supreme Court Advocates-on-Record Ass'n v. Union of India, (2016) 4 SCC 1.
140 *Id.*
141 Rehan Abeyratne, *Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective*, 49(2) GEO. WASH. INT'L L. REV. 569 (2017).
142 CHANDRACHUD, *supra* note 136.
143 Anwar Hossain Khan v. Speaker of Bangladesh Sangsad Bhaban, 47 DLR (HCD) (1995) 42.
144 Moudud Ahmed v. Anwar Hossain Khan, 60 DLR (2008) (AD) 108.
145 Rafique Hossain v. Speaker Bangladesh Parliament, 47 DLR 361 (1995).

adjudicatory responsibility except notifying the resignation to the Election Commission, the then Speaker issued a ruling in which he held that *en masse* resignation of the MPs was not valid in his judgment. He, therefore, refused to forward the matter to the Election Commission. A similar situation arose again in the *floor-crossing case*[146] where the Speaker issued a ruling saying that the MPs did not formally resign from their party and hence refused to notify the floor crossing of two opposition MPs officially. In this case, the government raised a question about the Court's power to direct the Speaker, who represents the Parliament, to do anything.[147] It was argued that the Speaker's ruling in Parliament was its "*internal proceedings*"; hence, it could not be called in question in any court.[148] The Speaker's office refused to tender any representation to the Court. It also did not supply a copy of the Speaker's ruling as requested by the Court.[149] Facing a non-cooperative parliament, the High Court Division tried to avoid a confrontation by holding that the Court didn't need to judge the validity of the Speaker's ruling.[150] The judges were rather concerned with the Speaker's constitutional duty in this matter.

Like India, this confrontational posture of the Bangladesh Supreme Court is in line with its characteristic trend of judicial review that is influenced by judicial protectionism and the state organisations' reluctance to engage each other constructively. Two recent cases represent the tendency to its extreme. The first is the *Speaker's Ruling* case (*A. K. M. Shafiuddin v Bangladesh*), and the second is the *Sixteenth Amendment Case* (*Advocate Asaduzzaman Siddiqui v. Bangladesh*).[151]

Facts of the *A. K. M. Shafiuddin* case, as summarised in the Court's judgment,[152] are as follows. An MP served a notice for discussion in the Parliament on a High Court Division judgment regarding a property called *Sarak Bhabon*. In the concerned judgment, a High Court Division Bench ordered the government to deliver the possession of disputed *Sarak Bhabon*

146 Khandker Delwar Hossain v. The Speaker, 51 DLR 1 (1999).
147 *Id.* ¶ 22.
148 *Id.* ¶ 23.
149 *Id.* ¶ 61.
150 *Khandker Delwar*, 51 DLR 1 (1999), ¶ 62.
151 Advocate Asaduzzaman Siddiqui v. Bangladesh, (2016) 10 ALR (AD) 03.
152 A. K. M. Shafiuddin v. Bangladesh, (2012) 41 CLC (HCD), ¶¶ 2–15.

to the Registrar of the Supreme Court.[153] During the discussion in Parliament, the Speaker allegedly commented that the judges of the Supreme Court act extra-ordinarily and swiftly when matters of their interest come to consideration.[154] This observation of the Speaker on the floor of the Parliament was later brought to the notice of the High Court Division Bench during a follow-up hearing. The sitting Judge then commented that the Speaker's speech amounted to "*sedition*", and she should be punished for that.[155] Infuriated by the comment, the MPs reacted harshly during the floor debate. The Speaker then issued a ruling observing that the concerned Judge violated his constitutional oath by breaching the Parliament's privileges. Should the Chief Justice take any action against the concerned Judge, Parliament would support such action.[156]

The ruling of the Speaker was then challenged in this *A. K. M. Shafiuddin* case. It was argued that the Speaker's ruling was unconstitutional as it amounted to an attack on the independence of the judiciary.[157] The High Court Division Bench, in this case, disposed of the matter without passing any order but by observing that legislature and judiciary are coordinate branches of the republic and hence there should be mutual respect and harmony among them.[158] Despite this, the Court did not miss the chance to remind the Speaker that parliamentary privileges are not unlimited under the Constitution[159] and, also that the Speaker's ruling, particularly the comment on the Chief Justice's disciplinary action, was unconstitutional and "*non est in the eyes of the law*."[160] This position of the High Court Division is clearly against the historical position of the Court in not questioning the Speaker's ruling,[161] which is clearly an internal proceeding of the Parliament. The most curious argument of the Court was that Judges' discipline being a matter for the Supreme Judicial Council, the Speaker

[153] *Id.* ¶ 3.
[154] *Id.* ¶ 2.
[155] *Id.* ¶ 21.
[156] *Id.* ¶¶ 12–13.
[157] *Id.* ¶ 1.
[158] *Id.* ¶¶ 35, 48.
[159] *Id.* ¶ 41.
[160] *Id.* ¶ 33.
[161] Khandker Delwar Hossain v. The Speaker, 51 DLR 1 (1999), ¶ 62.

must not comment on this.[162] While the Supreme Judicial Council is a disciplinary body activated by the President and comprised of the Supreme Court judges themselves,[163] there is no rule in the Constitution that says that nobody could complain to the President or the Chief Justice about any Judge's misconduct. Such a complaint is necessary to trigger the presidential action and subsequent activation of the Supreme Judicial Council.[164] Unsupported by the Constitution, the High Court Division's argument in *A. K. M. Shafiuddin* perhaps represents a classic example of judicial self-dealing and a refusal even to tolerate lawful criticism of the judges' conduct. The tendency is evidenced in this judgment where the Court effectively invalidates comments in a Speakers' ruling and at the same time ignores the disrespectful comments a sitting judge made about the Speaker of the Parliament. The Court in *A. K. M. Shafiuddin* simply rested by a brief but evasive and defensive mention of the concerned judge's comments:

> "*Even if we ignore the question of admissibility and reliability of the alleged comment published in media, one thing is required here to justify the Hon'ble Speaker's observation, that is, the Judge must challenge the validity of the proceeding in Parliament in a Court. Such comment, if at all made, is no doubt, very unfortunate but the requirement of law, that is, the validity of a proceeding of Parliament is being called in question in a Court, is absolutely a different thing. In the orders of 'Sarak Bhabon Case' as quoted earlier, we do not find any such comment or challenge the proceeding of Parliament.*"[165](emphasis supplied)

Two years after the *A. K. M. Shafiuddin* case, the Supreme Judicial Council system was abolished, and the Parliament sought to revive the original

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[162] A. K. M. Shafiuddin v. Bangladesh, (2012) 41 CLC (HCD), ¶ 26.

[163] BANGL. CONST. art. 96. It deals with removal of Supreme Court judges. It originally provided for parliamentary removal of the judges. It was amended later and a system of the Supreme Judicial Council was introduced. As per the system, judges became removable upon investigation and recommendation by the Supreme Judicial Council comprising the Chief Justice and two senior most judges of the Appellate Division. This provision was amended again through the Sixteenth Amendment which was done after in 2014, two years after this judgment in *A. K. M. Shafiuddin Ahmed.*

[164] BANGL. CONST. art. 96. cl. 5. It read as follows: "*Where, upon any information received from the Council or from any other source, the President has reason to apprehend that a Judge*...".

[165] *A. K. M. Shafiuddin*, (2012) 41 CLC (HCD), ¶ 31.

parliamentary removal system for the Supreme Court Judges.[166] As an aftermath, the second case (*The Sixteenth Amendment case*) came into play. This time, the Supreme Court declared the system of parliamentary impeachment of judges unconstitutional. Despite the argument that parliamentary removal of judges would install the so-far missing institutional balance between these two organs,[167] judges showed their clear distrust of the representative branch.[168] In the process, the Court ended up declaring a provision of the original Constitution unconstitutional for allegedly violating the basic structures of the same original Constitution.[169] The Court did this though India—whose Basic Structure jurisprudence it relied on, has the system of parliamentary removal. This time the Parliament reacted to the *Sixteenth Amendment* judgment very sharply, and the Chief Justice was forced to resign in the sequel of incidents that followed the judgment.[170] While the internal parliamentary proceedings jurisprudence of the Indian and Bangladeshi Supreme Courts are hit by their antagonistic systems of judicial review, the British judiciary has shown

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[166] The Constitution (Sixteenth Amendment) Act, 2014, No. XIII, Acts of Parliament, 2014 (Bangl.).

[167] Masum Billah, *Faith, Hope and Promise*, DHAKA TRIBUNE (Aug. 17, 2014), https://www.dhakatribune.com/uncategorized/2014/08/27/faith-hope-and-promise.

[168] M Jashim Ali Chowdhury & Nirmal Kumar Saha, *Advocate Asaduzzaman Siddiqui v. Bangladesh: Judiciary's Dilemma with Impeachment*, 3(3) COMP. CONST. L. & ADMIN. L. Q. 7 (2017).

[169] Advocate Asaduzzaman Siddiqui v. Bangladesh, (2016) 10 ALR (AD) 3, ¶ 383 (Per SK Sinha CJ). *See Id.* Ridwanul Hoque, *Can the Court Invalidate an Original Provision of the Constitution?*, 2(1) U. ASIAN PAC. J. L. POL'Y 13 (2016). *See also* Po Jen Yap & Rehan Abeyratne, *Judicial self-dealing and unconstitutional constitutional amendments in South Asia*, 19 (1) *Int'l J. Const. L.* 127 (2021).

[170] DS Report, *PM critical of CJ's remarks*, THE DAILY STAR (Aug. 22, 2017), https://www.thedailystar.net/frontpage/pm-critical-cjs-remarks-1452160; Partha Pratim Bhattacharjee, *AL leaders now calling for CJ to step down*, THE DAILY STAR (Aug. 23, 2017), https://www.thedailystar.net/frontpage/al-leaders-now-calling-cj-step-down-1452682; DS Report, *'I am completely well', says Chief Justice SK Sinha as he leaves country*, THE DAILY STAR (Oct. 13, 2017), https://www.thedailystar.net/country/cj-chief-justice-surendra-kumar-sinha-may-fly-australia-tonight-1475923; Ashutosh Sarkar, *Chief Justice Steps Down*, THE DAILY STAR (Nov. 12, 2017), https://www.thedailystar.net/frontpage/chief-justice-steps-down-1489819; DS Report, *Forced to quit: BNP, No pressure: AL*, THE DAILY STAR (Nov. 12, 2017), https://www.thedailystar.net/frontpage/its-pressure-bnp-no-pressure-al-1489828.

a visible awareness of the matter and taken an inter-institutional and dialogic approach by taking the Parliament in trust. For example, the question for consideration in *Warsama and Gannon v. Foreign and Commonwealth Office*[171] was whether the judiciary could consider the findings of a non-statutory inquiry about child abuse allegations in the St. Helena police department and other governmental institutions.[172] The government published the report of the inquiry under a motion of Unopposed Return. In the UK parliamentary practice, Unopposed Returns are the procedure through which the government or ministers publish papers in their hands.[173] While the papers themselves are essentially the government documents, publication of those through the Unopposed Return procedure gives them protection equal to parliamentary papers.[174] Judge McCloud found the report to be covered by "*proceeding in parliament*."[175] She, however, permitted an appeal against her decision by noting some observations about the Unopposed Return procedure.[176] She noted that motions for Unopposed Returns could not be debated in Parliament. It was rather a device that allowed the government to publish papers under the cloak of parliamentary privilege.[177] Master McCloud invited the Speaker's office to submit the status of Unopposed Return as an internal parliamentary proceeding.[178] The Speaker's counsel, Ms. Saira Salimi's written submission supported Unopposed Returns' internal proceeding status.[179]

In appeal, the UK Court of Appeal accepted the submission of the Speaker's counsel and argued that despite the lack of debate on the motion to publish a document, an Unopposed Return would qualify as

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171 Warsama v. Foreign and Commonwealth Office, [2018] EWHC 1461 (QB).
172 *Id.* The petitioners in this case, Warsama and Gannon—were the whistleblowers whose revelations led to the inquiry. The inquiry found the allegations unsubstantiated and criticized them harshly.
173 MAY, *supra* note 31, Part I Chapter 7, ¶ 7.32, https://erskinemay.parliament.uk/section/6480/unopposed-returns/.
174 Barry K Winetrobe, *The Autonomy of Parliament, in* THE LAW AND PARLIAMENT 14-32, 16 (Dawn Oliver and Gavin Drewry eds., Butterworths 1998).
175 *Warsama*, [2018] EWHC 1461 (QB), ¶¶ 107, 116, 117.
176 *Id.* ¶¶ 129–130.
177 *Id.* ¶ 103.
178 *Id.* ¶¶ 42–43.
179 *Id.* ¶ 83.

Parliament's internal proceedings.[180] This is because the publication marks a combined act of the executive and legislative branches rather than merely a government's "*magic trick*" of claiming immunities.[181] The government remains answerable to the Parliament regarding the findings of the report and its implementation.[182] As regards the weight to be given to the Speaker's submission, the Court of Appeal noted:

> "*Although we are not bound to accept the view of Counsel for the Speaker on what is or should be the scope of the privilege, we should 'pay careful regard' [……] to her view, reflecting that of the Speaker on behalf of the House of Commons, as a person in a position to speak on the matter with authority.*"[183]

The Court of Appeal's interactive approach in *Warsama* appears consistent with the UK's "*dialogic model of judicial review*"[184] that has ensued from the UK Human Rights Act ("**HRA**"), 1998. The *Warsama* court invited the Speaker's office to aid the court in finding the right answer to the question in hand, and showed its clear preparedness to give due weight, and if necessary, show due deference to the legislature's view on a matter that is essentially within the legislative branch's purview.

While the HRA is not directly related to the courts' internal proceedings jurisprudence, the operational context that flows from it has facilitated greater interaction, trust-building, and communication between the two organs.[185] Sections 19, 3, and 4 of the HRA have created a principled

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[180] Foreign And Commonwealth Office v. Warsama & Anor, [2020] EWCA Civ 142, ¶ 60.
[181] *Id.* ¶ 63.
[182] *Id.* ¶ 62.
[183] *Id.* ¶ 56 (Per Lord Burnett of Maldon, Lord Justice Coulson and Lady Justice Rose).
[184] Philip Norton, *A Democratic Dialogue? Parliament And Human Rights In The United Kingdom*, 21(2) ASIA PAC. L. REV. 141 (2013); Catherine A. Fraser, *Constitutional Dialogues between Courts and Legislatures: Can We Talk?* 14(3) F. CONSTITUTIONNEL 7 (2005); ALISON L. YOUNG, DEMOCRATIC DIALOGUE AND THE CONSTITUTION, 180 (Oxford University Press 2017); T. R. S. Allan, *Constitutional Dialogue and The Justification of Judicial Review,* 23(4) OX. J. L. STUD. 563, 582-584 (2003).
[185] Briefly stated, §§ 3, 4, and 19 of the HRA combined have created an opportunity for dialogue between the UK parliament and the judiciary. § 3(1) of the HRA entrusts the UK judiciary with the responsibility to interpret the law and check its compatibility with the

interaction between the legislature and the judiciary. Section 19(1) of the HRA requires a responsible Minister to make "*a statement of (a statute's European Convention) compatibility*" before the Parliament when a new law is proposed. The Minister-in-charge of a bill will have to state that a "*newly proposed law is compatible with the citizen's (European) Convention on Human Rights*".[186] If they cannot make such a statement, they would at least expressly declare that the UK government wanted the Parliament to proceed without such a statement.[187] Understandably, the ministerial statement made under Section 19(1) would constitute a direct external aid for the Court in the statutory construction process. The government's inability to declare the compatibility would raise a red flag and could possibly lead towards a judicial declaration of incompatibility under Section 4. Judiciary will, of course, try to read the law, so far as possible, in a way that makes it compatible with the European Convention. In cases where a law is apparently incompatible, and the Court's construction fails to do a compatible reading, Section 4 would oblige the Court to declare the incompatibility.

Given the Indian and Bangladeshi experiences of inter-institutional tension and confusion, adopting the *Warsama* styled dialogic approach appears extremely important in parliamentary privilege cases, which often place the judiciary and Parliament at risk of confrontation. *Warsama* constitutes a good example of how the judiciary could engage the legislative branch in the trust-building process.

European Convention on Human Rights to which the UK is a party. § 4 of the HRA permits the judiciary to declare a statute "*incompatible*" with the European Convention. §4 of is described as a transformative provision that may convert the UK's parliamentary sovereignty into one of bipolar sovereignty shared between the legislature and judiciary. Once a declaration of incompatibility is made, the legislature would need to work out the remedy. The UK Parliament's Joint Committee on Human Rights coordinates the government and parliamentary compliance with judicial declaration.

[186] Full text of § 19(1) of the UK Human Rights Act 1998 runs as follows: "*1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill — (a)make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or (b)make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill*".

[187] *Id.*

CONCLUSION

Despite some disagreement over its coinage, the dialogic model of judicial review is now travelling across the globe. Originating from Canada,[188] it has been internalised in a relatively weak judicial review system of the UK. Subtle dialogic premises are being discovered in the other UK influenced weak judicial review systems like Singapore, Malaysia, and Hong Kong.[189] Scholars have tested the doctrine to strong judicial review systems like that of India[190] and the United States of America.[191] The non-dialogic tendencies of the strong form judicial review in India and Bangladesh, on the other hand, contribute crudely in the way the legislature and judiciary un-relate each other. The inter-organisational tension between the legislative and judicial branches has obscured India's parliamentary privileges and immunities. The same problem has yielded contradictory and incoherent judicial decisions in Bangladesh. The Supreme Court of Bangladesh has often abdicated its responsibility to adjudicate important constitutional questions fearing that the legislature may not cooperate. In India, the Court is often accused of overstepping its boundaries. In both jurisdictions, the legislature has refused cooperation and showed reluctance to codify parliamentary privileges and immunities. This article has tried to argue that the UK courts' dialogic approach to the doctrine has helped forge a delicate balance between the judicial power of interpretation and the Parliament's claim of exclusivity over its internal affairs.

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188 Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or perhaps The Charter of Rights isn't such a bad thing after all)*, 35 OSGOODE HALL L.J. 75 (1997); Peter W. Hogg et al., *Charter Dialogue Revisited: Or "Much Ado About Metaphors"*, 45 OSGOODE HALL L.J. 1 (2007).

189 PO JEN YAP, CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA, 80–86 (Oxford University Press 2015).

190 Rehan Abeyratne & Didon Misri, *Separation of Powers and The Potential for Constitutional Dialogue in India,* 5(2) J. INT'L COMP. L. 363, 371–376 (2018).

191 Christine Bateup, *Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective*, 21 TEMP. INT'L COMP. L.J. 1 (2007); Mark Tushnet, *Dialogic Judicial Review*, 61 ARK. L. REV. 205 (2009).

LAW CLERKS AND ACCESS TO JUDGES: A COMPARATIVE REFLECTION ON THE RECRUITMENT PROCESS OF LAW CLERKS IN INDIA

ANURAG BHASKAR[1]

This article deals with the institution of clerkship and its recruitment process in the Supreme Court of India through a comparative lens. It analyses the factors which make the clerkships worthwhile in Australia, Canada, South Africa, the United Kingdom and the United States to argue that an important job profile like clerkship should have a transparent, accessible and inclusive recruitment process so that there is equality of opportunity. Using the framework of the recruitment process in these countries to cull out broader parameters, a scrutiny of the existing recruitment scheme in India has been done to highlight the flaws in the current scheme of things. Learning from the best comparative

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practices, the article proposes a new recruitment policy for law clerks at the Supreme Court of India.

INTRODUCTION

Every year, the Supreme Court of India hires young law graduates on a contract basis for "*Law Clerk-cum-Research Assistants*" to assist judges in their work. Each law clerk is required to work for an individual judge. In the legal profession, the term "*law clerk*" does not refer to any clerical or secretarial job, as maybe perceived by someone outside the profession. This term is related to a specific work assignment, which requires giving assistance to the concerned judge in terms of research, writing and so on. Countries like India and South Africa seem to have borrowed the nomenclature from the United States ("**US**") and Canada, where the term "*law clerk*" has been in prevalence for almost a century and a half. As I note in a subsequent part of this article, in the United Kingdom ("**UK**"), the nomenclature used is "*Judicial Assistants*", and similarly, the courts in Australia offer a number of positions of judge's "*Associates*" each year. Notwithstanding the difference in nomenclatures across countries, the work profile is similar.

Since the Supreme Court of India has been entrusted with a clear mandate to defend the Constitution and is also the highest court of appeal,[2] its judges play a major role in maintaining constitutional standards and administering justice in a democracy.[3] As a result, young law clerks assisting the judges of the Supreme Court directly in their work also contributes to the administration of justice vicariously. Though the courts are sometimes perceived as closely guarded institutions, the functionalities of the courts have been thrown open to young law graduates because of the clerkship scheme.

[2] INDIA CONST. arts. 131–143.

[3] Tarunabh Khaitan, *The Indian Supreme Court's Identity crisis: A Constitutional Court or A Court of Appeals?*, 4 INDIAN L. REV. 1 (2020).

While hiring law clerks on a short-term contract basis is approximately only two decades old in India, it has been in place in the US since the 1880s.[4] As a result, there has been a fair amount of attention given to the "*role and influence of law clerks at the Supreme Court of the United States*",[5] as compared to the discourse in India. In 2014, lawyer and scholar Abhinav Chandrachud published *"one of the first scholarly studies of the clerkship experience on the Supreme Court of India"*.[6] Drawing from the interviews of twenty-eight law clerks and interns who had worked for judges in the Supreme Court of India, Chandrachud presented a broader picture of the institution of clerkship in the country's Apex Court. At the same time, in a pending suit, the existing clerkship recruitment process of the Supreme Court of India was found to be unconstitutional by the Delhi High Court.[7] Consequently, the Supreme Court of India prepared a revised clerkship scheme[8] (dated January 8, 2015), which laid down detailed guidelines for engaging law clerks—including the recruitment process, the responsibilities of law clerks, among other things.[9] Since Chandrachud's article, no scholarly attention has been paid to the development of judicial clerkship in India, particularly in the revised scheme.

In this article, I compare the revised clerkship scheme of the Supreme Court of India with the formal clerkship process of apex courts of Australia, Canada, South Africa, the UK, and the US, with a specific focus on the recruitment process. I have chosen these countries for two reasons: *First*, the Supreme Court of India has increasingly placed reliance on jurisprudence produced by these countries. *Second*, these countries have a long record of a formal clerkship process, unlike India. In doing so, I argue

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[4] Mark C. Miller, *Law Clerks and Their Influence at the US Supreme Court: Comments on Recent Works by Peppers and Ward*, 39 LAW & SOCIAL ENQUIRY 741(2014).

[5] *Id.* at 741. Scholars have often studied to what impact have law clerks been able to influence the decision-making of the judges at the SCOTUS.

[6] Abhinav Chandrachud, *From Hyderabad to Harvard: How US Law Schools Make it Worthwhile to Clerk on India's Supreme Court*, 21 INT'L J. LEGAL PROF. 73, 79 (2014).

[7] Phaguni Nilesh Lal v. The Registrar General, Supreme Court of India & Anr., (2014) 206 D.L.T. 674 (India).

[8] *Revised Scheme For Engaging Law Clerk-Cum-Research Assistants On Short Term Contractual Assignment In The Supreme Court Of India*, SUPREME COURT OF INDIA (Jan. 8, 2015), https://main.sci.gov.in/pdf/cir/2015-01-08_1420713261.pdf [hereinafter *Revised Scheme for Engagement of Law Clerks, 2015*]. A formal scheme to hire law clerks in the Supreme Court in India.

[9] *Id.*

that the recruitment process for clerkships in the Supreme Court of India needs to be reformed to make the process more accessible and inclusive for most graduates. For the article, I sought inputs, experiences, and feedback from a number of law clerks, interns, law professors, and court staff of different countries familiar with the application process in those countries. The scope of the article is limited. I shall generally be dealing only with apex constitutional courts in different countries[10] and not the subordinate courts wherein clerkship has percolated. The article does not analyse the demographic/socio-educational profiles of past law clerks or the hiring patterns of different judges in India.

Furthermore, in countries like Australia, the US and the UK, the nomenclature used for judges is "*Justices*". India, Canada, and South Africa use the term "*Judges*". In this article, I have used both the terms—a "*Judge*" or a "*Justice*"—interchangeably.

The first part of the article compares a few aspects of the clerkship culture in different countries with that of India: nature of work, number of law clerks, salary and perception about clerkships. It highlights that despite considerable differences with other countries, clerkships remain an important job profile in India for many fresh law graduates. A natural corollary would be that the recruitment process to hire clerks considers all those factors, which can provide equal opportunity to this job profile. The second part explains the recruitment process in Australia, Canada, South Africa, the UK, and the US and culls out the key factors that shape this process. These key factors (such as accessibility) can act as parameters to scrutinise the existing clerkship scheme in India. The third part describes the evolution of the clerkship recruitment process in India and points out several concerns which have made clerkships inaccessible to many since its inception. The fourth part proposes a new recruitment scheme to make the process accessible and inclusive.

[10] The details about clerkship recruitment in Canada, India, South Africa, and the UK are available on their court websites. For the US, I have relied upon written work and inputs from former law clerks.

WHAT MAKES CLERKSHIPS WORTHWHILE?

A. NATURE OF WORK

In the US, not all matters filed in the Supreme Court are listed in open court for a hearing. The judges of the Supreme Court of the United States ("**SCOTUS**") decide together which cases would be approved for hearing and then sit *en banc* to adjudicate the issue.[11] Law clerks play an important role in reviewing the thousands of petitions for *certiorari* that come before the SCOTUS each year.[12] This means that they are required to read all the material related to a case and then write a "*memo*"[13]/note for their judge or for the SCOTUS, which allows the judges to avoid reading petitions that appear to have no merit or raise no important issues for the SCOTUS. A law clerk's standard work for their judge also generally includes writing bench memos on the cases that the SCOTUS has accepted for a full review, helping the judges to prepare possible questions for oral arguments, doing legal research, writing the first drafts of opinions, and working on editing and polishing the final drafts of judgments.[14] This much responsibility is expected of law clerks, as they already have invested in seven years of education (a four-year undergraduate and a third-year law degree), apart from work experience, before working in the SCOTUS.

The websites of the apex courts of Canada, Australia, the UK, South Africa and India mention the role and responsibilities undertaken by the law clerks/judicial assistants. In Canada, while working under the direction of the judge to whom a law clerk is assigned, it is required of law clerks to "*research points of law, prepare memoranda of law, and generally assist the Judge in the work of the Court*".[15] Judges' associates in Australia are "*employed as part of the*

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[11] Miller, *supra* note 4, at 743.

[12] *Id.*

[13] In judicial work, a "*memo*" is a brief written note or outline, of a particular case or document for the purpose of aiding the judge to go through particular important points for future reference.

[14] Adam Bonica et al., *Legal Rasputins? Law Clerk Influence on Voting at the US Supreme Court*, 35 J. L. ECON. & ORG. 1, 5 (2019).

[15] *Law Clerks Program*, SUPREME COURT OF CANADA (July 22, 2020), https://www.scc-csc.ca/empl/lc-aj-eng.aspx#sec11 [hereinafter *Canada Law Clerks Program*].

chambers staff of a particular judge".[16] They are supposed to "*provide legal research, in-court duties and other support for that judge*".[17]

The clerkship scheme of the Supreme Court of India requires law clerks to prepare a brief summary of fresh admission matters, prepare a synopsis of regular hearing matters, research on legal points in the preparation of draft judgments, and assist the judge in preparing speeches and academic papers.[18] Generally, a judge requires a brief note of just one page for matters to be heard. Since the Court sits in different benches of two-three judges, each bench typically "*decides between 30 and 60 admission matters in a day, with hearings often lasting no more than a few minutes for a case*".[19] With this much burden, a brief note prepared by a law clerk can save a judge's time to avoid reading each page on the file.

Judicial assistants/law clerks in the UK and South Africa are entrusted with certain responsibilities in addition to the tasks performed by judicial assistants/law clerks in India, the US, Australia and Canada. Apart from the key work of preparing bench memos (short notes summarising applications for permission to appeal) each week and researching on relevant issues as a judge would like, a judicial assistant in the UK is also required to draft press summaries (a concise synopsis of a judgment that the court is about to hand down) "*in a language which non-lawyers can comprehend in conjunction with UK SC Head of Communications*".[20] A judicial assistant is further expected to assist with the UK "*Supreme Court's*

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[16] *Judges' Associates*, FEDERAL COURT OF AUSTRALIA (July 23, 2020), https://www.fedcourt.gov.au/about/employment/associates [hereinafter *Australian Federal Court Judge's Associates*].

[17] *Id.*

[18] *Revised Scheme for Engagement of Law Clerk-cum-Research Assistants on Short-term contractual assignment in the Supreme Court of India*, SUPREME COURT OF INDIA (Feb. 22, 2019), https://main.sci.gov.in/pdf/other/2019-02-22_1420713261.pdf [hereinafter *Revised Scheme for Engagement of Law Clerks, 2019*].

[19] Khaitan, *supra* note 3, at 4.

[20] *Terms and Conditions: Judicial Assistants to the Justices*, UNITED KINGDOM SUPREME COURT, (July 22, 2020), https://webmicrosites.hays.co.uk/documents/4856148/4856273/TERMS+AND+CONDITIONS.pdf [hereinafter *UK Supreme Court Terms and Conditions for Judicial Assistants*].

communication and educational activities as required throughout the year" and liaise with "*all staff in the Supreme Court Registry as necessary*".[21] Similarly, in South Africa, a law clerk makes case summaries, cite-checks draft judgments before delivery and helps the judge prepare public lectures and speeches. A law clerk is also required to make "*media summaries*" and assist the judge in the Court and "*case-calling and ensuring that the oral hearings take place with propriety and efficiency*".[22] Other major responsibilities of a law clerk in South Africa include: assisting the judge in court-related administrative work and international human rights work; aiding with "*administration of Court papers, case management and public relations*"; "*conducting tours of the Court and the artworks collection for each judge's visitors*"; and helping with Court's "*outreach and public education program*".[23] A law clerk is further required to take part in clerks' committees.

Thus, in every country, though there are few common broad deliverables, the exact duties and responsibilities of each law clerk are determined by the hiring/allotted judge. Specific responsibilities may vary among chambers. It must, however, be noted that in the UK and South Africa, where the top-most constitutional courts are new in existence as compared to the US, the role of judicial assistants/law clerks seems broader, more institutionalised, and improvised as per country-specific requirements.

B. THE NUMBER OF CLERKS/ASSISTANTS

In the SCOTUS, the Chief Justice is authorised to hire five clerks, the eight Associate Justices are authorised to hire four clerks each and retired judges may hire one law clerk each.[24] Normally, to attract the best talent, judges hire law clerks "*well before their clerkship begins, typically at the beginning of the prior judicial term or earlier*".[25] The hiring schedule may differ from judge to judge.[26]

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[21] *Id.*

[22] Constitutional Court of South Africa, *About Law Clerks*, CONSTITUTIONAL COURT OF SOUTH AFRICA (July 22, 2020), https://www.concourt.org.za/index.php/law-researchers/about-law-clerks [hereinafter *South African Constitutional Court Law Clerks*].

[23] *Id.*

[24] Miller, *supra* note 4, at 742.

[25] Bonica et al., *supra* note 14, at 5.

[26] WILLIAM REHNQUIST, THE SUPREME COURT 231–232 (First Vintage ed., 2002) (Former SCOTUS Chief Justice William Rehnquist in Chapter XII titled "*Certioraris: Picking the Cases to be Decided*" describes his hiring process in some detail on pages).

In Canada, applications are invited for thirty-six positions of law clerks to the nine judges of the Supreme Court of Canada, *i.e.* four law clerks for each judge.[27] In the UK, applications are invited for up to eleven temporary posts, which means each Justice gets one candidate roughly.[28] The system in the Constitutional Court of South Africa provides that each judge has two South African law clerks, paid for by the State, and may, in addition, have a foreign law clerk who is self-funded.[29]

When the Supreme Court of India first revised the clerkship scheme, the Chief Justice and each judge of the Supreme Court was entitled to have services of a maximum of two law clerks.[30] This number was later increased to three.[31] Subsequently, with the administrative order dated June 5, 2019, the Chief Justice and other judges can now have a maximum of four paid law clerks—a maximum of 136 law clerks in the Supreme Court of India.[32]

C. SALARY

Law clerks in the US receive a generous annual salary for their one-year contract. The law clerks are paid an amount of $74,872 as an annual salary.[33] Currently, the annual starting salary for a law clerk at Washington State Supreme Court is $70,632.[34] One notable perquisite now, which did not exist thirty-forty years ago, is that law firms pay a $425,000 bonus for SCOTUS clerks who sign on with them for a minimum of a year or two, which does not include the starting salary for a first-year legal associate, about $200,000.[35] This may be because judges of the SCOTUS have life

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[27] *Canada Law Clerks Program*, *supra* note 15.
[28] *UK Supreme Court Terms and Conditions for Judicial Assistants, supra* note 20.
[29] *South African Constitutional Court Law Clerks, supra* note 22.
[30] *Revised Scheme for Engagement of Law Clerks, 2015, supra* note 8.
[31] This happened during my tenure as a Law Clerk at the Supreme Court of India.
[32] *Revised Scheme for Engagement of Law Clerks*, *2019, supra* note 18.
[33] Terry Baynes, *The Secret Keepers: Meet the U.S. Supreme Court Clerks*, REUTERS (July 29, 2020), https://www.reuters.com/article/us-usa-healthcare-court-clerksidUSBRE85D17120120614.
[34] Washington Courts, *Supreme Court-Clerkships* (July 22, 2020), https://www.courts.wa.gov/appellate_trial_courts/supreme/?fa=atc_supreme.clerkship.
[35] Inputs through email (dated June 9, 2020) by Michael Klarman, Professor at Harvard Law School (on file with the author).

tenure, and someone who worked with them in the past would be quite helpful for law firms in future.

Moreover, SCOTUS clerkships are also a feeder to American academia, mostly as Assistant Professor or Fellow, where starting salaries are around $130,000 annually (probably more).[36] In Canada, the annual salary is currently set at $74,122.[37] Besides, a fixed amount to assist with relocation from any point in Canada to Ottawa and return is provided.[38] Judicial assistants in the UK are paid £36,500 per annum (around $45,875), which will be paid monthly in arrears.[39] South African law clerks receive a uniform salary of about Rs. 300,000 (around $18,000) a year.[40] Associates in the High Court of Australia are paid an annual AUD 74,070 (around $53,000), plus 15.4% superannuation.[41]

Compared to this, the law clerks in India have generally been paid less. Law clerks at the Supreme Court of India were not paid initially,[42] later a monthly stipend from the Consolidated Fund of India was allotted to them.[43] From the term 2007-08, law clerks were paid an honorarium of Rs. 20,000 monthly, which was later hiked to a stipend of Rs. 25,000 per month, from September 2010 onwards.[44]

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[36] Inputs through email (dated June 14, 2020) by Rohit De, Associate Professor at Yale (on file with the author).
[37] *Canada Law Clerks Program*, *supra* note 15.
[38] *Id.*
[39] *UK Supreme Court Terms and Conditions for Judicial Assistants*, *supra* note 20.
[40] *South African Constitutional Court on Law Clerks*, *supra* note 22.
[41] High Court of Australia, *Applying for an associateship with a Justice of the High Court of Australia*, HIGH COURT OF AUSTRALIA, (July 29, 2020), https://www.hcourt.gov.au/employment/applying-for-an-associateship-with-a-justice-of-the-high-court-of-australia.
[42] Chandrachud, *supra* note at 6, at 79.
[43] INDIA CONST. art. 146 cl. 3 (It provides as follows: "*The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of India, and any fees or other moneys taken by the Court shall form part of that Fund*").
[44] Kian Ganz, *Supreme Court judicial clerkship stipends hiked to Rs 25k; Attractive enough?*, LEGALLY INDIA (July 22, 2020), https://www.legallyindia.com/the-bench-and-the-bar/breaking-sc-nlu-pref-in-judicial-clerkships-unconstitutional-says-delhi-hc-20131216-4192.

Subsequently, this amount was increased to Rs. 30,000 per month, and then with effect from January 2018, the amount was fixed at Rs. 50,000 per month. Pursuant to the order dated July 23, 2019 passed by the then Chief Justice of India ("**CJI**"), the monthly stipend for law clerks has been raised to Rs. 65,000 (approximately $10,500 annually).[45] In a further comparison, the High Courts in India pay much less to the law clerks.[46] Contrary to this, top-tier law firms in India pay more to a fresh law graduate of leading National Law Universities ("**NLUs**"). According to a survey, a first-year associate receives annually up to Rs. 1.82 million (around $24,300) in a top-tier firm.[47]

D. PERCEPTION

Clerkship at the SCOTUS is considered the most prestigious job any law graduate can get. Former law clerks can often be found in the "*top echelons of politics, business, academia, and the law*".[48]

In Canada, law clerks are engaged as "*term employees within the federal Public Service*" and as such are entitled to the "*same benefits and conditions of employment as term employees*".[49] Similar to the US, a clerkship at the Supreme Court of Canada is considered "*one of the most educational and auspicious experiences for early-career lawyers*".[50] Judicial assistants in the UK Supreme Court are

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[45] *See* the heading "*Consolidated Stipend*" at *Revised Scheme for Engagement of Law Clerks, 2015, supra* note 8.

[46] The monthly stipend for law clerks at different High Courts (for which information is publicly available) is as follows: Delhi High Court: Rs. 35,000 (earlier Rs. 25,000); Bombay High Court: Rs. 20,000; Allahabad High Court: 15000 per month (earlier Rs. 12,500); Madras High Court: Rs. 30, 000 (earlier Rs. 10,000 in 2017); Gauhati High Court: Rs. 20,000; Gujarat High Court: Rs. 20,000; Karnataka High Court: Rs. 16,500; Patna High Court: Rs. 30,000; Uttarakhand High Court: Rs. 20,000; Rajasthan High Court: Rs. 30,000.

[47] Kian Ganz, *2016 Law Firm Salary Surveys Bonanza: Find Out If You're Over- Or Under-paid*, LEGALLY INDIA (July 29, 2020), https://www.legallyindia.com/law-firms/law-firm-salaries-2016-00011130-8145.

[48] Miller, *supra* note 4, at 743.

[49] *Canada Law Clerks Program*, *supra* note 15.

[50] Loran Scholars Foundation, Clerking at the Supreme Court of Canada, LORAN SCHOLARS FOUNDATION (July 22, 2020), https://loranscholar.ca/supreme-court-of-canada-clerks/.

considered as "*civil servants*" and are given "*optional membership of the Principal Civil Service Partnership Pension Scheme/or Partnership Pension, an interest-free season ticket/bike loan, corporate membership to Benenden Healthcare*".[51] Similarly, in Australia, the associates of the judges are "*employed on a non-ongoing basis at the Australian Public Service Level 4 for a period of approximately 12 months*".[52]

One of the benefits of clerking at the Constitutional Court of South Africa is that law clerks, who are South African citizens, become eligible to apply for the scholarships offered by the Court for pursuing an LL.M. degree in an approved foreign university.[53] Currently, two scholarships are offered by the Constitutional Court Trust: the Ismail Mahomed Fellowship and the Franklin Thomas Fellowship, which cover travel, tuition and living expenses.[54]

Unlike these countries, clerkships on India's Supreme Court, as Chandrachud pointed out, are generally "*considered to be of significantly lower value by the local legal profession and teaching market in India*".[55] According to him, the law graduates have often pursued clerkships in the Supreme Court of India to strengthen their profile to get admission into an advanced law degree (usually an LL.M.).[56] However, a few candidates in recent years applied for a clerkship/internship after already having a post-graduate degree from abroad. Moreover, a clerkship tenure has also been a great learning experience for many law clerks, both in terms of the content and practice of law. Besides getting an opportunity to understand the thought process of a judge, a law clerk gets to observe in-depth how the Supreme Court functions and witness the style of arguments of different advocates. As several short pieces written by former law clerks indicate, many have

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[51] *UK Supreme Court Terms and Conditions for Judicial Assistants*, *supra* note 21.
[52] *Australian Federal Court Judge's Associates*, *supra* note 16.
[53] *South African Constitutional Court on Law Clerks, supra* note 22.
[54] Constitutional Court of South Africa, *Scholarships from the Court*, CONSTITUTIONAL COURT OF SOUTH AFRICA, (July 22, 2020), https://www.concourt.org.za/index.php/law-researchers/scholarships-from-the-court.
[55] Chandrachud, *supra* note 6, at 73.
[56] *Id.* (Abhinav Chandrachud further argued that the US law schools treat clerkships in the Supreme Court of India to be as important as a clerkship in the SCOTUS is, and this benefits the applicants from India in getting an admission to LLM programmes in the US).

developed a close personal bonding with the judge they worked for.[57] Similarly, in the US, former law clerks often refer to their judge as a "*mentor*" and describe the relationship as "*personal*" and "*intimate*". Some stories talk about the "*kindnesses*" that their judges did for them over the years.[58]

E. INFERENCE

The factors which make the clerkships worthwhile in other countries are different from those in India. Law clerks in the Supreme Court of India are neither provided with additional benefits like scholarships in South Africa nor are considered civil servants as in the UK and Canada. They are neither paid high salaries nor is the job considered as prestigious in the profession and academia as in other countries. Moreover, while several studies[59] have been done in the US tracing the influence and career trajectory of law clerks, such a study has never been done in India, even after two decades since the inception of clerkship culture. However, the fact that clerkship in India gives the opportunity to work with the judges of India's Apex Court and attracts fresh graduates for other mentioned factors, it becomes necessary to study the recruitment process. It would be imperative to analyse whether clerkships are accessible.

RECRUITMENT PROCESS: A COMPARATIVE FRAMEWORK

Law clerks in every country are generally appointed for one year.

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[57] Vishrutyi Sahni, *Justice Madan B. Lokur: The Epitome of Goodness*, LIVELAW (July 22, 2020), https://www.livelaw.in/justice-madan-b-lokur-the-epitome-of-goodness/; Interview by LiveLaw with Anurag Bhaskar, *My Harvard Degree is Symbolic of the Aspirations of Millions of Marginalized People: Anurag Bhaskar,* LIVELAW (July 29, 2020), https://www.livelaw.in/interviews/interview-my-harvard-degree-is-symbolic-of-the-aspirations-of-millions-of-marginalized-people-anurag-bhaskar-145710; Ashita Alag, *Justice Deepak Gupta: The Humane Judge*, LIVELAW (July 22, 2020), https://www.livelaw.in/columns/justice-deepak-gupta-the-humane-judge-156323.

[58] Miller, *supra* note 4, at 748.

[59] *Id. See also* Bonica et al., *supra* note 14.

Applicants for the position of judge's associate in the High Court of Australia are required to write directly to the judge in whose chambers they would like to work while including a cover letter addressed to the judge along with their curriculum vitae ("**CV**") and a copy of the academic transcript. The contact details for judges' chambers can be found on the Court's website. Some judges like to advertise vacancies on the Court website. However, others do not. Few judges may take an interview before finalising the applicant. One can also send a general application (without any preference for a judge) to the Court registry, which will then forward it to each judge.[60] As a matter of etiquette, an applicant accepts the position as an associate with the judge who makes the first offer to the applicant. Generally, there is no deadline for sending the applications, however, "*it is common for the Justices to appoint their associates two and three years in advance*".[61] An application should specifically indicate the years the applicant would be available for employment. It is expected that an applicant would have graduated with first-class honours and preferably has "*research experience (and often experience working for a law firm or university or another court)*".[62]

In the US, for the thirty-seven clerkship positions for the SCOTUS available each year, about a thousand people apply.[63] A decentralised application system has been put in place for the purpose of hiring clerks.[64] Every judge has a fixed hiring schedule and pattern every year. For instance, Justice Elena Kagan usually hires right after the term of the SCOTUS ends annually. The SCOTUS does not send out any formal notice that it is hiring clerks. It is universally known that they hire new clerks for every term. Professors and law school clerkship offices are probably the most important sources of information about the application process.[65] In practice, there is a two-step process to get selected as a SCOTUS clerk. An applicant generally does a clerkship with a lower federal

[60] High Court of Australia, *supra* note 41.
[61] *Id.*
[62] *Id.*
[63] Stephanie F. Ward, *Lucky 36: What It Takes to Land a Supreme Court Clerkship*, ABA JOURNAL (July 22, 2020), https://www.abajournal.com/news/article/podcast_monthly_episode_31.
[64] I am grateful to Professor Michael Klarman (Harvard Law School) and Cole Carter (former law clerk at SCOTUS) for sharing the insights about the SCOTUS clerkship process.
[65] *Id.*

court judge before he applies to the SCOTUS. A candidate is required to send the application directly to the Justice with whom they intend to clerk.[66] The application includes a CV, writing sample, transcript and letters of recommendation. The letters of recommendation from popular law school professors and lower federal court judges play a crucial role in the entire process. The SCOTUS Justices accept applications throughout the year.[67] After receiving the applications, each Justice short-lists applications and calls a few of the applicants for interviews and thereafter selects their final set of law clerks. Contrarily, at the lower level, several federal courts' judges in the US have signed up on a web-based system called the Online System for Clerkship Application and Review ("**OSCAR**"), which allows users to easily manage every aspect of the hiring process.[68] As the website of OSCAR indicates, judges use OSCAR to advertise clerkship vacancies and inform applicants of hiring practices and schedules. Applicants use OSCAR to find clerkship and staff attorney positions that fit their specific career goals and to research judges' hiring practices and schedules. Moreover, a system like OSCAR allows the applicants to create and submit applications all in one location. Similarly, the Washington State Supreme Court notifies about the vacancies of clerkships with different judges, along with the application requirements and mailing details, at one place on its website.[69]

It can be seen that except for the SCOTUS, all the apex courts in other countries have provided details about the entire recruitment process on their websites. This makes the information accessible to everyone. Besides, one's CV, writing samples, cover letter, and letters of recommendation are mandatory requirements for every application. Work experience adds an additional advantage for applicants. Interviews test the ability of candidates to work as a team, among other skills. In Australia and the US, judges have been given complete discretion to hire their own law clerks. While this maintains an element of choice and preference for both the judge and the

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[66] *Id.*

[67] *Id.*

[68] The website of OSCAR is at: <https://oscar.uscourts.gov/home>.

[69] The website mentioned here is: <https://www.courts.wa.gov/appellate_trial_courts/supreme/?fa=atc_supreme.clerkship>.

candidate, concerns have often been raised regarding the opaqueness of the system, lack of diversity, and hiring patterns of the judges. For instance, most of the recruited law clerks at the SCOTUS are graduates from Harvard and Yale.[70] Even a progressive judge like Justice Ruth Bader Ginsburg hired only one African American law clerk in her long tenure on the SCOTUS.[71] However, this makes the entire process of clerkship recruitment subject to the hiring pattern of a judge and is thus accompanied by the suspicion of hiring candidates only from certain law schools.[72] On the other hand, there is a formal system in Canada to ensure that there is fair representation from marginalised communities among law clerks. The Supreme Court of Canada has been vocal about providing an inclusive and barrier-free selection process and work environment. A better recruitment process may be the one that balances all these factors: accessible process, timely recruitment, element of choice, fair representation, academic excellence, analytical skills and so on.

The Supreme Court of Canada advertises the law clerk selection process through "*a job advertisement posted both on the Court's website and in a database of the Canada Public Service Commission in October of each year*".[73] Only persons holding Canadian citizenship or having permanent resident status in

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[70] From 2010–18, 78 of the 310 clerks on the U.S. Supreme Court came from Harvard Law School, the most number of clerks of any school. Yale Law School had the second representation with 74 clerks, meaning that Harvard and Yale combined for 151 clerks—almost half of all Supreme Court clerks. There are, of course, exceptions like Justice Clarence Thomas, who "*hired from 23 different law schools since 2005, with one-third of his clerks coming from schools outside the Top 10 on the U.S. News and World Report rankings*"; *See* Sloan (2017); Aidan F. Ryan, *A Well-Worn Path: Navigating the Road to Judicial Clerkships*, THE HARVARD CRIMSON (July 22, 2020), https://www.thecrimson.com/article/2018/5/1/clerkships-feature/.

[71] Paul Butler, *Ruth Bader Ginsburg Can Learn Something from Brett Kavanaugh*, THE WASHINGTON POST (July 29, 2020), https://www.washingtonpost.com/opinions/ruth-bader-ginsburg-can-learn-something-from-brett-kavanaugh/2018/10/15/b8974a86-cd77-11e8-a360-85875bac0b1f_story.html.

[72] Tony Mauro, *Supreme Court Clerks Are Overwhelmingly White And Male. Just Like 20 Years Ago*, USA TODAY (July 22, 2020), https://www.usatoday.com/story/opinion/2018/01/08/supreme-court-clerks-overwhelmingly-white-male-just-like-20-years-ago-tony-mauro-column/965945001/.

[73] Email response (dated July 27, 2020) by Remi Samson, who worked as Senior Legal Officer and Director of the Law Clerk Program for the Supreme Court of Canada (on file with the author).

Canada or a work permit for Canada may apply for a clerkship.[74] Applications made by persons who are not Canadian citizens are accepted only if there are insufficient qualified applicants who are Canadian citizens.[75] All clerkship applications are required to be submitted to the chambers of the Chief Justice of Canada on the contact details mentioned on the Court website by a fixed date in January, every year.[76] The candidates must attach a cover letter, a CV, official transcripts from law school(s), and four letters of reference, including one from the current dean of the faculty where the candidate obtained their law degree. These letters of reference attesting to the candidate's academic excellence, effective interpersonal skills, ability to work under pressure and ability to work as part of a team may be included with the candidate's application or sent separately by the persons who have agreed to forward references.[77] Candidates are also asked to complete and submit an online application form. They are then selected for further assessment based on a combination of criteria, including language proficiency, letters of recommendation, academic excellence, ability to work as part of a team, ability to work under pressure, effective interpersonal skills, and range of experience—legal and otherwise.[78] Those selected for an interview will be contacted and will be asked to provide two writing samples. Based on the writing samples and Skype interviews conducted by the judges of Court, the candidates are finalised before the end of March every year.[79]

This gives judges "*a considerable amount of flexibility in deciding how best to organise their own chambers, according to their own needs*".[80] The Supreme Court of Canada is also conscious of having a fair representation of marginalised communities. In their applications, candidates can indicate "*if they belong to any of the groups designated under the Employment Equity Act, S.C. 1995, c. 44, i.e. women, aboriginal peoples, persons with disabilities and members of visible minorities*".[81]

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[74] *Canada Law Clerks Program*, *supra* note 15.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Samson, *supra* note 73.
[80] *Id.*
[81] *Canada Law Clerks Program*, *supra* note 15.

On the website of the Court, it has been noted that the Canadian Supreme Court is "*committed to achieving equitable representation of all employment equity designated groups throughout the organisation*" and to "*developing inclusive, barrier-free selection processes and work environments*".[82]

In the UK, applicants are required to upload a detailed application form on a web portal prescribed by the UK Supreme Court before the end of March every year. Besides providing a CV, an applicant is required to submit academic and employment history in chronological order, along with grades/other achievements.[83] Any gaps in employment/education should be explained. Applicants are further needed to submit a supporting statement, showing clearly how they meet the criteria for the role, including the following skills: analytical ability, communicating and influencing, making effective decisions, delivering at pace, and working together.[84] One should also explain the reasons for applying, and how, if successful, the role of judicial assistant would fit with their overall career path. After an applicant is short-listed for an interview, they would be required to submit references at a later stage.[85]

Appointments of South African law clerks and foreign law clerks at the Constitutional Court of South Africa are ordinarily made in the month of May of the preceding year, for the following year, which may be from January to December or July to June.[86] The applications must be submitted to the registrar of the Constitutional Court by hand, post or electronically on the contact address given on the website by no later than March 31.[87] The application must include proof of a law degree, a motivational cover letter, a full CV, certified copies of academic records, an example of written work, names, and contact details of two references (one academic and one professional); and references regarding working experience (if applicable). Based on the application, applicants are short-listed, and some may be

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[82] *Id.*
[83] *How To Complete Your Application Form*, UNITED KINGDOM SUPREME COURT (July 22, 2020), https://webmicrosites.hays.co.uk/documents/4856148/4856273/HOW+TO+COMPLETE+YOUR+APPLICATION+FORM.pdf.
[84] *Id.*
[85] *Id.*
[86] *South African Constitutional Court on Law Clerks*, *supra* note 22.
[87] *Id.*

called for a one-on-one interview with judges who have specific recruitment requirements.[88]

The Supreme Court of India has been hiring law clerks for more than two decades and has been changing the recruitment process with time. It must be analysed whether the Court has incorporated the essential parameters of developing an accessible, barrier-free, and inclusive selection process, as could be derived from practices of other countries, which have a long and formal experiment with clerkships.

SUPREME COURT OF INDIA'S RECRUITMENT PRACTICE

A. INITIAL RECRUITMENT PROCESS IN SUPREME COURT OF INDIA

The recruitment of law clerks in the Supreme Court of India began with an informal process. With the cultural exchange that happened after the liberalisation of 1991, graduates of newly established specialised NLUs[89]—the first one being established at Bangalore in 1987—made efforts to adopt the American style clerkships in the Supreme Court of India.[90]

Chandrachud found the early years (the mid-1990s onwards) of "*the recruitment process for law clerks on the Supreme Court of India ad-hoc, informal, and unpredictable*".[91] There was no information available in public whether one could apply as a law clerk. Some law clerks got the job by writing directly to the judge hoping that the application would be noticed by the judge.[92] The culture of recruiting law clerks was just in its nascent stage at that time.

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[88] *Id.*

[89] The NLUs were established from the late 1980s with the aim to revitalize the legal profession by making law an attractive profession.

[90] Chandrachud, *supra* note 6, at 86.

[91] *Id.* at 95.

[92] *Id.*

Later, the process was institutionalised in a restricted and exclusive manner.[93] The Supreme Court Registry, *i.e.* the administrative side of the Court under the control of the Chief Justice, started soliciting applications for clerkships from only a handful of NLUs. Pursuant to the order dated July 2, 2002 passed by the then CJI, B.N. Kirpal, "*suitable law graduates from various National Law Schools; such as Bangalore, Bhopal, Jodhpur, Calcutta and Hyderabad*" were law clerks.[94] This happened with the Registry sending out a notice to these select institutions, which would then forward students' applications based on Cumulative Grade Point Average ("**CGPA**"). By the order dated August 27, 2002, the CJI directed the Registry of the Supreme Court to not entertain applications directly from students of these NLUs. In the event an application was sent directly, the Registry was directed to notify the applicant that they were required to secure a recommendation from the concerned NLU before they could be considered for engagement as a law clerk.[95] The Registry short-listed the applications received from these NLUs and called the candidates to interview before a panel of judges. The selected law clerks were then allotted to judges based on seniority, *i.e.* the candidate with the highest qualifying marks would be allotted to the senior-most judge and so on. This meant that in 2002, an applicant had to fulfil two basic conditions before being considered for the post of law clerk: first, they had to be a graduate of one of these five law universities, and second, their application had to be endorsed by the concerned university.

The said practice was followed by another order dated November 4, 2004, whereby the then CJI R.C. Lahoti framed guidelines to formalise this system for the engagement of law clerks.[96] On December 15, 2005, a proposal was mooted in the Supreme Court that another category of "*prominent Law Colleges/Institutes conducting five-years Law degree course*" should be created and that the candidates found suitable from this list can be put on "*wait-list*" and considered in case there are not enough suitable

[93] In its judgment in Phaguni Nilesh Lal v. The Registrar General, Supreme Court of India, (2014) 206 D.L.T. 674 (India), a Single Judge Bench of the Delhi High Court noted how clerkship selection process in the Supreme Court of India developed from 2002 to 2013.
[94] *Id.*
[95] *Id.*
[96] *Id.*

candidates from the five NLUs.[97] CJI YK Sabharwal, vide order dated December 16, 2005, constituted a committee of judges of the Supreme Court to look into this issue and make suitable recommendations.[98] Consequently, an administrative order was passed by the then CJI Sabharwal on February 15, 2006 to add four law colleges in the "*stand-by-category*".[99]As this order came, several other NLUs were also established in different states.[100] The committee of judges, therefore, recommended that all the NLUs be empanelled for consideration of their students for selection as law clerks. The then CJI K.G. Balakrishnan, by order dated January 28, 2009, passed an administrative direction to this effect.[101] Subsequently, another order dated March 3, 2009 was issued by the CJI, which approved a set of guidelines to consider applicants from only a total of eighteen law schools, in which there were twelve NLUs, four colleges in "*stand-by-category*", and two colleges in the other approved category.[102] This meant that if suitable candidates from twelve NLUs were not found, the Supreme Court Registry would consider the graduates from the other six colleges. Apart from the one candidate allotted from these select universities, each judge was also given the discretion to take one more law clerk of their choice from any law school in India.[103] Access to this backdoor entrance was still not available in the public domain. It may be for these reasons that the practice of recruiting law clerks only from eighteen colleges was challenged in 2013 by a student who did not belong from the Registry's approved list of colleges.

B. DELHI HIGH COURT JUDGMENT

[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] For instance, Dr. Ram Manohar Lohiya National Law University, Lucknow was established by an Act passed by the Government of Uttar Pradesh in December 2005. National Law University, Delhi was established in the year 2008 by the Delhi Legislature. Currently, there are 23 NLUs in India.
[101] *Phaguni Nilesh Lal*, (2014) 206 D.L.T. 674.
[102] *Id.*
[103] Chandrachud, *supra* note 6, at 78.

Phaguni Nilesh Lal, a student at the Army Institute of Law, Mohali (Punjab), had applied for a clerkship position for the year 2013-14. The Supreme Court Registry did not consider the application because her college was not empanelled with the Court, and her college did not forward her application. Aggrieved, Phaguni challenged the clerkship recruitment process before the Delhi High Court.[104] A single judge bench of Justice Rajiv Shakdher heard the matter. In its defence, the Registry argued that since there are a large number of law colleges and universities in India (around nine-hundred at that time),[105] a method of "*short-listing*", *i.e.* applicants from only approved institutions, was put in place due to administrative convenience and limited funds available at its disposal.

In its judgment,[106] the single judge bench noted that the impugned criteria of empanelling only a few law schools at the initial stage leads to the creation of a "*privileged category*", which keeps a "*large section of both, meritorious and needy law graduates out of the fray or zone of consideration*". Justice Shakdher further underlined that the existing clerkship process did not keep a *"room for those sociologically and economically deprived, and educationally handicapped, due to absence of requisite facilities in their respective alma maters"*. The court held that the argument of "*administrative convenience*" presented by the Supreme Court Registry "*cannot trump the mandate*" of Article 14 of the Constitution. Therefore, the existing clerkship recruitment process was held to be illegal and unconstitutional. It was held that each judge may choose a law clerk of his choice from a pool of candidates who have applied.[107] Since the application process for that year was already undertaken, the High Court directed that the Supreme Court Registry consider the application of the petitioner for the remaining term.

C. REVISED CLERKSHIP SCHEME

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[104] *Phaguni Nilesh Lal,* (2014) 206 D.L.T. 674.

[105] This figure was mentioned in the affidavit filed by the Supreme Court Registry in the case.

[106] *Phaguni Nilesh Lal,* (2014) 206 D.L.T. 674.

[107] *Id.* The Court held: "*That said the concerned Judge with whom a LCRA [Law Clerk-cum-Research Assistant] is to be attached will ultimately have a say in the matter. The concerned Judge would necessarily have a pool of eligible LCRAs available with him/her from which he /she could choose a particular LCRA for attachment*".

The Supreme Court Registry decided to file an appeal, against the decision of the single judge bench, before a division bench of the High Court. While this appeal was still pending, the Supreme Court, on its administrative side, revised the selection process on January 8, 2015. It issued a "*Revised Scheme for Engagement of Law Clerk-cum-Research Assistants on Short-term contractual assignment in the Supreme Court of India*".[108] The scheme provided that law clerks (candidates not above twenty-seven years as on the last date of receipt of applications) would be engaged for judges for a contract of one year. This period may be extended to such period as considered appropriate by the concerned judge with whom a law clerk is attached (Guidelines No. 3 & 7).[109]

A detailed selection process (Guideline No. 11)[110] was laid down, according to which an advertisement would be published by the Registry in January every year, inviting online applications. In order to short-list applications, a national level competitive exam[111] based on multiple-choice questions (a test of general knowledge, aptitude, and basics of only a few law subjects) would be conducted in four cities (Delhi, Mumbai, Bengaluru, Kolkata), with a requirement of minimum qualifying marks as sixty per cent. The short-listed candidates would then be called for an interview with a committee of judges for final selection. Based on the recommendations of the committee, the CJI would form a panel of approved law clerks and allot them to different judges on the basis of seniority.

The scheme also provided that the CJI and each judge may hire one other law clerk as "*candidates of choice*" (Guideline No. 4),[112] *i.e.*, candidates who are still considered worthy by the judge even though they did not appear for the exam or could not qualify. Like the earlier process, a judge of the Supreme Court could have two law clerks: one "*necessarily*" from the

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[108] *Revised Scheme for Engagement of Law Clerks*, *2015, supra* note 8.
[109] *Id.*
[110] *Id.*
[111] The exam comprised of two sections. While the first section included fifty questions related to General English and General Aptitude/Awareness, the second comprised of questions relating to Indian Constitution, Indian Penal Code, Criminal Procedure Code, Civil Procedure Code and Indian Evidence Act etc.
[112] *Revised Scheme for Engagement of Law Clerks*, *2015, supra* note 8.

approved panel of the Registry and one through their discretion. From July 2018 onwards, the number of total clerks for each judge was increased to three, out of which two could be "*candidates of choice*".[113] This discretion was further expanded by an order dated June 5, 2019, passed by then CJI Ranjan Gogoi. Guideline No. 4 has been amended to provide that each judge, including the CJI, can have four law clerks, out of which three could be "*candidates of choice*".[114]

However, vide order dated January 16, 2020 passed by CJI S.A. Bobde, it was decided that the CJI, "*if so considers appropriate, may direct the Registry not to invite applications in any particular year*" (amended Guideline No. 11), *i.e.* the clerkship exam may be called off for any particular year.[115] Would this mean that the judges can hire all four law clerks at their discretion? Probably, yes.

D. CONCERNS REGARDING THE SELECTION PROCESS IN INDIA

The recruitment process was started by giving institutional preferences to certain institutions. Initially, candidates from only five NLUs were considered. Even when the number of approved institutions was raised to eighteen, these institutions comprised only an exceedingly small fraction of all India's law graduates. In the Registry's own admission before the Delhi High Court, there were more than nine hundred law colleges in the entire country. This would naturally lead to complaints that the process was exclusive and denied candidates from other law schools an equal opportunity to even apply for clerkships. Getting selected for a clerkship can only happen when one gets a chance to apply. The institutional barrier of limiting clerkships to only certain institutions (initially five, and later eighteen) was exclusive and discriminatory for students from institutions other than the approved eighteen. The Delhi High Court rightly struck down the restrictive recruitment process.

An important issue that was not discussed either in the Delhi High Court judgment or in any scholarly work or general commentary is the centralised

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[113] This happened during my tenure as a Law Clerk at the Supreme Court of India.
[114] *Revised Scheme for Engagement of Law Clerks*, 2019, *supra* note 18 (the scheme includes a footnote mentioning the June 5, 2019 update).
[115] *Id.*

role played by the Supreme Court Registry in recruiting law clerks.[116] Through the Registry, the Supreme Court performs its administrative functions, with the CJI as the top authority. The administrative powers include managing day-to-day activities within the Apex Court. Can the Registry, in the administrative capacity of the Court, hire law clerks for individual judges without their choices? In a few other countries (mentioned before), it does. Should not the candidates be also a preference for a judge? As discussed before, the selected candidates were allotted based on the seniority of judges. What if a judge wanted to interview their candidate? Since the clerkship role is one where the individual judge has to have confidence in the candidate, it has to be reconciled with an accessible administrative process. It does not create an exclusive pattern of hiring by individual judges, as can be seen in the SCOTUS.

Moreover, despite its public nature, the clerkship policy framed[117] by the Supreme Court of India neither provides for any reservation nor any other method to ensure a diverse representation. In several sectors, the constitutional provisions of reservation (or quotas) have ensured adequate representation of socially marginalised communities. One might argue in an extreme scenario that clerkship is a contractual job, and hence reservation will not apply. Even in that scenario, the Supreme Court of India has not taken any other measure or given assurance like its Canadian counterpart to ensure a fair representation to candidates from marginalised communities. It is also difficult to assess the performance of the Court on this aspect in practice, as there has not been a single study on the general profiles of law clerks.

One would have expected that after the restricted recruitment process being held unconstitutional, the Supreme Court would have come up with

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[116] I am thankful to Rohit De (Associate Professor of History, Yale University) for pointing out this issue to me.

[117] INDIA CONST. art. 146 cl. 2. It provides : "*Subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or officer of the Court authorised by the Chief Justice of India to make rules for the purpose: Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the President*".

a transparent and inclusive recruitment process, where there would be a flow of necessary information. The Registry took a step towards this end and allotted its funds (in the revised clerkship scheme) to conduct a multiple-choice questions-based examination to select a set of candidates.[118] One may argue that since the clerkship is a research and writing-oriented job, merely a basic test of general knowledge, aptitude, and basics of only a few subjects was not the right method to select law clerks. As one former law clerk had proposed in 2012, "*it would be better if the candidates are also required to send writing samples*" as this would be "*an effective method for testing the applicant's familiarity with a particular topic as well as the ability to defend one's views*".[119] This could have been an apt criterion for short-listing in the open competition, as is also done in other countries. Despite not adopting this criterion, the fact that the Registry had opened access for clerkships to graduates of all law schools was, in any case, a welcome step.

Furthermore, in the interview round in past years, questions have been asked to applicants about their publications in order to check their research and writing skills.[120] It was the Registry, which was once again selecting one law clerk for the judges. However, each judge was provided with the discretion to remove the law clerk allotted by the Registry within one month of appointment if they were not satisfied with the law clerk's work performance. At the same time, the judge would be bound to choose "*a suitable incumbent*" candidate left on Registry's panel, "*but without interviewing with him/her*".[121]

The allotment through exams based on seniority also meant that a law clerk selected by the Registry did not have the discretion to give a preference to work with a particular judge. To respect a judge's choice, a balance seems to have been done in the revised clerkship scheme in 2015. The Registry reserved one slot (now three) for a "*candidate of choice*" for each judge. As discussed earlier, in countries like Australia, the US, *et cetera* the judges hire

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118 *Revised Scheme for Engagement of Law Clerks*, *2015, supra* note 8.

119 Sidharth Chauhan, Clerkships in the Indian Supreme Court: Some Reflections and Suggestions, CRITICAL TWENTIES (July 22, 2020), http://www.criticaltwenties.in/lawthe judiciary/clerkships-in-the-indian-supreme-court-some-reflections-and-suggestions.

120 This point is based on my conversations with a few candidates who appeared in the clerkship exam.

121 *Revised Scheme for Engagement of Law Clerks*, *2015, supra* note 8.

candidates of their choice. Nevertheless, there is an institutionally accessible practice where the process of applying is made abundantly clear. The hiring practices and schedules of a judge are generally known. In Canada, South Africa, and the UK, all necessary details of applying for a clerkship/judicial assistantship are mentioned on the court websites. In some courts (like the Washington State Supreme Court in the US), a judge places a notification on the website whenever there is a vacancy of law clerks in his office and prescribes the deadline as well as the postal/email address for sending applications (including documents like a CV and writing sample.).

Given that there was no information made available by the Supreme Court Registry in India regarding the process of selection of "*candidates of choice*" by judges, this led to informational opaqueness. As a result, only those candidates who would know judges personally, or had interned in the Supreme Court before, or had contact with previous clerks/interns, or knew someone in the Registry staff, or had family connection with the judge, would easily be able to get information about the vacancies of "*candidate of choice*" and the method of applying in the offices of respective judges.[122] If thousands of students start calling the Registry's landline number for this purpose, it may become a bit difficult for it to handle. Several applicants gather contact information of judges' offices by contacting previous/current law clerks on social media platforms.

What would happen in a scenario when only a handful of candidates (much less than required) qualify for the exam conducted by the Registry? For the year 2017–18, this is exactly what happened—the candidates who got selected through the exam were less than ten.[123] Consequently, the judges hired candidates from a pool of law graduates who had applied to their offices directly.[124] However, what if the judges already selected all law clerks

[122] In my own experience, I had to call the landline number of the Registry several times to get the contact details of the office of the judge to whom I wanted to apply for internship.

[123] The list was released on the Supreme Court's website.

[124] I was one of such candidates who had applied directly to a particular judge, and was selected eventually.

as "*candidates of choice*", even while the Registry was conducting the exam for that particular year? This happened for the year 2019–20. I spoke to two such candidates who, including a few others, had been selected as law clerks through the examination route, yet they were not made to join in that year by the Registry, citing "*unavailability of vacancies currently*".[125] This is problematic on four counts. *Firstly*, a false hope was given to the applicants that they had been selected and would be required to join. The efforts, time, and resources invested by such applicants were completely wasted. *Secondly*, it also led to a wastage of time of three judges of the Supreme Court who had conducted the interview of candidates who had qualified the written examination. Even if just one day was spent in conducting interviews of candidates who were eventually not made to join, the loss of time of the judges, considering the large pendency of cases,[126] was precarious. *Thirdly*, it reflected an overall lack of clarity regarding the selection process of law clerks. *Fourth*, it was a clear violation of the existing clerkship scheme.

Furthermore, the Supreme Court Registry did not conduct any exam for the year 2020–21. There was no public advertisement that could state that the exam would not be conducted this year. However, a soft copy of the revised clerkship scheme (w.e.f. January 16, 2020) was uploaded on the Supreme Court website, which provides that the CJI may direct the Registry not to conduct the exam in any particular year.[127] This step was taken even before the COVID-19 pandemic hit the Indian soil.[128] Since there was no exam conducted, most of the judges hired all the law clerks from a pool of candidates who had applied to them individually. Few judges hired candidates based on parameters similar to those in other countries: cover letter, writing sample, CV, and personal interview. However, since the hiring schedule and process of each judge is not open

[125] Despite continuous inquiry over several months, the candidates received no clear information from the Registry. One such candidate described her experience as "*being ghosted by the Registry*". The names of the candidates were present in the list of law clerks released by the Registry on its website for that year.

[126] As on March 1, 2020, there are 60,469 cases pending before the Supreme Court of India; *See* https://main.sci.gov.in/statistics (last visited on July 22, 2020).

[127] *Revised Scheme for Engagement of Law Clerks*, 2019 *supra* note 18 (the scheme includes a footnote mentioning the 16 January 2020 update).

[128] The first case of COVID-19 India was reported in the State of Kerala on January 30, 2020.

to common knowledge, only candidates who would have been able to secure access through networks (as I have already pointed out) would have been able to apply. Those students or graduates who would have been waiting for the exam notification would be completely unaware about when a particular judge opened their slot for hiring or if there is a vacancy.

Lastly, the Registry conducted a physical exam for clerkship for 2021–22 in four cities, with candidates travelling from different cities during the COVID-19 pandemic. However, one week before the exam, as the second COVID-19 wave hit India, the rules of the admit card for the exam stated that anyone who was COVID-19 positive would not be eligible to appear or even be allowed entry at the Examination Centre. Neither was the exam postponed for a few days nor was any alternative provided to candidates who got infected with COVID-19 during that period.[129]

All these flaws and inconsistencies with the recruitment process indicate that the Supreme Court has consistently followed *ad-hocism*, accompanied with non-transparency.

PROPOSED RECRUITMENT PROCESS

One starting temporary step to address the opaqueness around the recruitment system in India is that the Supreme Court Registry provides the details of clerkship hiring by judges on its website, on a separate webpage. The apex courts of several countries have provided the details about the entire recruitment process on their websites.[130] As a result, all the interested graduates get to know about the opportunity. After the candidates apply, the judges shortlist the applications and call a few candidates for an interview for the final selection. For instance, on the website of the Washington State Supreme Court, there is a page that lists the clerkship vacancies for each judge and the method of applying. Likewise, in India, it is better to institutionalise the entire process of judges

[129] One such candidate, a graduate of Jindal Global Law School, shared his disappointing experience with me. The pattern of the exam could also have been changed (with a focus on research skills), given the pandemic situation.

[130] *See* the second and third sub-headings of this article.

hiring their own law clerks. The Registry can create a page on the Supreme Court website, where it could give details about the hiring process followed by different judges, including contact details (official email).

However, some may apprehend that this discretion may lead to an exclusive hiring pattern, as in the US. The tendency of most SCOTUS judges to hire clerks mainly from the five big law schools has been a subject of criticism.[131] Moreover, what about ensuring a fair representation to marginalised communities as it is done in Canada? Also, what about ensuring due gender representation?

To make the system accessible, efficient, and inclusive on paper and in practice, a new system may be evolved by the Supreme Court Registry based on a teleological model. For clerkships, it is important to test the analytical, research, writing, team spirit, and other skills. Therefore, one's CV, writing samples, cover letter/personal statement, and/or prior work experience may be considered as the criterion on which a candidate must be assessed. Given the high number of cases that the judges of the Supreme Court of India hear and decide every day, it may not be possible for every judge to read such detailed applications of all candidates. A panel consisting of academics/directors of the law clerk program (like in Canada) may be constituted by the Registry to short-list the applications for interview every year. An online application system could be created on the webpage where the interested candidates can be asked to submit their CV, writing sample, cover letter and other requisite documents Candidates can be asked to list their preference for judges in a list of sequence.

Like in the Supreme Court of Canada, applicants can be asked to indicate their social background (like caste or religion) in order to ensure that a proper representation (with a mandatory minimum percentage/due reservation) can be taken into consideration before short-listing candidates. Once an application along with documents is submitted, the proposed panel/office can scrutinise the applications if they meet the minimum standard criteria and create a short-list. From there, if a judge

[131] Todd Peppers, *The Best and The Brightest Clerks: Why the Justices Should Look Beyond Harvard and Yale*, THE NATIONAL LAW JOURNAL (July 22, 2020), https://www.law.com/nationallawjournal/2019/09/23/the-best-and-the-brightest-clerks-why-the-justices-should-look-beyond-harvard-and-yale/?slreturn=20210824135116.

wants to interview his candidates, the panel can short-list a certain set of candidates from the applications, which have shown a preference for that judge in their application. This would also give an element of choice to a judge. If a judge desires, the panel can finalise all the four candidates for him after doing interviews, based on the hiring criteria provided by the judge. In case a candidate gets acceptance from more than one judge (if a candidate listed more than one judge as a preference and got short-listed for an interview with the judges), they would also have the choice to go finally with a judge of their preference.

Since in the Indian Supreme Court, few judges retire almost every year and thereby new judges are inducted throughout the year, judges who retire during July–December usually prefer existing clerks to continue.[132] These judges who do not want to recruit any new clerk may indicate this so that candidates do not apply for their chambers. If a judge who has been appointed to the Supreme Court after the date of application wishes to have a law clerk, the Registry can either provide them with candidates (whose judge retired) or can put out a new notification/advertisement on the online application website.

The proposed system will ensure that all the interested students and graduates have relevant information about the recruitment process in one place. The process is a combination of the criteria which courts in other countries have adopted. An LLM application from a top law school outside India is also finalised in this manner. Those graduates/students, who do not generally get to know about vacancies in a judge's office because of lack of information in public, would also be able to apply if this system is institutionalised with a crystallised flow of information. A judge would be able to choose the best candidates while also having a large pool of applications. An open process may attract the best talents to apply. This would benefit the judges too. A similar process may be adopted by High Courts as well. Moreover, competent law clerks trained in the modern

[132] If the judge retires and there is still time left in completion of tenure of a law clerk, then as per the current practice, the law clerk is kept in the pool of the Registry, and assists it in research work.

educational atmosphere may assist the judges in technological changes that have been happening.

Since its inception, the clerkship hiring process at the Supreme Court of India has been restrictive. It is high time that the Court makes it accessible to everyone. It can also take the opportunity to set out an example before other countries by ensuring that the clerkships reflect due representation.

IMPLIED LIMITATION ON THE POWER OF AMENDMENT: A COMPARATIVE STUDY OF ITS INVOCATION IN INDIA, COLOMBIA AND BENIN

SIDDHARTH SIJORIA[1]

The paper presents a comparative analysis of the invocation of the Basic Structure Doctrine in the jurisdictions of India, Colombia and Benin. The Colombian experience highlights that legislature being a constituted authority cannot replace or substitute the constitution with a new one. The experience of Benin is unique, as though there are implied limitations within the constitutional framework, the courts felt the need to expand the scope of the implied limitations. The Indian jurisprudence on the doctrine has expanded since its inception in the Kesavananda Bharati judgment to include not only constitutional amendments but also administrative actions and statutes. The author argues that the usage of the doctrine by courts is not to usurp the power of the executive or the legislature, rather acts as a check on the misuse. In light of the rise of populist figures throughout the world, the doctrine can be used as a check on their autocratic tendencies.

INTRODUCTION

The constitutional framework contains two distinct kinds of powers. *First*, a *constituent power* that is wielded by the people or their representatives in an assembly whose primary focus is to establish a constitution. *Second*, the *constituted power* that is exercised by the different organs of the State like the executive, legislature and judiciary, and is settled and limited by the constitution itself.[2] This distinction of power renders a puzzling

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[2] Vera Karam de Chueiri, *Is there such thing as a Radical Constitution*, *in* DEMOCRATIZING CONSTITUTIONAL LAW, 236 (Thomas Bustamante & Bernardo Goncalves Fernandes eds., Springer 2016).

question—*Whether a constituted authority like the legislature can amend the constitution in a way to alter it completely?*

Every constitution contains a procedure for its amendment. While constitutions of some countries, like Germany[3] and Italy[4] expressly limit the power of amendment enjoyed by the legislature, others do not.[5] This brings forth another important question—*Does the absence of express limitation in a constitution mean that the legislature has unlimited power to amend the constitution?*

The Supreme Court of India in *Kesavananda Bharati v. State of Kerala*[6] ruled that even in the absence of an express limitation on amendment power, the Parliament cannot amend the basic structure of the Constitution. This means that amendments that are enacted in compliance with the amendment procedure can be declared unconstitutional if they violate the essential features of the Constitution. This power of the Supreme Court is recognized as the "*Doctrine of Unconstitutional Constitutional Amendment*".[7] In the aftermath of the invocation of this doctrine, several constitutional courts have adopted the theory of implied limitation.

This article is divided into three parts. In the first part, I discuss the evolution of implied limitations on constitutional amendment power in India, Colombia, and Benin. In the second part, I discuss and identify the criticism of the theory as a facet of judicial overreach not traceable within the text constitution itself. After analysing the criticism, I also provide the constitutional basis and significance for the theory. In the third part, I offer legitimacy to the doctrine by arguing that it serves as a protection against abusive constitutionalism.[8] Furthermore, I study the relevance of the doctrine against the power grab tactic adopted by powerful incumbents by

[3] GERMAN CONST. art. 79, cl. 3.
[4] ITALIAN CONST. art. 139.
[5] YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 56 (Oxford University Press 2017).
[6] AIR 1973 SC 1461.
[7] ROZNAI, *supra* note 5.
[8] Landau David, *Abusive Constitutionalism,* 47 U. CALIF. DAVIS, 189, 191 (2013).

misuse of amendment power. Its application in these cases shows that the doctrine has evolved as an important tool of constitutionalism.

ORIGIN AND DEVELOPMENT OF IMPLIED LIMITATION THEORY IN INDIA, COLOMBIA AND BENIN

A. EVOLUTION OF BASIC STRUCTURE THEORY IN INDIA

The evolution of the Basic Structure Doctrine in India was a result of several challenges to land laws that were enacted for reforming land ownership and tenancy structures, after the Indian independence in 1947.[9] Several landholders across India challenged the constitutional validity of these land reform legislations contending violation of their right to own property under Article 19(1)(f), which led to some of these legislations being declared unconstitutional within the meaning of Article 13.[10] The Parliament viewed these decisions as an obstacle to their socialist aspiration. To nullify the effects of these judgments, the Constituent Assembly, which was functioning as interim Parliament, placed the land reform laws under the Ninth Schedule[11] by enacting the First[12] and the Fourth[13] Constitutional Amendments that removed judicial review of such legislations on the ground that they violate Part III of the Constitution.

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[9] Venkatesh Nayak, *The Basic Structure of the Indian Constitution,* COMMONWEALTH HUMAN RIGHT INITIATIVE, http://www.constitutionnet.org/sites/default/files/the_basic_structure_of_the_indian_constitution.pdf.

[10] INDIA CONST. art. 13 cl. 2.

[11] INDIA CONST. sch. 9 *inserted by* The Constitution (First Amendment) Act, 1951. Parliament enacted the Ninth Schedule as a means of immunising certain laws against judicial review. Under the provisions of art. 31, which themselves were amended several times later, laws placed in the Ninth Schedule—pertaining to acquisition of private property and compensation payable for such acquisition—cannot be challenged in a court of law on the ground that they violated the fundamental rights of citizens. This protective umbrella covers more than 250 laws passed by state legislatures with the aim of regulating the size of land holdings and abolishing various tenancy systems. The Ninth Schedule was created with the primary objective of preventing the judiciary—which upheld the citizens' right to property on several occasions—from derailing the Congress party led government's agenda for a social revolution.

[12] The Constitution (First Amendment) Act, 1951.

[13] The Constitution (Fourth Amendment) Act, 1954.

The constitutionality of these amendments were upheld by the Supreme Court in *Shankari Prasad Deo v. Union of India*.[14] The Court held that a constitutional amendment, enacted in exercise of constituent power under Article 368 is not subject to limitations under Article 13. A constitutional amendment, though a law, is made by the Parliament in exercise of its constituent power and Article 13 only concerns the laws enacted in exercise of legislative powers.

However, in *Golaknath*,[15] the *Shankari Prasad*[16] judgment was overruled and the Court declared that constitutional amendments are covered under the ambit of Article 13 of the Constitution. It further held that Article 368 was only a procedure for amendment, while power of amendment was found under residuary legislative powers which are subject to Article 13.

This decision of the Court led to severe political reactions and created a "*great war… over parliamentary versus judicial supremacy*".[17] As a response, the Parliament enacted the Twenty-Fourth Amendment Act[18] which sought to amend Article 368 and replace the word "*procedure*" with "*power*" of the Parliament to amend the Constitution. The Twenty-Fifth Amendment[19] sought to insert new Article 31C to insulate judicial review of the laws placed under the Ninth Schedule. The Twenty-Sixth Amendment[20] sought to abolish privy purses and the status of rulers under the Constitution and the Twenty-Ninth Amendment[21] inserted a few other acts under the Ninth Schedule.[22]

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[14] AIR 1951 SC 458. Similar amendments were upheld by the Supreme Court in the case of Sajjan Singh v. State of Punjab, AIR 1965 SC 845.
[15] Golaknath v. State of Punjab, AIR 1967 SC 1643.
[16] Shankari Prasad Deo v. Union of India, AIR 1951 SC 458.
[17] GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE, 198 (Oxford University Press 1999).
[18] The Constitution (Twenty-Fourth Amendment) Act, 1971.
[19] The Constitution (Twenty-Fifth Amendment) Act, 1971.
[20] The Constitution (Twenty-Sixth Amendment) Act, 1971.
[21] The Constitution (Twenty-Ninth Amendment) Act, 1972.
[22] *Id.*

The validity of these amendments was challenged in the famous case of *Kesavananda Bharati v. State of Kerala*.[23] The Supreme Court upheld the Twenty-Fourth,[24] Twenty-Sixth[25] and Twenty-Ninth[26] Amendment Acts but declared part of the Twenty-Fifth Amendment Act, that insulated judicial review of legislation—to be unconstitutional. It overruled the *Golak Nath*[27] verdict, holding that the term "*law*" in Article 13 does not include a constitutional amendment and therefore, the Parliament can amend any part of the Constitution. However, the majority judgment held that the power to amend the Constitution does not incorporate the power to destroy or amend the Constitution in a way that alters its identity or what came to be known as "*the Basic Structure of the Constitution*".[28]

B. COLOMBIA AND THE CONSTITUTIONAL REPLACEMENT DOCTRINE

Similar to India, the Colombian Constitution does not contain any express limitation and an amendment can only be declared unconstitutional if it fails to meet the procedural requirement spelt out in law.[29] Nonetheless, both the Indian and Colombian Constitutional Courts are perhaps the most active in developing the doctrine and applying it to strike down constitutional amendments.[30]

The Colombian Constitutional Court, from the early 2000s, embarked upon a new principle of "*Constitutional Replacement Doctrine*" or "*Substitution Doctrine*" identical to the Basic Structure Doctrine.[31] The Constitutional Court invoked the theory of implied limitation on amendment power in its

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[23] AIR 1973 SC 1461.
[24] The Constitution (Twenty-Fourth Amendment) Act, 1971.
[25] The Constitution (Twenty-Sixth Amendment) Act, 1971.
[26] The Constitution (Twenty-Ninth Amendment) Act, 1972.
[27] Golaknath v. State of Punjab, 1967 AIR 1643.
[28] AIR 1973 SC 1461.
[29] CONSTITUCIÓN POLÍTICA DE COLOMBIA arts. 241, 379.
[30] For a comparison of the Indian Basic Structure Doctrine and the Colombian Substitution Doctrine as responses to their respective political contexts, *see* Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606 (2015).
[31] ROZNAI, *supra* note 5, at 65.

decision numbered *C-551/2003*.[32] In this case, the Court broadened the scope of the concept of "*procedural error*" provided in Article 279 of the Colombian Constitution. It ruled that the power to amend the Constitution incorporates within its extent, the power to introduce changes to the constitutional text. However, these changes cannot be construed to allow derogation of the Constitution or its replacement by a different one. It noted that procedure and substance are related concepts and when the amending power substitutes the Constitution, it acts *ultra vires*.[33] The Court recognized this as "*substitution theory*".[34]

The Court has explained the Substitution Doctrine by distinguishing between "*original constituent power*", which is the unlimited power of the people to remake their political institutions and the "*derivative constituent power*" exercised by constitutional amendment mechanisms provided in the Colombian Constitution. The scope of constituted power is limited to the power of amendment and cannot be employed to exercise the constituent power of annulment or substitution of the Constitution from which its competence is derived.[35] The Court also emphasized that "*it was necessary to take into account the Constitution's principles and values, as well as those in the constitutional bloc*"[36] while adjudicating upon the cases pertaining to constitutional amendments. Thus, the Colombian Constitutional Court creates several layers for amendments.[37] Changes that are mere

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[32] Corte Constitucional [Constitutional Court], July 9, 2003, Sentencia C-551/03 [hereinafter *Sentencia C-551/03*]; *See* Gonzalez Bertomeu & Juan F., *Relying on the Vibe of the Thing: The Colombian Constitutional Court's Doctrine on the Substitution of the Constitution,* Working Paper, on file with the author).

[33] ROZNAI, *supra* note 5, at 65.

[34] Sentencia C-551/03, *discussed in* Joel I. Colo´n-R´ıos & Carl Schmitt, *Constituent Power in Latin American Courts: The Case of Venezuela and Colombia*, 18(3) CONSTELLATIONS 365, 373-76 (2011).

[35] Sentencia C-551/03, *supra* note 32. *See* ESPOINOSA CEPEDA JOSE MANUEL & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW: LEADING CASE, 341, 342 (Oxford University Press 2017).

[36] Sentencia C-551/03, *supra* note 32.

[37] *See* Vicki C. Jackson, *Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism*, *in* DEMOKRATIE-PERSPEKTIVEN FESTSCHRIFT FUR BRUN-OTTO BRYDE ZUM 70 GEBURTSTAG 47 (Herausgegeben von Michael Bauerle et al. eds., 2013).

"*amendments*" can be made by any of the mechanisms provided in the Constitution *i.e.*, congressional approval, or the referendum. Changes that materially replace or substitute basic features of the Constitution can only be done through an extraordinary mechanism of a constituent assembly.

Another case concerning Constitutional Replacement Doctrine arose in 2005, when the Congress enacted a constitutional amendment to establish the possibility of a presidential re-election to allow the then-President Alvaro Uribe Velez to run for a subsequent re-election. The challenge involved the violation of the basic elements of the Constitution because the Colombian Constitution explicitly put an embargo upon presidential re-election.[38] After examining its key contents, the Court upheld the amendment, observing that mere re-election would not cause loss of democratic value. The Court drew an analogy from other democratic nations in the Latin American region, where presidential re-election is permissible under the Constitution.[39]

However, the Court invalidated a minor clause in the amendment that empowered a non-elected body, a temporary authority to legislate without being subject to any form of judicial review.[40] This clause, according to the Court, contradicted the principle of constitutional supremacy and amounted to the formation of a new constitutional provision that restricted the judicial review powers of the Court.[41] Thus, the Court reiterated its holding, observing that constitutional amenders are not sovereign, and that they have limited competence according to the text adopted by the 1991 Constituent Assembly. However, in *C-1040/2005*, the Court was confronted with a question which it missed to explain in *C-551/2003*:[42]

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[38] Corte Constitucional [C.C.] [Constitutional Court], October 19, 2005, Sentencia C-1040/05 [hereinafter *Sentencia C-1040/05*].
[39] *See* Jackson, *supra* note 37 at 341.
[40] Sentencia C-551/03, *supra* note 32 .
[41] Sentencia C-1040/05, supra note 38. *See* Jackson, *supra* note 37.
[42] Bernal C Carlos, *Unconstitutional Constitutional Amendment: in the case study of Colombia: An analysis and Justification and Meaning of the Constitutional Amendment Doctrine,* 11(2) INT'L J. CONST. L. BLOG 343 (2013).

> "*how to determine the elements which constitute core principles of the Colombian Constitution and the specific constitution rules of interpretation that help in identifying these elements?*"

In response to this question, the Court observed that recognizing limits on amending powers does not preclude the Congress from introducing significant amendments to meet the needs and expectations of the evolving society.[43] It further distinguished the cases pertaining to substitution and other types of review, stating that in a judgment of substitution, the basic proposition is not enshrined in any article of the Constitution, and that it has to be understood in light of the core elements that define its identity.[44] It held that while reviewing a challenge contesting violation of the core elements of the Constitution, the Court has to look into (a) whether the amendment introduces an essential new element in the Constitution; (b) whether it replaces an element originally adopted by the Constituent Assembly, and (c) whether the new principle is different from the previous principles to the point of incompatibility.[45] It further held that in addition to the foregoing analyses, the Court has to further prove that a defining core element of the 1991 Constitution has been replaced by a wholly different one. For doing so, the Court established a seven-tiered test comprising the following steps:[46]

> *"(1) stating what is the essential element of the constitution that is at stake; (2) stating how the essential element underpins several constitutional provisions; (3) explaining why the element is essential; (4) providing evidence that the content of the element cannot be reduced to only one constitutional provision; (5) demonstrating that labelling an element as essential does not amount to labelling one or more constitutional clauses as eternal; (6) proving that the essential element has been substituted by a new one; and (7) explicating that this new element contradicts the essential element or is different from it in a manner that the new element is incompatible with the other essential elements of the constitution*."

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[43] Sentencia C-1040/05, *supra* note 38. *See* Jackson, *supra* note 37, at 341, 342.
[44] Sentencia C-1040/05, *supra* note 38.
[45] *Id.*
[46] Carlos, *supra* note 42, at 344.

Thus, after enunciating the rules of interpretation, the Court applied this test to the instant case and allowed presidential re-election. It held that presidential re-election for a single additional term, subject to a law that ensures the rights of the opposition and equal opportunities for all candidates during the presidential campaign, was not an amendment that substitutes the 1991 Constitution into a new one. The elements of a democratic and social state of the law were not replaced by the amendment as the people still retained the right to freely decide who to choose as president. The institutions with powers of control and review were not affected. The system of checks and balances and the independence of constitutional bodies were safeguarded, which according to the Court form the basic features of the Constitution in Colombia.[47]

Uribe won the re-election in 2006 and served his term until 2010. In 2009-10 his political supporters started gathering the signatures of the citizens to call for a referendum to amend the Constitution for allowing Uribe to run for a third term. After a huge voting at the referendum, the Congress enacted an amendment to allow the President to stand for a third term. The Court, this time, declared the process of the referendum as well as the proposed amendment to be unconstitutional as it violated the basic principles of democracy and had the potential to affect constitutional order.[48]

The Court affirmed that "*allowing second presidential re-election would seriously undermine the system of check and balance*" as it would allow him to gain influence over the appointments of high court judges and members of other state agencies.[49] The Court also observed that the exercise of a referendum as an instrument of constitutional reform is always a manifestation of derivative constituent power and not original or primary constituent power required to alter the essential features of the constitution. In effect, the Court observed that the people are also bound

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[47] Siddharth Sijoria, *Unconstitutional Constitutional Amendment: Limiting Amendment Power in India, Colombia and Benin,* CENTRAL EUROPEAN UNIVERSITY, http://www.etd.ceu.edu.

[48] Corte Constitucional [Constitutional Court], Sentencia C-141/10, Feb. 26, 2010 [hereinafter *Sentencia C-141/10*]. Allan R. Brewer-Carıas, General Report: Constitutional Courts as Positive Legislators in Comparative Law, XVIII International Congress of Comparative Law, International Academy of Comparative Law 42–44 (Washington, July 26–30, 2010).

[49] Carlos, *supra* note 42, at 346.

by the Constitution of 1991 and therefore cannot modify its defining elements when they exercise their constituted powers of amendment.[50] Interestingly, the Court observed that a referendum expressing people's will for reform can be exposed to distinct political forces which might end up modifying the original popular will, that may not necessarily coincide with the final text submitted for voting and takes all the weight of the argument that referendum stems exclusively from the people acting as a primary constituency with no limits on their power.[51]

Thus, the Court reiterated its position as declared in *C-1040/2005* that the Constitution can only be replaced through the mechanism of the Constituent Assembly which enjoys constitutional supremacy under the Constitution of 1991.[52] Thus, for the first time, the Court invoked the Constitutional Replacement Doctrine to invalidate an amendment against the popular and powerful incumbent.

C. IMPLIED LIMITATION THEORY IN BENIN

The study of the development of the "*Implied Limitation Doctrine*" in Benin is interesting because, unlike India and Colombia, the Benin Constitution contains express limitations *i.e.*, unamendable clauses within its text.[53] Title XI of the Benin Constitution provides the law on the amendment of the Constitution. The Constitution under Article 154 prescribes for the procedure to be followed while enacting an amendment. Article 155 requires a referendum in case the Parliament cannot garner the four-fifth majority to pass the amendment in house. Article 156[54] expressly restricts the amendment power of the Parliament. Despite the presence of express limitations on amendment power, the Constitutional Court of Benin in

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[50] ESPINOSA CEPEDA JOSE MANUEL & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES, 352 (Oxford University Press 2017).
[51] *Id.* at 353.
[52] *Id.* at 354.
[53] Sijoria, *supra* note 47.
[54] No procedure for revision may be instituted or continued when it shall undermine the integrity of the territory. The republican form of government and the secularity of the State may not be made the object of a revision.

three cases expanded the meaning and scope of limitation beyond the text of Article 156.

In the first case,[55] the Constitutional Court was required to decide if the Parliament, as a constituted authority, could extend its mandate through a constitutional amendment in view of Article 80 that restricts the tenure of Members of Parliament to four years.

This case arose as a result of the adoption of Law No. 2006/13 in June 2006, when the unicameral Parliament in Benin enacted a constitutional amendment to modify Article 80 to increase the tenure of the Parliament from four years to five years with immediate effect.[56] The Court declared the amendment as unconstitutional, because it viewed it as a "*violation of the national consensus, expressed in the preamble of the Constitution, to wholly reject any confiscation and personalization of power. Although the Constitution provides a clear procedure for its amendment, the Beninese people's determination to establish the rule of law, a plural democracy, and protect legal security and national cohesion requires all amendments to take into account that national consensus as expressed in the Preamble of the 1990 Constitution.*"[57]

This was very novel of a court to find a ruling of substantive unconstitutionality beyond the expressed limitations found in the constitution. The Constitutional Court invoked "*national consensus*" as an essential constitutional principle to declare the amendment unconstitutional.[58] In the Court's view, Article 80 contains a specific intent and national consensus against the confiscation of power which the Parliament sought to amend through the law in question.[59]

The declaration of the unconstitutionality of the amendment met several criticisms for its novel invention of national consensus as an unamendable principle despite the existence of express limitations. However, in

[55] Constitutional Court of Benin, DCC 06/074, July 8, 2006.
[56] *Id.*
[57] *Id.* at 28.
[58] *Id.*
[59] Constitutional Court of Benin, DCC 06/ 074, July 8, 2006.

subsequent cases, the Constitutional Court expanded the list of essential features of the Constitution.[60]

In September 2011, the Parliament adopted a referendum Law No. 2011/27 to regulate the organisation of constitutional referendum in Benin. Article 6 of the Benin Constitution provides for a mechanism to be followed when referring to a question in a referendum. The Constitution provides that the unamendable provision under Article 156 cannot be referred for amendment. In the referendum, the questions pertained to modifying the minimum and maximum age requirement for the President,[61] removal of the presidential term limit[62] and modification of the presidential nature of Benin's political system.[63] The Constitutional Court in its case numbered *DCC 11- 067* ascertained the constitutionality of the referendum, and declared the referendum unconstitutional.

It observed that Articles 42, 44 and 54 of the Constitution on presidential term limits, the minimum and maximum age for President, and the presidential nature of the political system, respectively, cannot be subjected to a referendum.[64] The Court held these articles "*constitute an integral part of the eternity clause of Article 156 of the Constitution*".[65] Again, in this decision, the Court implicitly added immutable clauses other than those explicitly mentioned therein Article 156. For holding so, the Court interpreted and applied the notion of fundamental objectives of constituent power which led to the adoption of the Constitution as a standard for controlling Article 6 and in deciding the validity of the questions referred therein in a referendum.

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[60] Constitutional Court of Benin, DCC 06/074, July 8, 2006.

[61] BENIN CONST. art. 44. The President should at least be forty years old but not more than seventy years old at the date of the filing of his candidacy.

[62] BENIN CONST. art. 42. The President of the Republic shall be elected by direct universal suffrage for a mandate of five years, renewable only one time. In any case, no one shall be able to exercise more than two presidential mandates.

[63] BENIN CONST. art. 54. A presidential form of political system.

[64] *Id.*

[65] *Id.*

The Court invoked the preamble of the Constitution and recounted the historical events like a violation of human rights, undemocratic rule and abuse of power which defined the struggle and ultimate adoption of the Constitution in 1990. According to the Court, the adoption of the Constitution defined the new tenets of the political and constitutional dispensation that emerged from the constitution building process. It further noted that the constitutional vision for the embracement of democracy and rejection of confiscation and personalisation of power are essential features of the Constitution that were attacked in the proposed amendment. It observed that democracy implies the theoretical possibility of each citizen to govern and also be able to govern in return. This rotation can only be realised if the Constitution and other legal frameworks provide equality of opportunity to citizens to get elected. Absence of term limits on how long a person can hold power signifies a risk of confiscation and personalisation of power by one person at the expense of society at large.[66] The preamble of the Benin Constitution recognises this problem and prohibits personalisation of power. Thus, the Court declared the limit on presidential term forms the part of basic structure and cannot be amended by the Parliament.[67]

The Court also took into consideration the prevailing social atmosphere in Benin at the time of the referendum which would have been upheld by the people. It ruled that the referendum can be used to manipulate the Constitution.[68] Therefore, on the basis of reading of the Constitution, the term limit clause must be read as an implicit "*eternity clause*" establishing the constitutional block of supra constitutional principle.[69]

The third Constitutional Court decision in *DCC- 14 – 199*[70] is one of its kind and depicts a unique extension of the Implied Limitation Doctrine. It involved a constitutional challenge to the contents of an open letter written by a minister, Mr. Latifou Daboutou, to the President of the Republic requesting him to revise the Constitution to allow himself to run for a third

[66] Constitutional Court of Benin, DCC 06/074, July 8, 2006.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] Translated version of the decision. I would extend my gratitude for translation to Professor Mathias Moschel, Professor of Law, Central European University, Budapest.

Presidential term. The Court held that the speech of the minister violated Article 34[71] which requires every citizen to abide by the Constitutional Court orders as the open letter provokes for violation of one of the basic features of the Constitution enshrined in Article 42 *i.e.*, presidential term limit as decided in *DCC 11- 06*.

The Court, akin to the Colombian Constitutional Court, highlighted the difference between the original constituent power and derivative constituted power. It observed that "*derived constituent power cannot destroy the existing constitutional order and substitute it with a new constitutional order…coming of a new Republic can only occur by the original constituent power*".[72] Therefore, by inviting the President to exercise his constituted power to substitute the Constitution, Mr. Daboutou had violated the Constitution.

The finding of the Court suggests that any alteration of the basic structure of the Benin Constitution requires the formation of an original constituent power like a constituent assembly and the Parliament being a derived constituent power cannot violate the basic structure. Through this judgment, the Constitutional Court declared itself as the final arbiter to decide upon the question of what constitutes basic structure and established the principle as developed by the Indian and the Colombian Constitution that any alteration to the basic structure would require the exercise of original constituent power.

CRITICISM AND DEFENCE OF THE DOCTRINE

In this part, I will briefly discuss the criticism of the theory and later offer legitimacy to it by justifying its constitutional basis.

A. CRITICISM OF THE IMPLIED LIMITATION DOCTRINE

[71] Every Beninese citizen, civilian or military has the sacred duty to respect, in all circumstances, the Constitution and the constitutional order and laws and regulations of the Republic.

[72] Translated version of the decision. I would extend my gratitude for translation to Professor Mathias Moschel, Professor of Law, Central European University, Budapest.

The invocation of the theory of implied limitation by courts has been met with several criticisms since its inception. Many scholars and constitutional experts have denounced it as undemocratic and counter-majoritarian in character, giving unelected judges vast political powers that are not vested in them by their constitution.[73] I will discuss these two criticisms in detail below.

Undemocratic Nature of the Theory

The theory is often characterized as undemocratic by its critics as its application limits the legislative power of the parliament. Parliament, being the representative of the people, is the "*fountain of all power*" which can amend the constitution as it pleases.[74] The theory's focus on protecting the original tenets of the constitution is also criticized for denying the opportunity to the present generation to decide for itself. Scholars such as Jefferson[75] and Walter Delligton[76] opine that the power to amend a constitution is necessary to allow the governed to adapt the constitution to the conditions of its time. Therefore, the constitution must be regarded as a living document designed to serve present and future generations, reflecting their fears, hopes, aspirations, needs and desires. The legislature thus, should have the power to amend the constitution according to changing needs.

The Implied Limitation Doctrine incorporates a high degree of abstraction and its features are broad, open-textured, and can be subjected to multiple interpretations.[77] Some critics argue that the doctrine's abstract formulation and vagueness have allowed the courts to enjoy unlimited judicial power making the judiciary "*the most powerful organ of the State*".[78] The

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[73] Raju Ramchandran, *The Supreme Court and the Basic Structure Doctrine*, *in* SUPREME BUT NOT INFALLIBLE, 108 (Oxford University Press 2000).
[74] Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 470–471(1994).
[75] Earl Warren, CJ in Trop v. Dulles 356 U.S. 86 (1958) 103.
[76] Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARVARD L. REV. 386, 387 (1983).
[77] PRAN CHOPRA, THE SUPREME COURT V THE CONSTITUTION A CHALLENGE TO FEDERALISM, 70–9, 137–46 (Sage Publication 2006).
[78] Sanjit Kumar Chakraborty, *Constitutional Amendment in India: An Analytical Reconsideration of the Doctrine of Basic Structure*, NATIONAL UNIVERSITY OF JURIDICAL SCIENCE, 54 (2008).

non-exhaustive nature of identifying the basic elements creates confusion and leads to inconsistent application[79] and leaves the discretion with judges to brand anything as a basic feature of the constitution.[80] Thus, critics suggest that courts should come up with an exhaustive and concrete list of basic elements of the constitution.[81]

Furthermore, critics argue that the theory undermines participatory democracy,[82] denying citizens of their final say over the constitution—since in a democracy, people express their disagreement with parliament by way of voting in elections.[83]

Bernal has argued that constitutions of countries such as Colombia and Benin, which include referendums as means of constitutional change, should require a less exacting standard for judicial review as referendum mirrors the opinion of the governed.[84] Therefore, if a referendum concerning any amendment is answered positively by the people, judicial review must be restricted to procedural compliance by the legislature.

Theory as a Facet of Judicial Overreach

In absence of any explicit constitutional mandate, the impact and consequences of the doctrine cannot be ascertained. Thus, the theory is often denounced as a facet of judicial overreach. For instance, Jeremy Waldron, in his book "*Law and Disagreement*", writes that the decision of what is amendable and what is not is not based on any set of principles or rationality but on preferences constructed out of a variety of coherent

[79] M Jafar Ullah Talukder & M Jashim Ali Chowdhury, *Determining the Province of Judicial Review: A Re-evaluation of "Basic Structure" of the Constitution of Bangladesh*, 2(2) METRO U. J. (2009).
[80] Omar & Hossain, *Constitutionalism, Parliamentary Supremacy, and Judicial Review: A Short Rejoinder to Hoque*, THE DAILY STAR (Nov. 26, 2015), https://www.thedailystar.net/law/2005/11/03/alterviews.htm.
[81] CHOPRA, *supra* note 77.
[82] R. Albert, *Counterconstitutionalism*, 31 DALHOUSIE L.J., 47–48 (2008).
[83] Chueiri, *supra* note 2 at 243.
[84] Carlos, *supra* note 42 at 357.

individual choices.[85] The lack of standard in judicial review results in creation of a "*government of judges*" which can render decisions more regressive in recognizing rights as compared to decisions made by a democratically elected parliament.[86]

Moreover, judicial review of constitutional amendments exacerbate the tension between the legislature and the judiciary as the doctrine deprives the parliament of the opportunity to decide what elements constitute essential elements of the constitution and leaves the final say exclusively in the hands of courts.[87] Thus, in the absence of any rational criteria for adjudicating cases relating to violation of essential features of the constitution, judges establish their own supremacy not originally conferred upon them under the constitution.

B. ESTABLISHING LEGITIMACY OF THE DOCTRINE

In response to the criticism that the Implied Limitation Doctrine is undemocratic and counter majoritarian, the following claims are made. *First*, even in a democracy, certain decisions must not be left to the majority. *Second*, the degree of representation and public support a government enjoys in modern democracies is questionable. *Third*, the framing of the preamble to the constitution suggests that it is meant to resemble a social contract, where people have the power to resolve certain rights themselves. Lastly, the model of constitutional sovereignty implies limits on legislative powers.[88]

In the subsequent sub-parts, I will justify the legitimacy of the doctrine by arguing that the doctrine has a democratic basis in theory and instead of

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[85] JEREMY WALDRON, LAW AND DISAGREEMENT, 89 (Oxford University Press 1994).
[86] Gonzalo Andres Ramirez-Cleves, *The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy*, *in* DEMOCRATIZING CONSTITUTIONAL LAW, 219 (Thomas Bustamante & Bernardo Goncalves Fernandes eds., Springer 2016).
[87] M.F. Mohallem, *Immutable Clauses and Judicial Review in India, Brazil and South Africa. Expanding Constitutional Courts' Authority*, 15 INT'L J. HUM. RTS., 765–766 (2011).
[88] Gautam Bhatia, *Basic Structure-II: The Argument from Democracy*, INDIAN CONST. L. & PHIL. BLOG (Nov. 4, 2013), https://indconlawphil.wordpress.com/2013/11/04/basic-structure-ii-the-argument-from-democracy/.

being a facet of judicial overreach, it signifies an important judicial function.

Democratic Basis of the Theory

Many argue that the "*true nature of democracy*" requires that a particular form of government must contain certain intrinsic values that are considered to be basic or that it serves to promote such values.[89] Freeman develops on these value systems by distinguishing procedural democracy with substantive democracy and arguing that democracy, in addition to the principle of majoritarianism, also includes other values like respect for individual rights and rule of law among others within its definition.[90] These values constitute necessary conditions for generic constitutional governance—what the renowned American legal philosopher, Lon Fuller, called the "*inner morality of law*".[91]

Drawing further on these values, Sudhir Krishnaswamy defends the legitimacy of the theory[92] by arguing that "*legal norms which guide judicial decision making include those norms which are written into the constitution as well as those norms developed by the court interpreting the constitutional text (intrinsic values)*".[93] These legal norms remain subject to the expression of constituent power.[94] In cases where these norms are indeterminate or under determinate, the decision maker enjoys some discretion in interpreting a particular norm.

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[89] *Id.* quoting Isiah Berlin's observation that oppression is oppression, whether it is imposed upon me by one person or by ninety-nine out of a hundred.

[90] Samuel Freeman, *Constitutional Democracy and Legitimacy of Judicial Review*, 9(4) L. & PHIL., 340 (1990-1991).

[91] LON FULLER, THE MORALITY OF LAW, 42 (Yale University Press 1964).

[92] KRISHNASWAMY SUDHIR, DEMOCRACY AND CONSTITUTIONALISM IN INDIA A STUDY OF BASIC STRUCTURE DOCTRINE, 167 (Oxford University Press 2010).

[93] *Id.*

[94] Martin Loughlin & Neil Walker, *Introduction*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 1-2 (Loughlin and Walker eds., Oxford University).

Furthermore, the nature of the legislature as constituted power as opposed to constituent power offers legitimacy to the theory of implied limitation. In the seventeenth century, George Lawson distinguished the two powers by claiming that the power of the constituted to make law is inferior to the constituent power of constitution making.[95] The latter power is the power to "*constitute, abolish, alter, reform forms of government*", which is exercised when the government breaches people's trust.[96] The constituted power cannot act against the power which formed it or alter its own foundation.[97] Contrary to the claim that parliaments are sovereign and the doctrine of implied limitation is an act of judicial overreach, the actual "*sovereign is the one who makes the constitution and establishes a new political and legal order*".[98]

Legislature lacks the power to destroy or reform the constitution in a way that replaces its basic features. The invocation of the theory by the judiciary should be seen as a facet of check and balance and an important tool in the performance of the court's role as the guardian of the constitution to protect it from loss of its identity and basic elements. A close observation of the judgments studied in the first part of this article makes it clear that the court did not hold that basic elements cannot be amended, rather that the parliament being a constituted authority, cannot amend them.

Meaning of Constitutional Identity

In the preceding part, we discussed that the critics of the theory claim that in the absence of expressed limitations, the doctrine lacks rational criteria for the determination of basic elements and its implementation depends on judicial preferences about what the judges mean by identity of the

[95] GEORGE LAWSON, POLITICA SACRA ET CIVILIS, 47–48. (Conal Condren ed., Cambridge University Press 1992).
[96] *Id.*
[97] DANIEL DEFOE, THE ORIGINAL POWER OF THE COLLECTIVE BODY OF THE PEOPLE OF ENGLAND, EXAMINED AND ASSERTED (Gale Ecco, Print Editions 1702).
[98] Andreas Kalyvas, *Popular Sovereignty, Democracy and Constituent Power*, CONSTELLATIONS 223, 226 (2005).

constitution. However, this claim is misplaced. Reforming a constitution is different from re-forming the constitution.[99] Aristotle questioned: [100]

> "*On what principles ought we to say that a State has retained its identity, or, conversely, that it has lost its identity and become a different State*?"

His answer was that a State's identity is changed when the constitution changes as a result of disruption in its essential commitments, much as a chorus is a different chorus when it appears in a tragedy rather than a comedy.[101]

Thomas Reid observed that "*continued uninterrupted existence...necessarily implied in its identity*".[102] The Supreme Court of India defined these basic features as "*those political, moral and legal principles which are reflected in several articles in the constitution the collection of which together forms the core normative identity of the constitution*".[103] Thus, if the legislature enacts any amendment which affects the inner unity and coherent identity of the constitution, the doctrine of implied limitation allows the court to uphold its core values and principles by holding such amendment unconstitutional.[104]

In the first part of this article, we saw that the unamendable features determined by the constitutional courts in their assessment of its constitution were not extra constitutional principles. They formed the part of constitutional identity because of the unique history and circumstances of the State. Further, features like secularism, form of government, rule of

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[99] Walter F. Murphy, *Slaughter-House, Civil Right, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 17 (1987).
[100] ARISTOTLE, THE POLITICS OF ARISTOTLE, 98 (Ernest Barker trans., Oxford University Press 1962).
[101] *Id.* at 99.
[102] Udo Thiel, *Individuation*, *in* 1 CAMBRIDGE HISTORY OF SEVENTEENTH CENTURY PHILOSOPHY, 253 (Daniel Garber & Michael Ayers eds., Cambridge University Press 1998).
[103] Raghunathrao Ganpatrao v. Union of India, 1993 AIR 1267.
[104] Md. Abdul Malek, *Vice and virtue of the Basic Structure Doctrine: A Comparative Analytic Reconsideration of the Indian sub-continent's Constitutional Practices*, 43(1) COMMONWEALTH L. BULLETIN 48 (2017).

law, equality of political opportunities forms the basis of any modern constitution.

A Facet of Judicial Function

The judiciary, unlike the executive and legislature, exercises independent authority and the maximum impact of its decisions upon the society is negligible when compared to other branches of government. Therefore, it may be argued that *ex majore cautela*,[105] the judiciary is the ideal institution to vest the highest power of the State (of overruling the decisions of the popular majority), as it has the least ability to abuse that power and all the vast implications that it carries.[106] Further, the courts are considered to be superior to legislatures as a forum for rational deliberation and therefore constitutional courts, in comparison to elected parliaments, are much better suited for disinterested deliberation and public reason giving.[107]

It is further important to vest the judiciary with such power because most of the fundamental rights and challenges to the violation of the basic structure of the constitution are claimed against the parliament representing the majority. Therefore, allowing the parliament to be the final arbiter on questions of violation of basic features of the constitution will amount to it judging its own cause in matters in which it has a close and intimate interest.[108] The invocation of the theory by the judiciary cannot be described as judicial overreach but must be seen as an important tool to perform its role as guardian of the constitution to protect the foundational elements of the constitution.[109]

The criticism of the development of the Implied Limitation Doctrine beyond express limitations by the Benin Constitutional Court is also very weak. A comparative analysis of express limitation clauses depicts that concepts such as "*Republic*" or the "*Rule of Law*" enjoy a degree of interpretation that can be extended or restricted, resulting in minimalist or

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[105] For greater caution.
[106] Bhatia, *supra* note 88.
[107] CONRADO HÜBNER MENDS, CONSTITUTIONAL COURTS AND DELIBERATIVE DEMOCRACY, 78 (Oxford University Press 2013).
[108] *Id.*
[109] Sijoria, *supra* note 47.

maximalist interpretation in assessing irreplaceable elements.[110] For instance, the French and Italian Constitutions contain the eternity clause related to the concept of "*Republic*", and the concept has been a given maximalist interpretation.[111] Hence, "*Republic*" should be understood not only as that regime which differs from monarchy, but also as a regime that establishes and guarantees the separation of power, the principle of constitutional supremacy, protection of rights, rule of law and possibility of judicial review of laws, among others.[112] This jurisprudential expansion of the scope of the eternity clause is justified because the constituent powers set fundamental goals and principles that have become indispensable for the meaningful existence of a democracy.

Therefore, from the arguments presented above, it is difficult to argue that the Implied Limitation Doctrine is undemocratic or a facet of judicial overreach. Further, judicial review of amendments, should be viewed as a facet of separation of power that allows the court to keep a check upon legislative powers. We will now see in the next part that the doctrine has placed an important check upon the legislature to protect democratic erosion caused by powerful incumbents who may abuse amendment power to manufacture permanency in office.

RELEVANCE AGAINST ABUSIVE CONSTITUTIONALISM

In many jurisdictions, powerful incumbents with a majority voting share in the legislature employ the mechanism of constitutional amendment as a means to undermine democracy.[113] David Landau calls this phenomenon "*Abusive Constitutionalism*".[114] He argues that powerful incumbent presidents and political parties can manufacture constitutional change so as to make themselves very difficult to dislodge and to control institutions like courts that place checks on their powers.[115] Hitler's abuse of constitutional

[110] Ramirez-Cleves, *supra* note 86, at 225.
[111] *Id.*
[112] *Id.*
[113] Landau, *supra* note 8, at 191.
[114] *Id.*
[115] *Id.*

emergency power to overthrow the Weimar Republic and install an authoritarian regime, Putin's latest constitutional amendment to allow himself to stand for Presidential election for four terms in a row against strict mandate provided in the Russian Constitution[116] are some incidents that can be referred to as examples of this phenomenon.[117]

In a constitutional democracy, the struggle for power between different political groups is inevitable. The existence of amendment power becomes susceptible to abuse when political actors tend to employ this power for political gains. Landau argues that the concept of "*militant democracy*" and "*Unconstitutional Constitutional Amendment Doctrine*" can be used to prevent this struggle from turning into abusive constitutionalism.[118] In this part, I will focus on the instances where amendment powers were exercised by political actors to employ this phenomenon.

As discussed in the preceding parts, the constitutional guarantee of democracy, rule of law and liberty are some of the principles that constitute the basic features of the constitution. One of the means of subverting this guarantee is via constitutional amendment.[119] In a dominant party democracy system, imposition of substantive constraint on the amending power serves as a hedge against the polity's uncertain commitment to rule of law.[120] However, despite the existence of this restraint, political parties enact amendments that tend to violate these features. In these situations, the constitutional courts use the basic structure theory as a remedy, like it did in India and Colombia, for such odious constitutional amendments.[121] While the application of the theory was originally restricted to a constitutional amendment, the doctrine is now invoked in

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116 Siddharth Sijoria, *Analysis of the Russian Constitutional Court Judgment Upholding Amendment that would allow Putin to remain in Office until 2036*, REVISTA DERECHO DEL ESTADO, https://revistaderechoestado.uexternado.edu.co/2020/07/14/analysis-of-the-russian-constitutional-court-judgment-upholding-amendment-that-would-allow-putin-to-remain-in-office-until-2036/.

117 David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 598 (2009).

118 Landau, *supra* note 8, at 193–194.

119 *Id.* at 193.

120 ROZNAI, *supra* note 5, at 657.

121 Landau, *supra* note 8, at 190.

challenges to ordinary legislations and executive actions which seek to undermine the unwritten constitutional values.[122]

A. INDIA

The first instance of abusive constitutionalism can be called the enactment of the Thirty-Ninth Amendment Act.[123] The vires of this amendment was challenged in the famous case of *Indira Gandhi v. Raj Narain*.[124] In this case, the Court declared the amendment ousting the jurisdiction of the Court as unconstitutional. The Court applied the basic structure theory and declared that rule of law, free and fair election, equality of citizens are some of the basic features that the proposed amendment destroyed.

Another instance of abusive constitutionalism was enactment of the Forty-Second Amendment[125] which amended the Article 368 and Article 31C of the Indian Constitution that were aimed at removing all limits upon the constituent power to amend the Constitution by insulating judicial review of constitutional amendments.[126]

The Supreme Court, while examining its validity[127] invoked the implied limitation doctrine and declared the Forty-Second Amendment Act unconstitutional. In its judgment the Court recognized that a limited amendment power is also a basic feature of the Constitution. Thus, the amendment to Article 368 was struck down on this ground. Similarly, with respect to Article 31C, the Court said that fundamental rights cannot be considered as a plaything and it was also struck down.

Later, in the *Bommai* case,[128] the Supreme Court was asked to review the decision of the then Central Government to dismiss six state governments

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122 Christopher J. Beshara, *Basic Structure Doctrines and the Problem of Democratic Subversion: Notes from India*, 48 VERFASSUNG UND RECHT IN UBERSEE 99, 101 (2015).
123 The Constitution (Thirty-Ninth Amendment) Act, 1975.
124 1975 AIR 865.
125 The Constitution (Forty-Second Amendment) Act, 1976.
126 *Id.*
127 *Id.*
128 S.R. Bommai v. Union of India, (1994) 3 SCC 1.

ruled by the Bharatiya Janata Party by invoking emergency power under Article 356 of the Indian Constitution.

This was an interesting case from the perspective that the Court was asked to review the validity of the President's political decision. The Court ruled that the basic structure had application beyond constitutional amendment and held that the President's exercise of discretion must comply with the Constitution's mandate. Recognizing secularism as an essential feature, the Court upheld the dismissal of state governments as complying with the basic features. However, in respect of certain states the Court noted that a dismissal would be unconstitutional if it sought to undermine any of the basic features of the Constitution.

B. COLOMBIA AND BENIN

In presidential systems like in Colombia and Benin, the application of the theory to declare removal of term limits has raised several questions against implied limitation on amendment granting the presidential re-election. Scholars have written extensively for the need for a presidential term limit to be removed for carrying out State policies.[129] If the removal of the term limit is decided by people exercising their right to participate in democratic referendum, like it occurred in Colombia and Benin, the people's will must be upheld. The reason for removal of limits on presidential tenure serves an illiberal restriction on the choice of the polity from retaining an executive who it may otherwise wish to keep. The polity can always vote the executive out of the office if it so chooses, and therefore there is no need for limiting a candidate's right to participate in election.[130] Mainwaring and Scully argue that "*because of fixed terms of office, if a president is unable to implement her/his program, there is no alternative but deadlock*".[131] Therefore, the invocation of theory has been rejected as it dilutes the importance of deliberative democracy.

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[129] *See* Juan J. Linz, *Presidential or Parliamentary Democracy: Does it make a Difference?*, *in* THE FAILURE OF PRESIDENTIAL DEMOCRACY (Juan J. Linz and Arturo Valenzula eds., 1994).
[130] U.S. Term Limits v. Thornton, 512 U.S. 1286 (1994).
[131] Scott Mainwarring & Timothy R. Scully, *Building Democratic Institutions: Party System in Latin America*, 58(3) J. POL. 924 (1996). *See* Jide O Nzelibe and Matthew C. Stephenson, *Complementary Constraints: Separation of Power, Rational Voting and Constitutional Design*, 123 HARV L. REV. 618, 643–45.

However, the term limit serves an essential purpose of restraining political power invoked to manufacture permanency in office. Moreover, limiting presidential terms is not a new concept. For instance, countries such as Greece[132] have restrictions on the term limit on the posts of certain officials.

In a presidential regime, the removal of term limits may lead to a one man dominated political and constitutional system, termed as "*absolute presidentialism*" by H. Kwasi Prempeh.[133] Carlos Bernal argues that in a hyper-presidential regime, the doctrine has an important role to play in protecting the constitution from amendments that seek to destroy basic features of the constitution. For instance, the Constitutional Court decision holding the amendment granting a third presidential term unconstitutional was crucial to prevent the principle of check and balance as one more term would allow the President to appoint public officers responsible for checking him and therefore it would become impossible to achieve constitutionalism.[134] Thus, in this case, the Court did prevent a significant erosion of democracy by preventing a strong president from holding onto power indefinitely.[135]

Further, term limits also encourage political competition and participation, as incumbency for a long period of time can serve as a barrier to entry for other candidates who might refrain from contesting against the established incumbent.[136] Term limits promote a party based, as opposed to a personality-based notion of democracy. The limit on re-election assumes that no one individual has a monopoly on the skills needed to govern.[137]

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[132] CHARLES C HIGNETT, A HISTORY OF THE ATHENIAN CONSTITUTION TO THE END OF THE FIFTH CENTURY B.C., 237 (Oxford, Clarendon Press 1952).
[133] Prempeh, H.K., *Constitutional Autochthony and the Invention and Survival of "Absolute Presidentialism" in Postcolonial Africa*, *in* COMPARATIVE CONSTITUTIONAL DESIGN AND LEGAL CULTURE, 209 (Gunter Frankenberg ed., Edward Elgar Publishers 2013).
[134] Carlos, *supra* note 42, at 351.
[135] Landau, *supra* note 8, at 203.
[136] Einer Elhauge, *Are Term Limits Undemocratic*, 64 U. CHI. L. REV. 83, 154–65 (1997).
[137] Tom Ginsburg, James Melton & Zachary Elkins, *On the Evasion of Executive Term Limits* 8 (University of Chicago Public Law & Legal Theory, Working Paper No. 328, 2010).

In light of the lack of actual incidents of abuse in Colombia and Benin, Bernal tries to focus on the importance of the doctrine by focusing on the problems that other hyper-presidential regimes have faced through the use of amendment powers. He argues that these amendments that seek to replace the deliberative nature of democracy with socialist democracy[138] or extend presidential tenure are possible in a hyper presidential system where the constitutional balance of power tilts more in favour of the President than the Congress. Such constitutional pre-eminence coupled with democratic legitimacy may allow the President to misuse the authority to garner majority support for a constitutional amendment through the practice of "*clientelism*".[139]

Given the potential misuse of the amendment powers in a hyper-presidential system, it can be said that the Constitutional Replacement Doctrine is justified in a political context in which some reasonable conditions of fairness and stability have not been met yet.[140] Thus, the doctrine serves as a safety valve against authoritarian behaviour adopted by powerful incumbents to abuse constitutional means for personal gains.

CONCLUSION

The importance of the doctrine lies in it being illustrative rather than an exhaustive list of elements which constitute the basic structure. In changing times, there can be new trends of constitutional abuse and in such circumstances, the doctrine can be invoked against new emerging threats. Its flexibility allows judges to defend the constitutional order without being constrained by the limits of the constitutional text.[141] From the Indian

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138 His imaginary amendment encompasses some of the changes to the Constitution of Venezuela proposed by President Chavez in 2007.

139 This is the practice of obtaining votes with promises of government post or other privileges. The parliamentary majority required by art. 375 of the Colombian Constitution in order to pass a constitutional amendment is not difficult to obtain. This art. states that an amendment "*must be approved in two ordinary and consecutive periods. Following approval in the first period by the majority of those present, the proposal will be published by the government. In the second period, approval will require the vote of the majority of the members of each chamber*".

140 Carlos, *supra* note 42, at 352.

141 S*ee* Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 1002 (2011)(noting that the basic structure approach may be valuable because it may not be "*apparent from the outset of a democracy which provisions may prove to be central*", and that ex

experience, it can be seen that from *Kesavananda* until *S.R. Bommai*, it was believed that the doctrine only applied to constitutional amendments. Its use in *Bommai*, as well as in the third presidential term cases in Colombia and Benin, demonstrates that the doctrine is aimed at a moving target and tends to protect the constitution from significant movement along the spectrum towards authoritarianism, rather than protecting any single constitutional principle in isolation.[142]

One of the problems associated with the theory is that while ordinary judicial review can set aside political action, the judicial decision might in turn be overridden by constitutional amendment.[143] However, it has to be appreciated that the political entities both in India and Colombia, except in a few cases that I have highlighted throughout the paper, have both respected the invocation of the doctrine and respected the decisions of the courts.

The theory as adopted by the courts allows the judiciary to play a key role in reasoning public passions with constitutional commitments. Alexander Hamilton observed that the passions of men would not conform to the dictates of reason and justice without constraint.[144] Thus, rather than seeing the evolution of the theory as a facet of judicial overreach, it must be seen as an important development in the realm of constitutionalism.

Furthermore, the application of the theory by courts in recognizing concepts like secularism, democracy, and equality of political opportunity, amongst others, signifies that the doctrine contains rational criteria in reviewing amendments and serves as an essential tool against power grab tactics adopted by the executive for scoring political gains.

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ante exposition of the provisions may be impossible).

[142] Landau, *supra* note 8, at 235.

[143] S*ee* Miguel Schor, *The Strange Cases of Marbury and Lochner in the Constitutional Imagination*, 87 TEX. L. REV. 1463, 1477–80 (2009) (arguing that foreign countries adopted easier amendment thresholds and other mechanisms partly because of unrestrained fear of judicial power as expressed through *Lochner*).

[144] THE FEDERALIST NO. 15 (Alexander Hamilton) (1787).

THE INEXTRICABLE LINKAGE BETWEEN CASTE AND PATRIARCHY: INEQUALITY IN GRANTING CASTE CERTIFICATES TO SC/ST CHILDREN

SRIJAN SOMAL[1] & KRATIKA INDURKHYA[2]

Indian society is largely shaped by the constructs of gender, caste, and economic relationships. These social constructs naturally create an interlinked system of hierarchy within the society. For instance, the Indian caste system continually feeds off the preconceived notions of gender roles while economic disparities are often fuelled by caste discrimination. This article is an attempt to examine how patriarchy influences policy on the caste system in India in the light of the issue discussed below.

Dr. B.R. Ambedkar, in his writings, suggested that the practice of endogamy is a crucial reason behind the prolonged sustenance of the caste system in India. Even in seemingly modern India, a large section of society frowns upon the idea of inter-caste marriages. While several states have attempted to promote inter-caste wedlock through sensitisation and incentives, their policies on the matter remain far from ideal. One evident and concerning flaw is that a child born out of such wedlock ordinarily inherits their caste from the father, which essentially disregards the caste identity of the mother. This becomes further problematic if the mother belongs to a scheduled caste or scheduled tribe; such a child loses the tribal/caste identity associated with their mother's community. This also denudes them of the advantages attached therewith.

This article attempts to highlight how this goes against the constitutional ethos and the right to equality. The authors also discuss certain tests propounded by the Supreme Court, which sought to clarify the "exceptional" circumstances wherein the child can inherit their mother's caste, but have been inconsistent and inapt, to say the least. Certain

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changes are recommended in the concerned policy so as to make the framework more inclusive and functional.

INTRODUCTION

Patriarchy is an institution that gauges women as inferior to men and thereby strengthens the iniquitous power relation between genders.[3] India has myriad examples of rampant patriarchy in the country. One such instance is the protest against women entering the Sabarimala temple,[4] even when their entry was unequivocally permitted by the Supreme Court of India.[5] Along with inherent patriarchy, India's caste system is one of the oldest surviving social orders which divides individuals on the basis of ritual purity. With a highly exploitative past, patriarchy and the caste system mutually feed off each other.[6]

Caste, a concept that draws legitimacy from various religious texts,[7] is firmly lodged in our society and has an independent identity that cannot be overlooked.[8] As also pointed out by Hon'ble Justice Gajendragadkar, "*in the Hindu social structure, caste, unfortunately, plays an important part in determining the status of the citizens*".[9] Since ancient times, inter-caste marriages have been frowned upon. The marriage between an upper-caste male with a *Shudra* female was termed an "*anuloma*" marriage and it was required that the ceremony be performed without *mantras*.[10] The children born out of inter-caste marriages had neither the caste of the mother nor the father.

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[3] Preeti S. Rawat, *Patriarchal Beliefs, Women's Empowerment, and General Well-being*, 39 VIKALPA 43 (2014).

[4] Priti Salian, *Women visited this sacred temple. Then violent protests broke out. Why?,* NATIONAL GEOGRAPHIC (Jan. 8, 2019), https://www.nationalgeographic.com/culture/article/sabarimala-temple-india-kerala-protests.

[5] Indian Young Lawyers Assn v. State of Kerala, (2019) 11 SCC 1.

[6] Venkatanarayanan S., *Power of Patriarchy*, FRONTLINE (Mar. 13, 2020), https://frontline.thehindu.com/cover-story/article30911470.ece.

[7] Ghanshyam Shah & Surinder S. Jodhka, *Comparative contexts of Discrimination: Caste and Untouchability in South Asia*, 45 ECON. & POL. WKLY. 99 (2010).

[8] Sharat K. Bhowmik, *Caste and Class in India*, 27 ECON. & POL. WKLY. 1246 (1992).

[9] M.R. Balaji v. State of Mysore, AIR 1963 SC 649.

[10] Government of India, Circular on Caste status of the offspring of inter-caste married couples on 21st May 1899, Circular No. 39/37/73-SCT. I, 1977/31 Baisak, (1899).

They were called "a*nulomaja*" and belonged to an intermediate caste, which was higher than their mother's and lower than their father's.[11] A similar ideology and stratification persists in Muslims as well.[12] While Islamic jurisprudence recognises the rule of precedence, the Sunni School of jurisprudence lays utmost importance on descent or lineage.[13]

Even though inter-caste marriages present a progressive change from the archaic notions of caste hierarchy, pervasive patriarchy continues to subdue the position of a lower-caste wife in an inter-caste marriage and disregards the social handicaps of her children.[14] The question of the caste of a child born out of an inter-caste wedlock between a Scheduled Caste/Scheduled Tribe ("**SC/ST**") woman and a "*forward*" caste man is no longer *res integra*, but this article attempts to highlight how the inconsistently applied multitudinous tests have left these children in an ill-fated situation. For the purpose of uniformity in the article, "*inter-caste marriage/wedlock*" is used to refer to a marriage where one spouse belongs to a "*forward*" community while the other to an SC/ST community.

As the law stands today for inter-caste marriages, there exists a "*presumption*" that the child would take the caste from their father.[15] Simply put, if the father belongs to an SC/ST community, the child is issued the caste certificate without any further scrutiny. Contrastingly, if the mother belongs to an SC/ST community, the claimant of the caste certificate has to discharge the heavy "*burden of proof*" by not only proving their mother's caste but by also "*passing*" the additional and varied tests that are applied inconsistently.[16] While the numerous tests used in issuing caste certificates

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[11] *Id.*

[12] IMTIAZ AHMED, CASTE AND SOCIAL STRATIFICATION AMONG THE MUSLIMS (AAKAR, 1973) as quoted in Anwarullah Chowdhury, *Reviewed Work: Caste and Social Stratification among the Muslims by Imtiaz Ahmad*, 23 SOCIOLOGICAL BULLETIN 261 (1974).

[13] Ghanshyam Shah & Surinder S. Jodhka, *Comparative contexts of Discrimination: Caste and Untouchability in South Asia*, 45 ECON. & POL. WKLY. 99 (2010).

[14] Uma Chakravarti, *Conceptualising Brahmanical Patriarchy in Early India,* 14 ECON. & POL. WKLY. 48 (1993).

[15] Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204.

[16] Sobha Hymavathi Devi v. Setti Gangadhara Swamy, (2005) 2 SCC 244; *See also* Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204; These cases depict how two tests namely, the test of acceptance of community and the test of sufferings and disabilities, which are individually based on non-inclusiveness and inequity have sometimes been applied in conjunction and sometimes exclusively.

to a child of an inter-caste marriage have been reiterated in different ways, individually or in conjunction, the unviability of these tests has escaped judicial, legislative, and academic scrutiny.

This issue has recently made headlines because of two reasons: (i) the reformative government order issued by the Backward Classes, Most Backward Classes and Minorities Welfare Department of the State of Tamil Nadu in February, 2021 which states that, "*the children born out of a marriage between parents of two different castes shall be considered to belong to either the caste of the father or the caste of the mother based on the declaration of the parent/s*".[17] (emphasis supplied); and (ii) the 2020 division-bench judgment of the Delhi High Court in *Rumy Chowdhury v. The Department of Revenue, Govt. of NCT of Delhi,*[18] which examined the issue from the lens of Article 14 for the first time. It was held that the non-issuance of a caste certificate to the children of a single mother belonging to the SC community on the failure of providing any humility or deprivation suffered by her children is not violative of Article 14 of the Indian Constitution.[19]

In a gist, this whole practice highlights the unbridled social prejudices, stereotypes, subordination, and discrimination prevalent in India. What unfolds in this article is that off-springs of such wedlock suffer discrimination at two levels; first at the hands of the society, and then by the law which ought to protect them. While on one hand, the State has been providing huge financial incentives to promote inter-caste marriage which marks a great step towards social integration,[20] on the other hand,

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[17] Social Welfare Department, Government of Tamil Nadu, *Issuance of Community Certificate of the Children born to the parents belonging to two different castes—Clarification*, Feb. 9, 2021, Order (MS) No. 08, (2021), http://cms.tn.gov.in/sites/default/files/go/bcmbc_e_8_2021.pdf.
[18] Rumy Chowdhury v. The Department of Revenue, Govt. of NCT of Delhi, (2020), LPA 648/2019.
[19] *Id.*
[20] Welfare of Scheduled Caste and Backward Class Department, Government of Haryana, *Scheme for the encouragement of inter-caste marriage*, http://haryanascbc.gov.in/scheme-for-the-encouragement-of-inter-caste-marriage; Pavithra K.M., *1.2 Lakh beneficiaries receive incentives under Inter-Caste Marriage scheme in 7 years*, FACTLY (Dec. 21, 2016), https://factly.in/1-2-lakh-beneficiaries-receive-incentives-under-inter-caste-marriage-scheme-in-7-years/.

by undermining the experiences of children of inter-caste marriages, it goes against the ethos of the Constitution.

Proceeding further, the second part of this article explores whether the tests applied at present provide the correct criteria to assess the offspring's caste status. Thereafter, in the third part of the article, the practice is examined and analysed in light of Article 14 of the Constitution. Lastly, the fourth and fifth parts conclude the article with recommendations that will help law in being an instrument of social change.

INSUFFICIENCY AND INCONSISTENCY OF TESTS

As mentioned above, the Indian judiciary has come up with a variety of tests for determining the caste of children born out of inter-caste marriages. This section critically examines all the tests propounded so far.

A. THE FATHER'S CASTE: CONCLUSIVE & IRREBUTTABLE?

Traditionally, the caste of a person is ascertained at birth by the caste of their parents.[21] The law has taken a similar stance, declaring that the caste status of a person is determined by birth and cannot be changed by one's own volition.[22] At face value, this appears to be a felicitous approach considering the significance of familial ties at the roots of the Indian caste system.[23] However, such ascertainment becomes tricky in the case of children born out of inter-caste marriages. In the predominantly patriarchal society of India, such children are usually assigned their father's caste as per customary laws.[24] Several courts across the country have held that children of inter-caste marriages belong only to the caste of their father, not that of their mother.[25] This perspective presupposes the derivation of a child's identity from their father and disregards the influence of the mother. In a normal setting, both the parents bear social and cultural

[21] S.B. WAD, CASTE AND THE LAW IN INDIA (DOCUMENTATION CENTRE FOR CORPORATE & BUSINESS POLICY RESEARCH, 1984).
[22] Sunita Singh v. State of U.P., (2018) 2 SCC 493.
[23] *How India's caste system works*, EURONEWS, (Feb. 23, 2016), https://www.euronews.com/2016/02/23/delhi-water-protests-expose-india-s-ever-present-caste-system.
[24] Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204.
[25] T. Rajesvari v. Sree Venkateswara University, (1999) 1 AP LJ 36 (SN); Sonali Devendrakumar Nimal v. State of Maharashtra, (1996) SCC OnLine Bom 608.

influences upon their child[26] and to that extent, restricting the child's identity to their father's caste is problematic.

Per this approach, the children having an SC/ST mother and a "*forward class*" father are not given SC/ST status; thus, completely excluding them from the benefits of affirmative legislative action in educational/professional settings associated with being a member of their mother's community. With time, however, the courts have come to realize the exclusive nature of this approach and consequently, have discarded its stringent application. The Supreme Court in *Rameshbhai Dabhai Naika v. State of Gujarat* declared that the presumption that the children inherit the caste of the father is neither conclusive nor irrebuttable and such children are free to produce evidence of being treated as a member of their mother's caste.[27] The Court also opined that the caste of such a child is a question of fact, which must be determined as per the specific circumstances of each case.[28] Even so, the earlier presumption of inheritance of one's caste identity from the father has not been eliminated entirely. The judgments insisting determination of caste on the basis of the father have not been explicitly overruled, which could create confusion for the executive and the lower judiciary. As the law stands today, it is only in certain "*exceptional*" cases that the children may inherit the caste from their mother.[29] Such exceptional cases have been assessed by the courts by developing new tests, aimed to appreciate the peculiar facts and circumstances of each different matter.

B. TEST OF ACCEPTANCE OF COMMUNITY: SUFFICIENT & APT?

As held by the Apex Court, "*If a person claims to be a member of a community, he has to be accepted by the community*".[30] This principle forms the premise of the test of "*acceptance of community*". This test entails that to ascertain the caste

[26] Daniella Barniet al., *Parent–Child Value Similarity Across and Within Cultures*, 45(6) JOURNAL OF CROSS-CULTURAL PSYCHOLOGY 853 (2014).
[27] Rameshbhai Dabhai Naika v. State of Gujarat, (2012) 3 SCC 400.
[28] *Id.*
[29] Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204.
[30] C.M. Arumugam v. S Rajgopal, (1976) 1 SCC 863.

of a child born out of an inter-caste marriage, it has to be determined whether the child is accepted and assimilated in the sub-caste or sub-tribe of such community.[31] The Delhi High Court in the *Rumy Chowdhury* case[32] substantiated the stance on this issue, declaring:

> "*A perusal of the authoritative judicial dicta shows that it is now well settled that in an inter-caste marriage, the caste status of a person would have to be determined in the light of acceptance from the other members of the very same caste into which the person seeks an entry. Unless and until there is some positive evidence adduced to demonstrate that the community had accepted the Scheduled Caste person and her offsprings back into the fold, the children would not be entitled to the benefit of a caste certificate.*"

While the courts have been prompt in applying the test, their appreciation of facts with regard to what constitutes "*acceptance of community*" has been inconsistent, to say the least. In *Punit Rai*, the Supreme Court contextualized being accepted by a community as practising the customary traits and tenets of such community and being treated as a member thereof.[33] In another case, the appellant was considered to be accepted by an SC community by virtue of the fact that he held the office of *Annusuchit Jati Karmachari Parishad* and had been treated as a member of SC throughout his career.[34] Such equivocal wordings of the courts in different cases have led to further distortions of the test.

To remedy this, the Apex Court sought to narrow down the test to provide a precise interpretation in *Anjan Kumar v. Union of India*[35] and opined that the acceptance of community must be shown through a village resolution, which would then be recorded in the village register. Moreover, the court observed that such an event should ordinarily be accompanied by a feast and/or rituals.[36] The Court also quoted Bhowmik (1971) to define the term

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[31] Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204.
[32] Rumy Chowdhury v. The Department of Revenue Govt of NCT of Delhi, (2020) LPA 648/2019.
[33] Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204.
[34] Arabinda Kumar Saha v. State of Assam, (2002) 3 Gau LR 151.
[35] Anjan Kumar v. Union of India, (2006) 3 SCC 257.
[36] *Id.*

"*tribe*"[37] and associated the tribal identity of an individual to a specific territory, dialect, tradition, etc.[38] This implies that a person seeking to relocate to a city away from their tribal village, in order to find better opportunities would inevitably lose his tribal identity along with the benefits attached therewith, *i.e.*, reservations. The authors strongly disagree with such an exclusive outlook.

The goal of laws on reservation is to uplift the socio-economic status of SC/ST communities in order, to bring them on equal footing with the so-called "*forward class*" and should be construed as such.[39] An interpretation of those laws, which excludes the people attempting to achieve such equal footing by settling into cities or pursuing opportunities, would be antithetical to the constitutional mandate. Relocating away from a community or tribe does not necessarily take away one's SC/ST identity. As noted by the Bombay High Court in *Rajendra Shrivastava*, a person's label of SC/ST continues even after such person is transplanted into "*forward class*" surroundings.[40] Along with the label, the disadvantages, sufferings, hardships, and struggles associated with the community also remain ingrained in such a person's life.

Murari Lal in 2019 reaffirmed that the primary factor while bestowing SC certificates to offspring of an inter-caste couple is the acceptance of such offspring by the SC community.[41] However, non-acceptance by a community does not eliminate a person's social status of being connected to the community through their parent. Such people may still face the same disadvantages and handicaps, but they would be excluded from benefits under this test. To that extent, the authors believe that the test of "*acceptance of community*" is insufficient and inapt.

C. TEST OF UPBRINGING

[37] K.L. BHOWMIK & SAMAR GUPTA, TRIBAL INDIA: A PROFILE IN INDIAN ETHNOLOGY (WORLD PRESS 1971).
[38] Anjan Kumar v. Union of India, (2006) 3 SCC 257.
[39] Valsamma Paul v. Cochin University, (1996) 3 SCC 545.
[40] Rajendra Shrivastava v. State of Maharashtra, (2010) 112 (2) Bom LR 762.
[41] Murari Lal v. State of H.P., 2019 SCC OnLine HP 2918.

In a peculiar case that came before the Nagpur bench of the Bombay High Court,[42] the appellant sought to be identified by her mother's caste instead of her father's. The Court allowed her to inherit her mother's caste considering the fact that she was raised by her mother single-handedly, after being abandoned by her father during infancy.[43] The Court relied on the judgment of *Rameshbhai Dabhai Naika*, in which the Supreme Court held that although there is a presumption that a child inherits caste from their father, such a presumption is not conclusive.[44] In certain cases, the child can claim the mother's caste if it is proved that they were brought up by the mother.[45] For a person to be entitled to an SC/ST certificate, it must be proved that they have been brought up within the environment of the SC/ST community. This test has been used by the Supreme Court numerous times, often in close proximity with the "*acceptance of community*" test.[46]

This test becomes most relevant in ascertaining the caste of a child whose inter-caste parents have separated.[47] Let us assume, for instance, an inter-caste couple breaks off their marriage, and the mother belonging to an SC community assumes custody of their child. Such a child, although born into his father's "*forward*" caste would now be brought up in their mother's community. However, the courts have not ruled on the age dynamics of the upbringing of such a child. It was discussed in *A.S. Sailaja v. Principal Kurnool Medical College Kurnool*[48] that a child not originally belonging to a scheduled caste must be assimilated into the community at a fairly young age, at first year or second year or up to fifth year, in order to successfully claim scheduled caste status. Though, it is pertinent to note that the facts of the *Sailaja* case related to adoption of a non-SC/ST child by an SC/ST

[42] Anchal D/O Bharati Badwaik v. The District Caste Scrutiny Committee, (2019) MANU/MH/0690/2019.
[43] *Id.*
[44] Rameshbhai Dabhai Naika v. State of Gujarat, (2012) 3 SCC 400.
[45] *Id.*
[46] Anjan Kumar v. Union of India, (2006) 3 SCC 257; Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204.
[47] Anchal D/O Bharati Badwaik v. The District Caste Scrutiny Committee, (2019) Writ Petition No. 4905/2018 (Bombay High Court 2019); Rumy Chowdhury v. The Department of Revenue, Govt. of NCT of Delhi, LPA 648/2019 (Delhi High Court 2020).
[48] A.S. Sailaja v. Principal Kurnool Medical College Kurnool, 1986 AIR (AP) 209.

family. Therefore, the principles laid down in the judgment cannot be applied to the cases of inter-caste couples.

D. TEST OF SUFFERINGS AND DISABILITIES

Affirmative action was introduced in India in order to curb suffering, handicaps, and disabilities faced by certain communities, owing to their socially underprivileged status.[49] These factors should take centre-stage while determining whether or not a person should get benefits of reservation. The Apex Court held in *Valsamma Paul* as follows:[50]

> "*a person transplanted into a 'Dalit' community must have had undergone the same handicaps and must have been subjected to the same disabilities, disadvantages, indignities or sufferings so as to entitle him to avail the facility of reservation*."

This principle constructs the test of sufferings and disabilities. As per this test, a person claiming to be a member of SC/ST by virtue of his mother belonging to such a community must prove that he has suffered the same disabilities and handicaps as an ordinary member of the community.[51] This principle has been discussed and applied in many cases.[52] More recently, Jharkhand High Court has held that to claim the status of scheduled caste, a person must have "*suffered all the social sanctions, ridiculous/ignominy as well as the handicaps being an integral member of scheduled caste society*".[53] Although this test *prima facie* appears to be appropriate, it imposes the burden of proving such sufferings and disabilities on the claimant, which could be quite difficult to discharge.

It is quite pertinent to note that the above-discussed tests are not mutually exclusive and at times, have been applied in conjunction. In any case, most

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[49] Deepak Kumar & Others, *Affirmative Action in Government Jobs in India: Did the Job Reservation Policy Benefit Disadvantaged Groups?* 55(1) J. ASIAN & AFR. STUD. 145 (2019).
[50] Valsamma Paul v. Cochin University, (1996) 3 SCC 545.
[51] M.C. Valsala v. State of Kerala, AIR 2006 Ker. 1.
[52] Sobha Hymavathi Devi v. Setti Gangadhara Swamy, (2005) 2 SCC 244; Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204.
[53] Madhusudan v. State of Jharkhand, 2017 SCC OnLine Jhar 3038.

of these tests display the traits of inequity and non-inclusiveness, to the extent that they differentiate between inheriting the caste from one's father and mother. This idea will be further substantiated in the upcoming parts of this paper.

ARTICLE 14: ARE THE OFFSPRINGS DENUDED OF THEIR FUNDAMENTAL RIGHT?

Justice Mishra, former Chief Justice of India, for himself and the majority, began the landmark judgment of the *Sabrimala Temple case*[54] with the following lines, which are aptly applicable to the present context as well:

> "*The irony that is nurtured by the society is to impose a rule, however unjustified, and proffer explanation or justification to substantiate the substratum of the said rule. Mankind, since time immemorial, has been searching for explanation or justification to substantiate a point of view that hurts humanity.*"

Even this absurd presumption that the child will take his caste from his father even in an inter-caste marriage has been attempted to be justified in the garb of "*customary Hindu law*" of inheriting caste from father.[55] Viewing this whole practice as a violation of the fundamental right of equality escaped judicial scrutiny until *Rumy Chowdhury* (2020).[56] But even then, the bench concluded by holding that this practice in issuing caste certificates does not violate Article 14 of the Constitution.

To be held violative of Article 14 and thereby void under Article 13 of the Constitution, the practice must either be a "*law*" or "*law-in-force*". As mentioned in the case laws, this practice forms a part of customary "*laws*", thereby comes under judicial review mentioned in Article 13 of the Indian Constitution. Furthermore, stating that "*laws*" have an inclusive definition, Hon'ble Justice DY Chandrachud held that no customs and usages are

[54] Indian Young Lawyers Assn. v. State of Kerala, (2019) 11 SCC 1.
[55] Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204; Rameshbhai Dabhai Naika v. State of Gujarat, (2012) 3 SCC 400; Rumy Chowdhury v. The Department of Revenue, Govt. of N.C.T. of Delhi, (2020) LPA 648/2019 .
[56] Indian Young Lawyers Assn. v. State of Kerala, (2019) 11 SCC 1.

excluded from judicial scrutiny and doing so would deny the "*constitutional vision of ensuring primacy of individual's dignity*".[57]

But what must be kept in mind is that this practice that asserts a claim over legitimacy, owes its origin to the patriarchal order. As would be proved herein, this dogmatic practice which is permeated by patriarchal prejudices fails to qualify the traditional test of reasonable classification used for determining the violation of Article 14. Influenced by American jurisprudence, the "*classification test*" was adopted by the Indian Courts.[58] Consisting of two prongs, this test states that to pass Article 14 scrutiny, there must exist (a) an intelligible differentia between the individuals or groups that are subjected to differential treatment, and (b) a rational nexus between that differentia and the State's objective sought to be achieved.[59]

The differentiation between an SC/ST man and an SC/ST woman in a marriage with a "*forward class*" spouse does not qualify as "*intelligible differentia*" to impose such starkly different mechanisms in issuing caste certificates. It has no basis as a child of an inter-caste marriage still experiences humiliation and indignities which cannot be proved in all circumstances. There are examples wherein the offspring of "*sambandham*" marriages between higher-caste men, such as Namboothiri Brahmins, Tamil Brahmins, and Kshatriyas, and lower-caste women such as Nair women, were considered children whose touch could pollute their father and are treated differently.[60] Amongst many others, there have been instances when a child born out of wedlock between a Brahmin father and an SC/ST mother also suffered humility as many of his upper-caste

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[57] *Id.*

[58] Chiranjit Lal v. Union Of India, (1981) AIR 1981 SC 41; Gautam Bhatia, *"Civilization has been brutal": Navtej Johar, Section 377, and the Supreme Court's Moment of Atonement*, INDIAN CONST. L. & PHIL. BLOG (Sept. 6, 2018), https://indconlawphil.wordpress.com/2018/09/06/civilization-has-been-brutal-navtej-johar-section-377-and-the-supreme-courts-moment-of-atonement/.

[59] State of West Bengal v. Anwar Ali Sarkar, (1952) AIR 1952 SC 75.

[60] Rohan Manoj, *What does it mean to be a child of an intercaste union in modern India*?, THE HINDU (Feb. 6, 2021), https://www.thehindu.com/society/what-does-it-mean-to-be-a-child-of-an-intercaste-union-in-modern-india/article33757476.ece.

relatives did not eat food when he served.[61] Even in hypogamy, where a higher-caste woman marries a lower-caste man, there remains a probability of no sufferings faced by the offspring, but the law of the land demands no scrutiny, highlighting the rampant patriarchy. The ancient texts, as mentioned above, also evince differential treatment to such children.

Furthermore, Indian society is also undergoing a perceptual shift from being the propagator of hegemonic patriarchal notions towards equality. Today, when patriarchal norms such as virilocality and patriliny are not followed even across Hindu communities, the question is—how can such a blind application of practice in issuing caste certificates be said to qualify the first prong of the classification test?

Even though it is abundantly clear that the practice fails the first prong itself, resulting in violation of Article 14, for the sake of argument, this article discusses the second prong of the test as well. It is stated that in case of an inter-caste marriage, scrutiny is warranted as it might result in the inclusion of children who have not suffered any deprivation, etc; therefore amounting to fraud on the Constitution of India.[62] This is where the newly developed third prong of the "*legitimate state purpose*" also finds importance which states that if the object of the classification is illogical, unfair, and unjust, the classification will be unreasonable.[63] The object is unfair and unjust for two reasons. *First*, it undermines the experiences of a child of an inter-caste marriage, and the various tests, as already critiqued in the preceding section, are inappropriate with an inconsistent application. *Second*, the objective subverts the ethos of the Constitution, which placed all those, who, because of caste, patriarchy, etc., were stripped of their human rights and "*were to be placed in control of their own destinies by the assurance of the equal protection of law*."[64] Rather than protecting the Constitution, this

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[61] *Id.*

[62] Rameshbhai Dabhai Naika v. State of Gujarat, (2012) 3 SCC 400.

[63] Deepak Sibal v. Punjab University, (1989) AIR 1989 SC 903; Gautam Bhatia, *"Civilization has been brutal": Navtej Johar, Section 377, and the Supreme Court's Moment of Atonement*, INDIAN CONST. L. & PHIL. BLOG (Sept. 6, 2018), https://indconlawphil.wordpress.com/2018/09/06/civilization-has-been-brutal-navtej-johar-section-377-and-the-supreme-courts-moment-of-atonement/.

[64] Indian Young Lawyers Assn. v. State of Kerala, (2019) 11 SCC 1.

practice, at best, divests the children of inter-caste marriages of their fundamental right and overlooks their humiliations.

Moreover, in recent years, the Supreme Court has evolved standards other than the formal classification test. Justice Chandrachud, in the famous judgment of *Navtej Singh Johar*, stated that Article 14 along with dignity and liberty forms the basis of the Indian Constitution and reflects the quest for ensuring fair treatment to every individual.[65] In *Indian Young Lawyers Assn. v. State of Kerala*, it was held that for the individuals to secure justice, liberty, equality, and fraternity in all its forms, the Constitution must pursue a social transformation.[66] Clearly, imposing the heavy "*burden of proof*" and discriminatory tests such as "*acceptance of community*", which do not adequately reflect the humiliations suffered by the offspring of inter-caste marriages, do not ensure fair treatment.

Furthermore, the practice is also "*arbitrary*"[67] because as shown above, it is without any adequate determining principle.[68] As elaborated in *Sharma Transport v. State of U.P.*, "*an action fixed or taken capriciously or at pleasure, without adequate determining principle is not found in the nature of things, it is non-rational*" and hence, arbitrary.[69] In *E.P. Royappa*, it was held that equality and arbitrariness are sworn enemies.[70] Furthermore, the lack of guidelines to determine the caste of a child of an inter-caste marriage would result in decisions guided by the "*social philosophy*" of the judges and hence, was arbitrary.[71]

Although the Kerala High Court in the case of *M.C. Valsala v. State of Kerala,*[72] sought to bring equality, it ended up creating a further divide. The judgment stated that in a union between a higher-caste woman and a lower-caste man as well, the child will have to prove that he still uses their father's

[65] Navetj Singh Johar v. Union of India, (2019) AIR 2018 SC 4321.
[66] *Indian Young Lawyers Assn.*, (2019) 11 SCC 1.
[67] EP Royappa v. State of Tamil Nadu, AIR 1974 SC 555.
[68] DR. L. M. SINGHVI ET AL., CONSTITUTION OF INDIA (2013).
[69] Sharma Transport v. State of U.P., (2002) 2 SCC 188.
[70] *EP Royappa*, AIR 1974 SC 555.
[71] Bachan Singh v. State of Punjab, 1983 SCR (1) 145.
[72] M.C. Valsala v. State of Kerala, 2005 SCC OnLine Ker. 391.

caste and has suffered all handicaps.[73] It creates an unreasonable and distinct divide by classifying children of such marriages differently from SC/ST children born out of an endogamous marriage in the SC/ST community. Lastly, the discriminatory nature of the practice is further highlighted as the whole practice fails to take notice of matriarchal societies.

In the only exceptional case of *P. Jeya v. Union of India,*[74] the child was issued the SC certificate when the mother, not the father, fulfilled the origin requirement necessary for the issuance of the certificate. This was solely on the ground that disregarding the mother's origin would be discriminatory against the female and amount to giving credence only to the male. It is the only instance where the SC/ST woman's position in the inter-caste marriage was not suppressed. Henceforth, following this and after appreciating the discriminatory nature of the practice, the authors argue that this practice must be void as it is violative of Article 14.

RECOMMENDATIONS

As previously discussed, the judiciary's relentless attempts at developing diverse and comprehensive tests for ascertainment of the caste of a child born out of an inter-caste marriage have resulted in naught. The position of law on the issue is still devoid of clarity. This is problematic considering ambiguities in law are often susceptible to manipulation against the downtrodden groups.[75] The Government of India by a circular dated May 21, 1977 sought to bring clarity on the matter. Having regard to prominent judgments of the Apex Court, the circular stipulated that a child born out of inter-caste wedlock is entitled to get a SC/ST certificate, given that they are accepted as a member by such scheduled caste/tribe community.[76] However, such circulars being administrative instructions, are not considered as "*laws*" under Article 13 of the Indian Constitution[77] and hence, the official position on the issue has remained shrouded in dubiety.

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[73] *Id.*

[74] P. Jeya v. Union of India, (2002) W.P. No 30841 of 2002.

[75] Anupriya Dhonchak, *Standard of Consent in Rape Law in India: Towards an Affirmative Standard*, 34 BERKELEY JOURNAL OF GENDER, LAW & JUSTICE 29 (2019).

[76] Government of India, Circular on Caste status of the offspring of inter-caste married couples on 21st May 1899, Circular No. 39/37/73-SCT. I, 1977/31 Baisak, (1899).

[77] Dwarka Nath Tewari v. State of Bihar, AIR 1959 SC 249.

In fact, different states have assumed different stances on the matter over the years, as discussed by the authors below.

A. POSITION IN KERALA

The State Government of Kerala declared that all children born out of inter-caste marriages will be eligible for being treated as belonging to SC/ST, vide a government order in 1977.[78] This move also allowed children having a "*forward class*" father to claim scheduled caste status. However, after the Apex Court's judgment in *Punit Rai*,[79] the state was forced to withdraw the law. Another government order was released specifying that SC/ST certificates shall be issued only as per the caste of one's father, subject to the guidelines of *Punit Rai*.[80]

Soon thereafter, the State Government proposed to amend Kerala (SCs and STs) Regulation of Issue of Community Certificates Act, 1996 ("**Community Certificates Act**"), with a view to enable a child born out of inter-caste wedlock to apply for SC/ST certificate by virtue of their father or mother being a member of SC/ST community.[81] The proposal was a commendable step towards promoting equality between the father and the mother of a child in the context of an inter-caste marriage. The most unique and admirable feature of the proposed Section 5A was that it raised a positive presumption in the favour of such children. It stipulated that any child born of an inter-caste wedlock would be entitled to claim SC/ST status unless it is found on enquiry that such child has not suffered the same handicaps or disabilities attached to the SC/ST community.[82]

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[78] M.C. Valsala v. State of Kerala, (2006) AIR 2006 Ker 1.

[79] Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204.

[80] Government of Kerala, Government Order on June 26, 2005, Government Order (MS) No. 25/2005/SCSTDD, (2005).

[81] *Brief note on the proposal of Government of Kerala for amendment of Kerala (SCs and STs) Regulation of Issue of Community Certificates Act, 1996*, NATIONAL COMMISSION FOR SCHEDULED TRIBES, https://ncst.nic.in/sites/default/files/copy_of_minutes_of_meeting/Agenda120508-I4704095757.pdf.

[82] *Id.*

The proposal was sent for comments from several departments including the Ministry of Tribal Affairs and the National Commission for Scheduled Tribes ("**NCST**"), along with some State Governments.[83] While five out of seven consulted State Governments disagreed with the general idea behind the proposal,[84] NCST raised some apprehensions regarding its social implications. NCST seemed concerned for misuse of such a provision by "*unreserved*" candidates and that the provision will bring forth a "*social change*" with regard to the constructs of SC/ST communities.[85] The authors argue that such views are completely unfounded and simply depict the hidebound approach of Indian legislature and policy wings. While NCST noted that this amendment would bring equality into the laws, being apprehensive of the social change such equality may spark, displays their hard-boiled patriarchal mindsets. NCST was of the opinion that:

> "*Since customary/personal laws are not always gender-neutral, it is perhaps not possible to have gender-neutral definition of caste/tribal status applicable to children born to couples one of whom is the member of a Scheduled Tribe.*"[86]

The current position in the state derives from the decisions of the Supreme Court and the Kerala High Court on the issue. As discussed in *Indira v. State of Kerala*:[87]

> "*In order to get the benefit of Article 15(4), 16(4) or 16(4A) read with Articles 341 and 342 of the Constitution, the person born to an inter-caste married couple has to establish that the person still uses the caste of Scheduled caste or Scheduled Tribe, as the case may be, and is subject to same disabilities, disadvantages, sufferings etc. of that caste or tribe*."

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[83] *Id.*

[84] *Comments of State Governments on the proposal of Government of Kerala for amendment of Kerala (SCs and STs) Regulation of issue of Community Certificates Act, 1996*, NATIONAL COMMISSION FOR SCHEDULED TRIBES, https://ncst.nic.in/sites/default/files/Important_References/A_5_6_2008_099295341136_0.doc.

[85] *Brief note on the proposal of Government of Kerala for amendment of Kerala (SCs and STs) Regulation of Issue of Community Certificates Act, 1996*, NATIONAL COMMISSION FOR SCHEDULED TRIBES, https://ncst.nic.in/sites/default/files/copy_of_minutes_of_meeting/Agenda120508-I4704095757.pdf.

[86] *Id.*

[87] Indira v. State of Kerala, (2005) (4) KLT 219.

B. POSITION IN OTHER STATES

Several other states have sought to bring in rules and guidelines on the issue through legislative/administrative actions. In 1978, a circular was issued by the Government of Bihar, which declared that a child born from a non-SC father and an SC mother would be considered in the category of SC.[88] In the absence of any statutory law on the issue, the appellant in *Punit Rai* sought to rely on the same.[89] The circular, however, was not considered "*law*" under Article 13 of the Constitution by Sinha J., as it was an administrative instruction.[90] Another State which delved into the matter was Himachal Pradesh in 1977.[91] The State Government issued a letter to all government departments prescribing the guidelines on determination of caste status of a child of inter-caste marriage, which was on the same lines as the circular of the government of India dated May 21, 1977. It laid focus on the acceptance of community as a test for ascertainment of such a child's caste identity.[92]

Most recently, a Government Order addressing the matter has been issued in Tamil Nadu on February 9, 2021, as previously mentioned. It stipulates that the child born out of an inter-caste wedlock may be considered as belonging to either of the caste of the father or the mother, depending on the declaration of the parent(s).[93] This has brought in a new basis for

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[88] Government of Bihar, letter dated 03.03.1978 *as quoted in* Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204.

[89] Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204.

[90] *Id.*

[91] Deptartment of Personnel of Government of Himachal Pradesh, *Guidelines of Issuance for Caste/Tribe Certificates to the Members of SCs and STs* (July 6, 1977), letter No. PER. (AP-II)-f(4)-7/75 (1977), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwins_fJ3sHzAhUmzjgGHZOUB9QQFnoECAIQAQ&url=https%3A%2F%2Fhimachal.nic.in%2FWriteReadData%2Fl892s%2F5_l892s%2FPIII-05-08-2019-SC-ST-OBC-Parentage%2520Basis-73968640.pdf&usg=AOvVaw2atm3UrRXt-aDRgvsKHBwK.

[92] *Id.*

[93] Social Welfare Department Government of Tamil Nadu, *Issuance of Community Certificate of the Children born to the parents belonging to two different castes—Clarification* (Feb. 9, 2021), Order (MS) No. 08, (2021), http://cms.tn.gov.in/sites/default/files/go/bcmbc_e_8_2021.pdf.

ascertainment of such children's caste, disregarding the notions of "*acceptance by community*" or "*sufferings and disabilities*". However, examination of its veracity in the light of the Apex Court's decisions in *Punit Rai*,[94] *Anjan Kumar*,[95] and *Rameshbhai Dabhai Naika*[96] remains to be seen.

As for the position in other states, the State Governments have avoided taking a direct stance on the matter and have preferred to leave the matters to the judiciary. Different High Courts have relied on the landmark judgments of the Apex Court while deciding such matters.[97]

C. NEED FOR UNIFORMITY

The above discussion highlights a lack of uniformity on the issue. The absence of a federal law on the issue has resulted in several states using separate criteria to assess the issue. Even the multitudinous tests developed by the Apex Court have been applied inconsistently. The authors, therefore, recommend a uniform statutory law for the country addressing the matter. Further, the proposal of the Kerala State Government to amend the Community Certificates Act appears to be the most felicitous approach to be adopted. As noted previously, the amendment seeks to relieve the claimants from the burden of proving that they have suffered disabilities or handicaps and raises a presumption in their favour.

This amendment would bring a progressive transition from the now prevalent approach which requires claimants to prove "*acceptance of community*" or "*sufferings and disabilities*". The imposition of such a heavy burden of proof causes even more hardships for the already downtrodden. The Supreme Court in *Punit Rai* espoused the problematic idea relying on Section 106 of the Indian Evidence Act, 1872. It was stipulated that upbringing and sufferings/disabilities of an individual are facts, which are especially in the knowledge of such claimants and according to Section 106, they have to discharge the burden of proving them.[98] This analysis was extremely flawed, as Section 106 applies to certain exceptional cases only

[94] Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204.
[95] Anjan Kumar v. Union of India, (2006) 3 SCC 257.
[96] Rameshbhai Dabhai Naika v. State of Gujarat, (2012) 3 SCC 400.
[97] *See* Harpreet Kaur v. Govt. of Punjab, (2008) 8 SLR 368 (P&H); *See also* Madhusudan v. State of Jharkhand, 2017 SCC OnLine Jhar 3038.
[98] *Punit Rai*, (2003) 8 SCC 204.

wherein the facts are in "*exclusive*" knowledge of a person and they could prove the same without any difficulty or inconvenience.[99] The facts with regard to the upbringing of a child or social handicaps/disabilities faced by him/her are not isolated; such instances take place in a social context and are not within the "*exclusive*" knowledge of the claimant. Hence, the rule under Section 106 would not apply to the issue and the burden of proof need not necessarily be on the claimant.

In essence, the authors recommend that a provision should be adopted allowing all children of inter-caste marriages to claim SC/ST community certificate by the virtue of their father or their mother being members of such SC/ST community. A proviso may be added stating that such certificate may be refused or revoked if it is found that the claimant has not faced similar disabilities and handicaps as suffered by other members of such community. Adding such a provision would bring a much-needed inclusivity and equality in the scheme of things.

CONCLUSION

When the law is bestowed with the herculean task to act as a leveller, it must not perpetuate patriarchy is what this article advocates. Moreover, while the Constitution embodies a "*vision for social transformation*"[100] with a new social order which places the individual at the "*cardinal centre of all social activity*",[101] such onerous and discriminatory practice undermines the social handicaps of offspring of inter-caste marriages. Law must be an instrument for social change marking a break from the history of subjugation and discrimination attached to certain individuals. From the policy and case law discourse, it is clear that judges and policymakers have failed to realise the transformative nature of the Constitution. The preceding sections have sufficiently substantiated that these tests, which are primarily based on non-inclusiveness and inequity, have sometimes been applied in conjunction and sometimes exclusively. Moreover, the various government

[99] State of W.B. v. Mir Mohd. Omar, (2000) 8 SCC 382; Sanjay v. State (N.C.T. of Delhi), (2001) 3 SCC 190.
[100] Indian Young Lawyers Assn. v. State of Kerala, (2019) 11 SCC 1.
[101] *Id.*

orders, circulars, and tests not only highlight the lack of uniformity but also completely disregard the intrinsic fundamental rights of children of such inter-caste marriages.

Henceforth, against the inconsistent application of multitudinous tests that exist to claim an SC/ST certificate in an inter-caste marriage, in turn perpetuating a patriarchal order, the authors recommend the adoption of Kerala State Government's proposed Amendment of 2008. Against inequality, a child, through this recommendation, will be able to take his/her caste from their father *or mother*. Moreover, as discussed above, by doing away with the burden of proving disabilities and handicaps and raising a presumption in favour of children of inter-caste marriages, this model promotes equality and provides for an adequate and uniform model.

Furthermore, since recognition as an SC/ST is a matter of civil right,[102] this unfair practice has a significant impact on the civil status of individuals who cannot escape judicial scrutiny. Therefore, the article prescribes that a practice, which not only imposes an onerous burden to be discharged but is also violative of Article 14 of the Constitution, must be held void under Article 13.

[102] Rajeena v. State of Kerala, (2002) SCC OnLine Ker 536.

READJUSTMENT OF THE COMMONS: EVALUATING CLAIMS OF SOUTHERN RESISTANCE

SHREENATH A. KHEMKA[1] **& ANIKET PANDEY**[2]

INTRODUCTION

The Westminster tradition of democracy follows a bicameral archetype for legislative representation.[3] While the Westminster Parliament is traceable to a consistent eschewing of powers from the Rex to the House of Lords to the House of Commons,[4] its continuance today serves the need of a federal democracy. As polities have grown larger and heterogeneous, there has been a functional need for provincial governance.[5] Therein, the bicameral archetype has been successful in keeping the Union of both its units (through the House of Lords *i.e.* the Upper House) and its people (through the House of Commons *i.e.* the Lower House) together. In India, controversy brews on the impending redistribution of seats in the Lower House wherein the southern states are critical of readjustment as per population, which has seen a steeper rise in the northern states.[6]

BICAMERAL ARCHETYPE OF THE INDIAN PARLIAMENT

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[3] INDIA CONST. arts. 80, 81.

[4] *The evolution of Parliament*, UK PARLIAMENT, https://www.parliament.uk/about/living-heritage/evolutionofparliament/, (last visited on Oct. 1, 2021).

[5] *The Upper House of Indian Parliament*, RAJYA SABHA, https://rajyasabha.nic.in/rsnew/practice_procedure/book1.asp, (last visited on Oct. 1, 2021).

[6] Srikanth D, *For Tamil Nadu loss of 2 Lok Sabha seats in '60s, Madras high court moots Rs 5,600 crore in damages,* TIMES OF INDIA (Aug. 22, 2021), https://timesofindia.indiatimes.com/city/chennai/for-tamil-nadu-loss-of-2-lok-sabha-seats-in-60s-hc-moots-5600cr-in damages/articleshow/85526680.cms.

Under Article 79 of the Indian Constitution, the President, the Council of States, and the House of People, together constitute the Indian Parliament; mirroring the Westminster setup of the Rex, the House of Lords, and the House of Commons.[7] Whilst the Council of States represents the provincial units (*i.e.* the states and the union territories), the House of People represents the individual populations within such units.[8] Given this teleological difference, both the Houses have different compositional parameters.[9]

A. WEIGHTED PROPORTIONAL REPRESENTATION IN THE UPPER HOUSE

The Council of States consists of two hundred and fifty members, whereof two hundred and thirty-eight members are elected by a single transferable vote by the Legislative Assemblies,[10] and up to twelve members can be nominated by the President.[11] The distribution of seats among the states and the union territories is determined as per the Fourth Schedule,[12] wherein seats have been redistributed through various Reorganization Acts, as and when new states and union territories have been created.[13] Although there exists no constitutional guidance as to how these seats will be distributed, the underlying principle identified by the Supreme Court in *Kuldip Nayar v. Union of India*[14] has been that of "*unequal yet weighted proportional representation*".

Unlike the corresponding Article I, Section 3 of the American Constitution,[15] where each state is equally represented by two senators, the

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[7] *The evolution of Parliament*, UK PARLIAMENT, https://www.parliament.uk/about/living-heritage/evolutionofparliament/, (last visited on Oct. 1, 2021).
[8] INDIA CONST. arts. 80, 81.
[9] *Id.*
[10] INDIA CONST. art. 80, cl. 1 (b), read with art. 80, cl. 4.
[11] INDIA CONST. art. 80, cl. 1 (a), read with art. 80, cl. 3.
[12] Only those Union Territories are represented which have their own Legislative Assemblies.
[13] *See* Jammu and Kashmir Reorganization Act, 2019, § 8, No. 34, Acts of Parliament, 2019 (India).
[14] Kuldip Nayar v. Union of India, (2006) 7 SCC 1, ¶ 87.
[15] *"The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years; and each Senator shall have one vote…".*

Constitution of India does not mandate either equal representation for each provincial unit or proportional representation in relation to their populations. As held by the Supreme Court, the reason for not choosing either has been to "*safeguard the interests of the smaller states but at the same time giving adequate representation to the larger states so that the will of the representatives of a minority of the electorate does not prevail over that of a majority*".[16] Therefore, the working compromise has been to "*assign relatively more weightage to smaller states but larger states are accorded weightage regressively for the additional population. Hence the Rajya Sabha incorporates unequal representation for states but with proportionally more representation given to smaller states*".[17]

B. PROPORTIONAL REPRESENTATION IN THE LOWER HOUSE

The House of People consists of five hundred and fifty members, whereof up to five hundred and thirty members are directly elected from the states,[18] and up to twenty members are directly elected from the Union territories.[19] The distribution of seats between the states and the Union territories is currently determined at five hundred and forty-three members under the First Schedule of the Representation of the People Act, 1950.[20] However, unlike the Council of States, Article 81(2) provides that the distribution of these seats will be "*in ratio to the population*".

The virginal Article 81 prescribed as follows:

> "*States will be divided, grouped or formed into territorial constituencies and the number of members to be allotted to each such constituency shall be so determined as to ensure that there shall be not less than one member for every 750,000 of the population and not more than one member for every 500,000 of the population*".[21]

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[16] Kuldip Nayar v. Union of India, (2006) 7 SCC 1, ¶ 79.
[17] *Id.*
[18] INDIA CONST. art. 81, cl. 1 (a).
[19] INDIA CONST. art. 81, cl. 1 (b).
[20] Albeit the Schedule stands modified pursuant to the Second Schedule of the Jammu and Kashmir Reorganization Act, 2019, wherein six seats stand transposed from the "*States*" to the "*Union Territories*".
[21] INDIA CONST. art. 81, cl. 1 (b), *substituted by* The Constitution (Seventh Amendment) Act, 1956; Under § 4 (3) of the Representation of the People Act, 1950 it was provided

Furthermore, it prescribed that the "*ratio between the numbers of members allotted to each territorial constituency and the population of that constituency…shall, so far as practicable, be the same throughout the territory of India*".[22] Lastly, it was prescribed that "*upon completion of each census, the representation of the several territorial constituencies in the house of people shall be readjusted*".[23]

In 1956,[24] Article 81 was structurally overhauled and recast as Articles 81 and 82. Firstly, each state would be allotted a fixed number of seats so that the "*ratio between that number and the population of the state is, so far as practicable, the same for all states*".[25] Secondly, each state was divided into constituencies such that the "*ratio between the population of each constituency and the number of seats allotted to it is, so far as practicable, the same throughout the state*".[26] Thirdly, the allocation of seats and the distribution of constituencies, was to be "*readjusted*", upon completion of each Census.[27]

SOUTHERN RESISTANCE TO READJUSTMENT

The recent furore has fomented with the southern states resisting readjustment under Article 82,[28] which is currently locked as per the 1971 Census.[29] The fear that they would be penalized by the reduction of seats allotted to them, for effective population control as compared to their northern siblings, where population growth has seen a steeper rise.[30] The

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that all constituencies shall be single-member constituencies.

[22] INDIA CONST. art. 81, cl. 1(c), *substituted by* The Constitution (Seventh Amendment) Act, 1956.

[23] INDIA CONST. art. 81, cl. 3, *substituted by* The Constitution (Seventh Amendment) Act, 1956.

[24] The Constitution (Seventh Amendment) Act, 1956, No. 29, Acts of Parliament, 1956.

[25] INDIA CONST. art. 81, cl. 2(a).

[26] INDIA CONST. art. 81, cl. 2(b).

[27] INDIA CONST. art. 82, read with The Delimitation Act, 2002, § 8, No. 33, Acts of Parliament, 2002.

[28] Kenneth Mohanty, *Explained: The Lok Sabha 'Loss' That's Made Madras HC Ask for Rs 5,600 Cr Compensation for Tamil Nadu*, NEWS 18 (Aug. 21, 2021), https://www.news18.com/news/explainers/explained-the-lok-sabha-loss-thats-made-madras-hc-ask-for-rs-5600-cr-compensation-for-tamil-nadu-4114211.html.

[29] INDIA CONST. art. 82, third proviso, cl. i.

[30] Srikanth D, *supra* note 6; Mohanty, *supra* note 28; *see also* M. Vaishnav & J. Hintson, *India's Emerging Crisis of Representation*, CARNEGIE ENDOWMENT FOR INTERNATIONAL

southern claim is augmented by the argument that the "*actual percentage of voters*" in a state should be the function for readjustment, rather than the "*actual number of voters*". Demonstrably, Tamil Nadu would lose seven seats whilst Uttar Pradesh would gain seven seats, if the 2001 Census was to be taken into account.[31] However, the average number of voters per constituency in Tamil Nadu would be more than in Uttar Pradesh.[32]

A. DIVERGENCE ON THE STATE AS UNIT OF REPRESENTATION

In the Council of States, the unit of representation is the "*state*", where provincial constituents are represented to the Union.[33] This is done to preserve the balance in the division of powers between the Union and the states.[34] Because the political will of the state is wielded by its Legislative Assembly,[35] the legislative members are the electors under Article 80(4).

However, there is divergence on what constitutes the unit of representation for the House of People. One argument is that "*individual*" is the unit of representation, whereby populational constituents are represented to the Union. Accordingly, even in the absence of Article 82, the composition of the House must be responsive to the change in the populations between the states, as mandated under Article 81(2)(a). Therefore, Article 82 only expressly provides for the implicit, by mandating readjustment after every Census.

On the other hand, contrarians have argued that "*state*" is still the unit of representation, because the allotment of seats under Article 81(2)(a) is to the state, though individuals are the electors under Article 326. The adherence to "*ratio*" is not mandatory and is to be followed "*so far as practicable*" under Article 81(2)(a) and Article 81(2)(b). The Proviso to

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PEACE (Mar. 14, 2019), https://carnegieendowment.org/2019/03/14/india-s-emerging-crisis-of-representation-pub-78588.

31 *Id.*

32 *Id.*

33 Excepting the 12 nominated members under INDIA CONST. art. 80, cl. 1 (a).

34 Notably under Lists I, II, and III of the Seventh Schedule.

35 *Executive: Its Accountability to Parliament*, RAJYA SABHA, https://rajyasabha.nic.in/rsnew/practice_procedure/naccount.asp (last visited on Oct. 3, 2021).

Article 81(2) evinces that once Article 81(2)(a) "*shall not be applicable*" to smaller states, there is no binding effect to the design *per se*.

B. VARIANCE ON MODALITIES OF READJUSTMENT

The contrarians read Article 82 as only providing for periodical consideration for readjustment, and not as an actual obligation to mandatorily readjust. As per the third proviso to Article 82, "*it shall not be necessary to readjust*" till the publication of the "*first Census taken after the year 2026*".

Moreover, Article 82 does not specify the manner in which readjustment is to be undertaken, which has been left open so that the "*Parliament may by law determine*" the same, therefore permitting deviation from the "*ratio*" under Article 81(2). In fact, under Section 9(1)(a) of the Delimitation Act, 2002, the Parliament by law has provided for consideration to "*physical features, existing boundaries of administrative units, facilities of communication and public convenience*", therefore providing the "*manner*" for readjustment under Article 82.[36] Taking note of Section 9(1) of the Delimitation Act, 2002, the Supreme Court in *R. C. Poudyal v. Union of India*[37] held as follows:

> "*Population, though important, is only one of the factors that has to be taken into account while delimiting constituencies which means that there need not be uniformity of population and electoral strength in the matter of delimitation of constituencies. In other words, there is no insistence on strict adherence to equality of votes or to the principle one vote—one value*".[38]

C. POLITICAL THICKET OF THE FORTY-SECOND AMENDMENT

[36] Since both arts. 81 (2)(a) and (b) maintain the same design of "*proportional* representation" based upon the *'ratio to the population'*, therefore the delimitation of seats under § 9 of the Delimitation Act, 2002 and the division of constituencies under art. 81 (2)(b), can be mirrored to the allotment of seats under art. 81 (2)(a) and the readjustment under art. 82 and § 8 of the Delimitation Act, 2002.

[37] R.C. Poudyal vs Union of India, 1994 Supp (1) SCC 324, ¶ 186.

[38] Justice S.C. Agrawal, otherwise partially dissenting, was in agreement with the majority on this aspect.

The political thicket concerning the resistance to readjustment can be traced back to 1976.[39] The Indian population had seen a sharp rise during the '50s and '60s, prompting the insertion of "*population control and family planning*" as entry 20A to list III in the Forty-Second Amendment. It was felt that both the Union and the states must work towards a sustainable population growth.[40] It is here that the southern states cry foul.

While the 1956 amendment was simply an effort to "*revise and simplify*"[41] the virginal Articles 81(1)(b), 81(1)(c) and Article 82, "*since after reorganisation each of the States will be large enough to be divided into a number of constituencies and will not permit of being grouped together with other States for this purpose or being 'formed' into a single territorial constituency*",[42] it was only in 1976 that the proviso to Article 81(3) was introduced to freeze the populational ratios under Articles 81(2)(a) and (b) to the immediately preceding Census of 1971. Correspondingly, the third proviso was inserted into Article 82 so that "*until the relevant figures for the first Census taken after the year 2000 have been published, it shall not be necessary to readjust the allocation of seats in the House of the People to the States and the division of each State into territorial constituencies*". Thus, the political vision was constitutionally assured for the next twenty five years, as states were asked to commence with demographic reforms.

When the calendar turned over in 2001,[43] the assurance was continued for another twenty-five years by substituting references to "*2000*" with "*2026*", at both the proviso to Article 81(3) and the third proviso to Article 82. Furthermore, the Eighty-Fourth Amendment went a step ahead in delinking the common expression of "*population*" under Articles 81(2)(a) and (b) so that while the allocation of seats among the states was fixed as

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[39] The Constitution (Forty-Second Amendment) Act, 1976, No. 91, Acts of Parliament, 1976.

[40] Srikkanth D, *supra* note 6; Mohanty, *supra* note 28.

[41] The Constitution (Seventh Amendment) Act, 1956, cl. 3, Statement of Objects and Reasons, No. 29, Acts of Parliament, 1956.

[42] *Id.* Reasserting the idea that State is the unit of representation to the Lower House, as cross-cutting constituencies were a pragmatic compromise only in the absence of adequate population in smaller states.

[43] The first Census subsequent to 2000 was being undertaken in 2001; The Constitution (Eighty Fourth Amendment) Act, 2001, No. 172-F, Acts of Parliament, 2001.

per the 1971 Census,[44] the division of constituencies within the state was fixed as per the latest 2001 Census.[45]

Now, as the calendar is due to turn over in 2026, the constitutional assurance is set to expire. It is here that the southern states seek extension (as sought in 1976[46] and 2001[47]), arguing that the population ratio for allotment of seats among the states should only be unfrozen once the northern states have successfully controlled their populations.

NON-JUSTICIABILITY OF SOUTHERN CLAIMS

Whilst there is no doubt that the southern claims are historically well-founded,[48] their operationalization lies in the legislative realm. The grant of extension and the freezing of population ratios require constitutional amendment, and at best, a deliberate design by the Central Government to de-operationalize the mandatory effect under Article 81 and Article 82 by delaying a census post-2026, as far as possible. However, given the present wording of the constitutional text, and the Central Government's timely conduction of the census,[49] southern claims cannot be made justiciable.

A. INCONGRUITY WITH BICAMERAL REPRESENTATION

Even if the southern claim of the state being the unit of representation to both the Houses is accepted, it does not address the teleological variance which gives result to the difference in their compositional character. Because the Upper House is representative of the provincial units, and the Lower House is representative of individual populations, their electors vary

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[44] INDIA CONST. art. 81, cl. 3, proviso, cl. (i) read with INDIA CONST. art. 82, third proviso, cl. (i).

[45] INDIA CONST. art. 81, cl. 3, proviso, cl. (ii) read with INDIA CONST. art. 82, third proviso, cl. (ii).

[46] INDIA CONST. art. 81, cl. 3, proviso.

[47] INDIA CONST. art. 81, cl. 3, proviso, read with INDIA CONST. art. 82, third proviso.

[48] Please refer to the foregoing discussion, especially at Section *'C'* titled *"Political Thicket of the 42nd Amendment"* (*supra*).

[49] Excepting the 2021 Census, which though notified to be conducted in 2020 and 2021, was indefinitely deferred due to the outbreak of the COVID-19 pandemic; Press Information Bureau Notification dated 25.03.2020.

between Article 80(4) and Article 326. This functional need to represent two different attributes of the same unit of representation (as an administrative unit *vis-à-vis* as a populational unit) results in the southern claims sustaining for the Upper House, but not for the Lower House.

It is a justifiable proposition that a change in the populational composition of a state does not eschew its administrative character. Hence, unlike Article 82, there is no constitutional mandate for periodic readjustment of the Council of States based on demographic changes. On the other hand, when the populational composition of a state is being represented, it must be readjusted as the populational composition changes. Therefore, Article 82 mandates a periodic readjustment of the House of People. Just as it would be a ludicrous proposition to retain seats in the Upper House for states which have recently extinguished, or to not provide for seats for newly formed states, it would be an equally ridiculous proposition to not readjust seats in the Lower House when populations substantially increase or decrease among the states; evermore so when the allotment of seats to the states is in "*ratio to the population*".

B. ABSENCE OF NUMERICAL EXACTITUDE

The norms of the composition of the House of People are contained under Articles 81(2)(a) and (b) in the form of a "*ratio*". Article 82 provides that as this "*ratio*" changes, the House should be readjusted. Further qualifiers under Article 82 yield the result that readjustment must be made by the Delimitation Commission[50] based on the latest census figures. The "*manner*" of readjustment under Article 82 would largely encompass processual considerations, and even when they encompass substantive considerations, would not override the norms of composition enumerated under Articles 81(2)(a) and (b).

In fact, both Articles 81(2)(a) and (b) accept the concept of numerical exactitude by mandating that both the allotment of seats and the division of constituencies be "*so far as practicable*". The Parliament by law[51] has

[50] The Delimitation Act, 2002, § 3, No. 33, Acts of Parliament, 2002 read with The Delimitation Act, 2002, § 8, No. 33, Acts of Parliament.

[51] INDIA CONST. art. 327 read with The Delimitation Act, 2002, § 9, No. 33, Acts of Parliament, 2002.

provided for non-populational considerations to be kept in mind while delimiting such constituencies so that every constituency retains a homogeneous and composite character for maximising representational efficiency. However, the same does not mean that readjustment is not to be based on demographic changes. Hence, there is no divergence between the mandate of "*proportional representation*" under Articles 81 and 82 and the Supreme Court's enunciation in *R. C. Poudyal.*[52]

Dealing with *mutatis mutandis* design concerning the composition of Panchayats under Articles 243C(1)[53] and (2),[54] the Allahabad High Court in *Pradhan Sangh Kshetra Samiti v. State of Uttar Pradesh*[55] held that "*the representation of an area has to be balanced to the ratio of the population in it; not the population to the area*".[56]

Therefore, even if readjustment and delimitation under Article 82 and Article 327 were based purely on non-populational considerations, the same would still require the representation of such areas to be adjusted to the "*ratio of the population*".

CONCLUSION

It is therefore clear that the southern resistance to readjustment is *non-est* in law. The northern states have a well-founded claim, both in legal theory and constitutional text, to demand an imminent readjustment of the seats to the House of People. In the end, any redistributive exercise, whether under the Fourth Schedule or Article 82, is a zero-sum game.[57] Some states must always lose to provide for others. Of course, electoral considerations

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[52] R.C. Poudyal vs Union of India, 1994 Supp (1) SCC 324.

[53] *"The ratio between the population of the territorial area of a Panchayat at any level and the number of seats in such Panchayat to be filled by election shall, so far as practicable, be the same throughout the State"*; in *pari materia* with art. 81, cl. 2 (a).

[54] *"Each panchayat area shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the Panchayat area"*; in *pari materia* with INDIA CONST. art. 81, cl. 2 (b).

[55] Pradhan Sangh Kshetra Samiti v. State of Uttar Pradesh, AIR 1995 All 162.

[56] *Id.* ¶ 92.

[57] Subject to the caveat that Parliament does not alter numerical composition under INDIA CONST. arts. 80(1) and 81(1).

cannot be divorced from their *realpolitik*, which in the present case raises suspicion of a Central Government cementing its foothold in the "*favourable*" north, at the expense of the "*rebellious*" south being muffled. Good or bad, this has been the humble tradition of our great democracy!

BOOK REVIEW: WHY RELIGIOUS FREEDOM MATTERS FOR DEMOCRACY: COMPARATIVE REFLECTIONS FROM BRITAIN AND FRANCE FOR A DEMOCRATIC 'VIVRE ENSEMBLE' BY MYRIAM HUNTER-HENIN (NON-WEST READING OF HUNTER-HENIN'S DEMOCRATIC APPROACH)

ADITYA RAWAT[1]

Myriam Hunter-Henin in her recent book "*Why Religious Freedom Matters for Democracy*", studies religious freedom in the context of the employment sector by comparing the French model of *Laicite* against the English model of Church establishment.[2] Under the French separatist policy of *Laicite,* supremacy is given to explicit secular civic religion and neutrality to curtail religious influence over the State in order to establish a uniform, religion-free citizenship and nationhood.[3] The English model is a counterpoint to the French separatist *Laicite*—while it recognises a religious establishment (church), over the period of time, the form of establishment has become mild. The relationship is of recognition and it does not lead to devolution of any of the powers or functions of government to the church.[4] This non-coercive establishment is based on two features of English polity: (i) legal safeguards of dissenters and abolition of discriminatory practices[5] and (ii)

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[2] MYRIAM HUNTER-HENIN, WHY RELIGIOUS FREEDOM MATTERS FOR DEMOCRACY: COMPARATIVE REFLECTIONS FROM BRITAIN AND FRANCE FOR A DEMOCRATIC "VIVRE ENSEMBLE" (2020).

[3] 2 REX AHDAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE (2d ed. 2013).

[4] Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v. Wallbank, [2003] UKHL 37; [2004] 1 AC 546.

[5] *See* Repeal of Test and Corporation Acts 1828, 9 Geo. 4 c.17; Roman Catholic Relief Act 1829, 10 Geo. 4 c.7; Religious Disabilities Act 1846, 9 & 10 Vict. c.59; Jewish Relief

maintenance of democratic boundaries between the political and religious spheres.[6] The author asserts that the court adjudications concerning religious freedom in the mentioned countries have often looked (especially in the twenty-first century *vis-à-vis* increasing fear against Islamic radicalisation) at its negative dimension *i.e.*, negative liberty, to protect believers from State intrusions and interferences.

The author argues that the contemporary approaches such as "*analogous-to-secular*"[7] and "*accommodationist*"[8] adopted by domestic and supranational European courts do not help overcome deadlocks in the complexity of state and religious discourse. Under the "*analogous-to-secular*" approach, religious freedom is not considered as a special category and should be protected only when it is in consonance with rights emanating from secular concepts of equality, liberty and neutrality. The "*accommodationist*" approach is based on the principle of non-interference of the State into religious claims.

The "*analogous-to-secular*" approach can undermine the force of religious commitments (under-inclusive) and can also be used to expand religious requests exponentially (over-inclusive). On a similar note, the "*accommodationist*" approach has an attitudinal shift towards (i) muzzling dissent within religious communities and (ii) deprives the court of legitimacy to set the limits to religious freedom.

The author brings into discourse the positive dimension of religious freedom which is essential for deepening democracy and enriching

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Act 1858, 21 & 22 Vict. c.49; Oaths Act 1888, 51 & 52 Vict. c.45; Excommunication Act 1813, 53 Geo. 3 c.127). Religious Disabilities Act, 1846; Marriage and Registration Acts 1836, 6 & 7 Wm. 4 cc.85 and 86; Burial Act 1880, 43 & 44 Vict. c.41.

[6] Rex Ahdar & Ian Leigh, *Is Establishment consistent with Religious Freedom,* 49 McGill L.J. 635 (2004).

[7] CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2010); CÉCILE LABORDE, LIBERALISM'S RELIGION (2017).

[8] Michael W. McConnell, *Why is Religious Liberty the First Freedom*, 21 CARDOZO L. REV. 1243 (1999).

pluralism. A similar sentiment was echoed by the European Court of Human Rights ("**ECtHR**") in *Kokkinakis v. Greece* case.[9] The same is stated as below:

> "*Freedom of thought, conscience and religion are one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.*"[10]

Hunter-Henin proposes three complementary methods of adjudicating the tension to maintain the positive dimension of religion as a source of plurality—(i) method of avoidance; (ii) a principle of inclusion; and (iii) a principle of revision, collectively called the "*Democratic Approach*". Method of avoidance is a classic separation between State and religion.[11] Furthermore, this separation is also beneficial for democracy, by allowing it to avoid "*cluttering democratic debate with conflicting issues*".

However, the method of avoidance tends to favour the majority and muzzling of minority religious voices. Therefore, the principle of inclusion complements avoidance. Under this principle, State institutions are obliged to ensure that minority voices are addressed in the mainstream political debate. The last thread proposed is the principle of revision. This principle has two components—citizens are expected to review their commitment in the light of evolving society and political framework; if citizens don't review their commitments accordingly, the judiciary should legitimately put a cap to the expression or manifestation of their views to promote the culture of democracy.

The book is structured into two parts. Part I has three chapters, the first two chapters are dedicated to the contextual analysis of the *Laicite* model in France and the *church establishment* model in the United Kingdom. Concerning the French model, Hunter-Henin has built upon Grimm's typology of secularism and has argued that at the turn of this century,

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[9] Kokkinakis v. Greece 17 Eur. Ct. H.R (Ser. A) at 31 (1993).
[10] *Id.*
[11] RAN HIRSCHL, CONSTITUTIONAL THEOCRACY (2010).

France has moved back to *Type 1* secularism, *i.e. militant secularism* which has further cultivated hostility towards Islamic values.[12] On a similar note, Britain's earlier mild church establishment model was identical in terms of Grimm's aspirational *Type 3* secularism. However, recent times (Trojan plot scandal,[13] prevent duty provision in legislative enactment,[14] *et cetera*) have seen it moving towards *Type 1* secularism through its Fundamental British Values ("**FBV**") discourse.[15] The book attempts to argue that the contemporary models of both Britain and France dissuade harmonization of plurality and create further fissures in the divided society. In the last chapter of Part I, a model is built upon two lines of works—McConnell/ Sullivan to state how liberalism is not competing with religion and can walk along with religious diversity[16] and Rawlsian public reason as respect for pluralism and to aspire for *vivre ensemble*.[17]

Part II has three chapters wherein the central argument has covered case laws in the western liberal democracies with a focus on France and Britain (in the landscape of employment laws) to buttress her argument that the contemporary approaches are disparaging religious voices, muzzling dialogue and plurality (*for example*, Court of Justice of the European Union ruling in Achbita was not inclusive).[18] Through these chapters, the author attempts to highlight the problems associated with the ordoliberal

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[12] Dieter Grimm, *Conflicts Between General Laws and Religious Norms in* CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL (Susanna Mancini & Michel Rosenfeld eds. Oxford University Press 2014).

[13] Samira Shackle, *Trojan horse: the real story behind the fake 'Islamic plot' to take over schools,* THE GUARDIAN (Sept. 1, 2017), https://www.theguardian.com/world/2017/sep/01/trojan-horse-the-real-story-behind-the-fake-islamic-plot-to-take-over-schools.

[14] Counter Terrorism and Security Act, 2015, §26.

[15] Myriam Hunter-Henin & Carol Vincent, *The problem with teaching "British values" in School,* THE CONVERSATION (Feb. 6, 2018), https://theconversation.com/the-problem-with-teaching-british-values-in-school-83688.

[16] Kathleen M. Sullivan, *Religion and Liberal Democracy,* 59 U. CHI. L. REV. 195, 198 (1992).

[17] 2 JOHN RAWLS, POLITICAL LIBERALISM (2d ed. 2005).

[18] Case C-157/15, Samira Achbita v. G4S Secure Solutions, Judgment of the Court (Grand Chamber) of 14 March 2017, eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0157.

approach, employment as outside the political sphere, religious consistency test wherein judges inquire into the consistency of particular beliefs with religious doctrine (given preference over proportionality review), and the misguided idea of a "*natural baseline*".[19] The author has also offered possible alternate models to view religious voices as an essential component of democracy in Europe and Britain, supplemental to her democratic paradigm—(i) deference towards national authorities and (ii) contextual judicial proportionality review; lessons from ECtHR.

NON-WEST READING HUNTER-HENIN'S DEMOCRATIC APPROACH

At the onset, Hunter-Henin's work is insightful. Chapter 4 of Part I is a gateway to understanding contemporary euro-constitutional discourse concerning State and religious relations. Now as a student of non-western constitutional law, it is tempting to migrate her model—and see if it facilitates mitigation in the Indian constitutional discourse. I took the liberty of extrapolating her model from the employment sector to a wider rights-based discourse especially in the light of tensions that have dominated Indian constitutional discourse over the last decade.

The author's democratic model will ring a bell with sub-continent constitutionalism. Religion is not only symbolically accepted, but has always lived as an essential component of identity in the sub-continent, with countries like Bangladesh and Pakistan having a State religion. The legitimacy of "*religion as an essential component*" got crippled in an aggravated manner through colonization.[20] Post-colonial constitutionalism with its focus on nation-state and aspirational western modernity accentuated intolerance towards the inchoate character of lived religions. Ashis Nandy, in his seminal work, asserted that resources of religious toleration are to be found in domains of lived religions rather than the domain of State and law.[21]

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[19] For ordoliberal critic, *see* OLIVER GERSTENBERG, EUROCONSTITUTIONALISM AND ITS DISCONTENTS (2018).

[20] Ashis Nandy, *An Anti-secularist Manifesto*, 22(1) INDIA INT'L CENTRE Q. 35, 35–64 (1995).

[21] *Id.*

In the context of India, it would not be erroneous to claim that Hunter-Henin's aspirational model was employed by Indian constitutional fabric. (*For instance*, constitutional endorsement of prohibition of untouchability, autonomy to religious denominations, etc.), and later through judicial interventions (essential practice doctrine through Mukherjea's dicta in *Swamiar* case).[22] Ran Hirschl classified the Indian model under the selective accommodation model (countries like Kenya and Israel would fit this description).[23]

At this junction, it becomes pertinent to point that this identification with Hunter-Henin's model is wherein my reservation to her discourse lies. It would be a far-fetched silver lining scenario to state that such a model will increase democratic dialogue. At the risk of sounding curt, I feel that the author has cherry-picked the battle to buttress her core arguments. The author has not touched upon the complexities of discursive formation in the context of legal pluralism of religion especially when those practices are a manifest expression of injustice. *For example*, honour killing by the community for inter-caste, inter-religious marriages, or religious lynching for consumption of meat which is considered sacred by the majority religion. The author's democratic dialogue is dipped in the ink of unmarked individualism as a bearer of rights and secular insistence which does not respond well to multiculturalist society. Aditya Nigam in his recent work argues:

> "*cultural rights or religious rights can often be very closely tied to highly discriminative and oppressive practices within religious communities and these do not allow for a direct relationship between the individual and the State. That is really the democratic challenge for our times—of defending the cultural rights of minorities but also holding the communities to account in some fashion*".[24]

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[22] The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Teertha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282.

[23] HIRSCHL, *supra* note 11.

[24] ADITYA NIGAM, DECOLONIZING THEORY: THINKING ACROSS TRADITIONS (2020).

My reservation lies with Hunter-Henin's engagement with legal pluralism of majority religion. When the author argues that proposed model posits religious freedom as a positive value of democracy and enriches plurality, the author has used the context of legal pluralism of the minority and vulnerable voices only. *For instance*, the author has picked up Islamic values in France and the United Kingdom. The author's deliberation over pluralism is thinly premised upon western individualism and therefore ties a cord between respect for pluralism and accommodation for minority voices which overlooks communitarianism concerns. In the context of the non-west, communitarianism discourses of plurality become more significant. Neera Chandhoke points this out in her recent work asserting that pluralism in Indian philosophical traditions reflects the social and relational concept of self.[25]

Hunter-Henin does concede in the introduction that the method of avoidance risks advantaging majority factions but unfortunately does not elaborate on how the complementary paradigms of inclusion or revision mitigate this tension. The reason for pointing out the example of honour killing earlier is also to highlight that the Court, in its landmark judgment, held the practice of khap panchayat to be illegal (Locating Hunter Henin's principle of revision wherein judges legitimately set limits to the expression or manifestation of their views and practices).[26] However, the empirical reality on the ground is abject. Khap panchayat's express flouting of Supreme Court guidelines presents not only a grim picture of judicial legitimacy which Hunter-Henin presupposes as undisputed, but also posits a direct challenge to modern constitutionalism.[27]

Thirdly, the aforementioned component of the author's principle of revision also falters when the State, through law, imposes the secular values in reforming the society. The second component of the revision principle is identical to Indian Courts' articulation of constitutional morality when the Court has issued certain pronouncements to cultivate the public

[25] NEERA CHANDHOKE, RETHINKING PLURALISM, SECULARISM AND TOLERANCE: ANXIETIES OF COEXISTENCE (2019).
[26] Shakti Vahini v. Union of India, (2018) 7 SCC 192.
[27] Staff Reporter, *Khaps oppose SC decision against their interference in marriage*, THE HINDU (Mar. 27, 2018), https://www.thehindu.com/news/national/khaps-oppose-sc-decision-against-their-interference-in-marriage/article23365872.ece.

morality in consonance with "*constitutional morality*" or with the doctrine of essential practice.[28] Hunter-Henin's revision principle is based on the implied assumption that (i) legitimacy of the judiciary is undisputed concerning setting limits to the manifestation of religious views and (ii) courts are the correct forum for such restrictions. In a plural or divisive society, this legitimacy is questionable as we can see from the recent uproar over certain pronouncements touching upon the tenets of religion (whether majority or minority).[29] Secondly, courts as the appropriate forum for setting the limit to religious freedom is a questionable premise to reform the society. Baxi wrote in a different context regarding the impossibility of constitutional justice elsewhere but it would be pertinent to borrow this phrase with respect to religious freedom.[30] There is an urgent need to recast liberal constitutionalism's understanding of plurality and the court's top-down methodology of reforming society might just be a top dressing.[31]

It is a far-fetched and obsolete argument to state that the courts' articulation is apolitical and based on a moral virtue only. While asking a

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[28] Indian Young Lawyers' Association v. State of Kerala, (2017) 10 SCC 689; Kantaru Rajeevaru v. Indian Young Lawyers Association, (2020) 9 SCC 121; Shayara Bano v. Union of India, (2017) 9 SCC 1; *See also* Nikhil Soni v. Union of India, 2015 Cri L.J. 4951.

[29] Staff Reporter, *Sabarimala: India's Kerala paralysed amid protests over temple entry,* BBC NEWS (Jan. 3, 2019), https://www.bbc.com/news/world-asia-india-46744142; Raina Assainer, *Thousands of Muslim Women protest against triple talaq bill,* THE HINDU (Apr. 4, 2018), https://www.thehindu.com / news / cities / mumbai / thousands-of-muslim-women-protest-against-triple-talaq-bill/article23428187.ece; Scroll Staff, *Triple Talaq bill is a 'complete charade' and against minorities, say civil society members,* SCROLL.IN (July 31, 2019), https://scroll.in/latest/932325/triple-talaq-bill-is-a-complete-charade-and-against-minorities-say-civil-society-members.

[30] Upendra Baxi, *The (Im)possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism*, *in* INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES 31 (Zoya Hasan et al. eds. Permanent Black 2004).

[31] WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM: NEW EDITION (2018).

similar question, Nigam underlines the impossibility of such top dressing' democratic dialogue:

> "*However, one must underline that this 'democratic dialogue' is virtually impossible given that our language has no vocabulary to understand the puranic, a necessary consequence of modernity's cognitive arrogance. This democratic dialogue can be made possible by acknowledging a certain equality between different ways of thinking and being*".[32]

Hunter-Henin's euro-constitutionalism prevents her from deliberating upon religious freedom beyond a charity extended by moderns.

My last reservation lies with her presentation of liberal constitutionalism's accommodation of legal pluralism. There is a reiteration that liberal constitutionalism can go hand in hand and aspire for a harmonious relationship with pluralism but unfortunately does not dive into the concept of pluralism aside from strictly religious. Non-west constitutional democracies are facing contestations from non-State pluralism which is intricately mixed with cultural, caste, linguistic and other identity markers. This tension between liberal constitutionalism and pluralism is very important for us since our constitutional ethos is allegedly divorced from the social reality of the country and inchoate legal traditions sometimes directly posit challenges to the legitimacy of constitutionalism.[33]

As a concluding remark, Hunter-Henin's democratic paradigm model starts a very ambitious disquisition in the west wherein religion is not antithetical for the realisation of democracy but an enriching component of it. However, her model falls short on primarily two grounds. *Firstly*, her theorisation is heavily dipped in western liberal imagination and aspires to maintain a clean binary of "*Freedom v. Authority*" which when migrated to non-west becomes opaque. The author sincerely tries to break from it, but her model has strong remnants of what Wendy Brown calls "*oxymoronic edge to the concept of religious liberty*" in her work.[34] Brown has

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[32] NIGAM, *supra* note 24.
[33] MAHENDRA PAL SINGH & NIRAJ KUMAR, THE INDIAN LEGAL SYSTEM: AN ENQUIRY (2019).
[34] Wendy Brown, *Religious Freedom's Oxymoronic Edge, in* POLITICS OF RELIGIOUS FREEDOM 324 (Winnifred Fallers Sullivan et al. eds. University of Chicago Press 2015).

argued that the framing of "*religious toleration*" as "*religious freedom*" is a category mistake and Hunter-Henin's endeavour of creating a neat binary of freedom v. authority also falls prey to this category mistake.

Secondly, Hunter-Henin does not really skim the surface of politics of religious freedom when played out in institutional forums including courts. Webb Keane posits a very interesting question about religious freedom.[35] He asserts that in order to understand how free religious freedom is, it becomes imperative to unmask understanding of "*religion*" as presupposed by the laws that regulate and protect it. However, Hunter-Henin does not really engage in this discourse.

[35] Webb Keane, *What is Religious Freedom Supposed to be Free?, in* POLITICS OF RELIGIOUS FREEDOM 324 (Winnifred Fallers Sullivan et al. eds. University of Chicago Press 2015).